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Dualism or monism: The stance of SC still not clear

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Abstract
Dualism and Monism are two principles which help to determine the relationship of international law with domestic law and how international law will be implemented in the domestic regime. Article 253 of the constitution of India makes it mandatory for the parliament to enact a law to transform international law into municipal law thereby expressly declaring India to be a Dualist country. However various judicial pronouncements of the SC throw light on the fact that SC has time and again divested from Article 253 of the constitution thereby leaving open the question - whether India follows Dualism or Monism? This article discusses in the detail concepts of dualism, monism and what they mean in the domestic legal regime of nations and also various Supreme Court judgements causing confusion as to India being Dualist or Monist and its effects on lives of people.

Keywords: dualism, monism, supreme court judgments, international law and domestic law, role of parliament, article 253 of constitution of India, position of India on dualism or monism

Introduction

'All the world's a stage and all men and women merely players.' coined by William Shakespeare in the 17th century has taken a different perspective today. While he used it to depict the roles played by human being in their lives, I would like to commemorate his thought of depicting the entire world's human beings as one, i.e., no matter where you go in this world, in similar situations every human being mostly reacts similarly. So why should they be dealt differently? When they interact with each other should they not follow some set of principles and laws which are common to all? International law gives an affirmative answer to these questions. International law is that set of rules, norms or standards which are binding between the nations. It owes its origin to customs, treaties and general principles of law which are recognised by 'most' nations. The applicability of international law varies a lot as it is the sweet wish of the nations to enforce these laws or not. In short, international law is not universally applicable. The relationship of international law and domestic law is even more complex [1]. So many questions are always open for interpretation. Say for instance, it is a question of law that in case of contradiction between international law and domestic law which law should be applied? Should one override the other or both be construed harmoniously? The simplest way possible to solve these questions would be to look up in the statues. Different nations have enacted different legislations to inculcate international law in their domestic regimes. Some nations have opted the policy of Dualism – which means that international law does not automatically gets incorporated in the domestic regime until an act is passed by the legislature. For e.g. – UK and Australia are strictly dualist nations. In both these nations international law will have no effect on the municipal law until an act of the parliament gives effect to it. On the contrary lies the policy of Monism – which means that the international law automatically gets incorporated in the domestic regime without the need of a statute. In other words the international law is considered as a part of domestic law and the judiciary while applying the law can prioritise international law over national law. Germany is the perfect example of the nation following monism [2]. What about our country India? Are we dualist or monist? Is the SC in consonance with the legislation when it comes to application of international law in our domestic regime? Is the stance of SC clear or has it diverged from its views? In this article we shall try to find answer to these questions.

Legal regime of India

One of the salient features of our constitution is its supremacy. It is the paramount source of law in our country and all other laws derive their source from it. Every law must be made in accordance with the constitution and it must always be obeyed thereby making it The Grundnorm as propounded by Kelson [3]. And Article 253 [4] of this very basic norm makes it mandatory for the parliament to enact a law to transform international law into municipal law. In other words, India follows the policy of Dualism. In our legal system the international law does not automatically gets incorporated until and unless the parliament enacts a law for the same. Let's explain this by an example – in order to implement the TRIPS agreement of the WTO, the legislature of India enacted - the patent act, 1970, the copyrights act, 1957, the trade marks act,1999, the geographical indication of goods (registration and protection) act,1999, and the designs act, 2000 [5]. Despite the fact that India is a party to World intellectual property organisation (WIPO) and a member of the World trade organisation (WTO), if these legislations were not enacted, the TRIPS agreement would not be applicable in our nation by virtue of Article 253 [6] of the constitution. But is the policy of Dualism implemented in letter and spirit is still a million dollar question. The job of the legislature is merely to enact the laws; it is purely the work of judiciary to

interpret these laws and to apply them to relevant cases before them. India has a very strong judiciary which is hierarchical in structure. At the top is the SC which is often known as the apex court. It is the final court of appeal and due to us having a system of integrated judiciary, the decisions of SC are binding upon all the other courts is the country. The judgments of the SC take the form of precedents and are always taken as the final authority on a particular question of law. SC is also known as the guardian and interpreter of the constitution. But with regard to Dualism is the SC interpreting the constitution right, we are still looking for a logical answer to this.

SC Judgements causing confusion

SC is seen following the Dualist approach in the case of *P.Geetha vs. Kerala livestock development board ltd* [7] stating in its Para 56 that municipal courts cannot enforce international laws, conventions and treaties in the absence of a municipal law. They may have persuasive value in interpreting domestic law but article 253 [8] of the constitution cannot be done away with. The SC while giving this judgement had placed reliance on its various previous judgements such as *Selvi and ors vs. State of Karnataka* [9] in which a three judge bench had clearly stated that even though India is a signatory to a convention, till the time the parliament does not ratify it, international law will have no automatic application in the Indian legal system by virtue of Article 253 [10] of the constitution. Reliance was also placed on *State of West Bengal vs. Kesoram industries ltd and ors* [11] in which the SC at page 401 had stated in clear words that the principle of monism does not prevail in India. In India the doctrine of dualism applies. International law deals with various domains such as trade, environment, diplomacy, war, human rights and so much more. Each of these subjects is sensitive enough and requires careful scrutiny by the courts. Since these are the matters of international importance and very often involves parties from different nations, there is immense pressure on the SC to impart full justice without prejudicing both the international law and domestic law. And SC has done a great job in regard to that. However, we can see SC digressing towards monism in various cases such as *Vellore citizen's welfare vs. Union of India and ors* [12] in which the SC held that if the customary international law is not inconsistent with the domestic law, there is no harm in incorporating it. As a result the precautionary principle was made a part of the environmental law despite the absence of legislation on it. We can see similar rulings in various other judgements of the SC such as *Daya Singh Lahoria vs. Union of India* [13], *Thilakan vs. Circle Inspector of Police* [14]. SC has justified its decisions by referring to Article 51(c) [15] of the constitution which directs the state to 'foster respect for international law and treaty obligations'. And so in order to do so the SC has applied the principles of international law automatically in our domestic legal system with due regard to any repugnancy which exists between the two legal systems. SC can be seen stating time and again that some principles are *jus cogens* and from them no derogation is possible. If this is not Monism then what is? To give effect to Article 51(c) [16] is the SC divesting itself from Article 253 [17]? Which case laws of these should we follow as precedents? But most of all, what should we call our nation – Dualist or Monist? What aches my heart the most is the suffering caused to humans due to lack of proper answer to this question. Following the principle of monism as laid by the SC in the important case of *Hans Muller of Nuremberg vs. Superintendent, Presidency jail Calcutta* [18], the HC of Delhi in the year 2011 stayed the deportation of two Iraqi nationals to Iraq due the principle of non-refoulement [19]. It must be noted that no law in our nation incorporates this principle yet it was applied. And now a sudden shift from this principle in the case of *Mahommad Salimullah vs. Union of India* [20] is appalling. In this case SC refused to accept the principle of 'non-refoulement' and allowed the deportation of about 150 Rohingya refugees to Myanmar. SC in this case very gallantly overlooked the fact that non-refoulement is a principle of United Nations Human rights commission and also is a part of customary international law often regarded as *jus cogens*. The reasoning of the SC seemed quite simple – India is not a signatory to the UN convention on status of refugees, 1951. Also it was held that right not to be deported is not a part of article 21 [21]. And since for refugees there is no law brought forth by the parliament as required by the Article 253 [22], SC was well within its limits to not allow the Rohingya refugees to live in India, thereby restoring India its status of Dualism! Is this justified? Is the interpreter and guardian of constitution playing its role well or is this the beginning of judicial anarchy? With regard to international law, are we Dualist or Monist, there is still a lot left for us to ponder.

Role of Parliament

It would however be highly discriminatory to look at this issue from just one angle. On the face of it, the ball might seem in the court of SC but when we dig deep, the role of the parliament is also found to be paramount is this aspect. The relationship between the executive and the judiciary is that of no interference into each other. One however works to fill the lacunas of other. Judiciary works towards progressive development when the parliament fails to do so due its political agendas [23]. Similarly in this scenario, we can see SC continuously trying to fill up the vacuum left by the parliament. It is the failure of the legislature in enacting the laws that keeps us in such a vulnerable state with regard to such important issues. International law is a developing law. It is changing continuously with the changing world and when the parliament is unable to catch up with the pace of this development, the judiciary has to step into the shoes of the legislature. This is often viewed as a bone of contention between the two [24]. The role of judiciary is to enact the law but when there is no law to interpret, the courts cannot act as mute spectators. According to our constitution, India is a Dualist nation with Article 253 [25] standing firm in support of it, the main reason why the stance of SC has not been clear on it is because the scope of international law is very wide. It covers such wide dimensions of so many topics like health, art, human rights, literature etc. that some of it gets overlooked by the parliament. And in the absence of any law the SC is forced to apply the international law according to the circumstances of each case and the current international scenario. I strongly suggest that the parliament should do its job right by enacting proper domestic laws touching every aspect of international law and the courts should do theirs

by applying judicial mind and following a more analytical approach in interpreting topics of similar nature, because if these two organs of the state don't work in harmony the entire system is bound to lapse giving justice a huge setback.

Conclusion

A complete clarity about the relationship of international law with domestic law is the need of the hour as the vision of the very SC itself seems clouded at this point of time. In my humble opinion we should try to enact more and more domestic laws which are harmonious with the international law as it impacts the entire world. International law was developed by the United nations to regulate the world order and to promote international peace and security and all the big fishes such as US, UK, China, Australia etc. are playing their part in giving full effect to it. In order to gain world recognition it becomes indispensable to abide by the principles of international law. India is still a developing nation striving hard to become a superpower and its capabilities can hardly be doubted. In its huge struggle of changing its status from a developing nation to a developed one we should not let such technicalities act as a roadblock. If implemented well these principles not only help improve the position of India at international level but can also be useful in the overall development of the country. India is one of the largest and most successful democracies of the world and key feature of a democracy is that people are the sovereign. And it is 'we the people' who have enacted the constitution of India. So I would not be wrong in saying that it is we the people who wanted India to follow the principle of dualism. So why digress from it? The SC should take a clear stance on this matter and instead of taking things lightly follow a rigour approach in dealing with international law [26]. The legislature should fill the gaps by enacting harmonious laws with regard to relationship of international law with domestic law. I would like to conclude by saying that William Shakespeare was right after all, the world's actually a stage but the players are not men and women but nations playing their roles by making their entrances and exits into various international conventions and treaties. India; is playing its part by being a signatory to many such conventions and I hope that it will play a bigger part by implementing them well.

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