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# Customary International Law in Indian Courts

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## ABSTRACT

*Customary International Law (CIL), an integral part of Public International Law, has played its own role in Indian judicial discourse. Though not prominently and explicitly recognized as a part of Indian domestic law, CIL has been incorporated into Indian discourse via various case laws by Indian courts of law. This article analyses the circumstances and motives under which such incorporation has been done by the Indian judiciary. This article describes the importance of employing the principles of CIL into Indian domestic legal system and its imminent necessary in certain areas. The article also studies the previous landmark judgements delivered by the Indian judiciary, in which the principles of CIL are used to bring in a progressive thought and to uphold the fundamental rights of Individuals, guaranteed by the Constitution of India. This article also examines the careful and minimal way in which the courts proceeded to use the principles of CIL and other statutes and treaties of Public International Law (PIL) to support their stance in particular verdicts that went on to become bases for many other verdicts which continue to uphold the rights of people of India. The article makes an effort to comment on whether this way of using the principles of CIL and PIL as such is beneficial to our legal system or should the courts try a novel way.*

The Customary International Law, abbreviated as CIL, is not considered as domestic law as such by the judiciary in India. CIL is a merge of State Practice and *Opinio juris*.<sup>2</sup> According to Article 38 in Chapter II of International Court of Justice Statute, International customs, practices by nations are considered as sources of CIL for the Court.<sup>3</sup> These two components make a practice by a state as CIL and is followed by the states as an obligation, unless a state(s) objects to that custom explicitly. As Indian judiciary does not give domestic law status to CIL, when there is a conflict between the CIL and domestic or municipal law, the CIL will not prevail over domestic or municipal law.<sup>4</sup> Indian law considers treaties and

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<sup>2</sup> CUSTOMARY INTERNATIONAL LAW LII / LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/customary\\_international\\_law](https://www.law.cornell.edu/wex/customary_international_law) (last visited Sep 18, 2020).

<sup>3</sup> STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, Chapter II, Article 38.

<sup>4</sup> THE CONSTITUTION OF INDIA AND INTERNATIONAL LAW IPLEADERS, <https://blog.ipleaders.in/constitution-of->

customs as sources of international law, when it comes to applying international law in domestic arena.

Justice Kuldeep Singh in the case of *Vellore Citizens Welfare Forum*,<sup>5</sup> ruled that when there is no conflict, that is when the CIL does not go against the principles of municipal law, then it is deemed that, that principle of CIL is incorporated into municipal or domestic law and courts shall follow the CIL principle as domestic law. Here, the court held that the practice is between the environment, ecological protection and development (industrial development as such), and the balancing concept would be sustainable development.<sup>6</sup> Here, the context was the court accepting the Polluter Pays Principle (PPP), which is a customary principle in International arena, as an incorporation into domestic law. The Court was not hesitant to accept CIL. CIL has a chance to be a part of domestic legal system in India. It is a settled stance that one norm becomes a part of CIL only if that norm is followed by the states with a sense of legal obligation (*opinio juris*). Thus, indirectly, international norms in legal sphere are not enforceable in domestic sphere (here, Indian courts) unless there is an explicit domestic law or legislation which allow these norms.

Not just this case, but also the cases like *A.P. Pollution Board v. Prof. M. V. Nayudu*<sup>7</sup> and *PUCL v. UOI*<sup>8</sup> also raised this pertinent question whether CIL is deemed to be a part of domestic law in India or not. Most of the times, these cases addressed the relation between International Law, its principles and municipal law in India. These cases mostly discussed this aspect as *obiter* and did not invest in the efforts to establish a concrete principle to determine whether a particular CIL principle can get automatically assimilated into domestic law. No criteria were given by the courts in these cases to address this.

Normally, for an international principle to be considered to be applied in domestic law in India, it is easy to persuade the judiciary in case that principle is in the form of treaties. But when it comes to establishing a norm as a custom, there is a need to prove that the states follow a practice as they have a sense of legal obligation and thus, follow that particular norm. This satisfies the *opinio juris*. However, it is difficult to establish this part of a practice, to completely prove that a practice comes under CIL. However, in India, a CIL practice will not be treated automatically as domestic law. Nevertheless, it can be said that in situations of fulfillment of international obligations by India, the judiciary has been extremely careful and

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india/ (last visited Sep 18, 2020).

<sup>5</sup> *Vellore Citizen Welfare Forum v. Union Of India*, (1995) 6 SCC 647.

<sup>6</sup> Is the Supreme Court Confused About the Application of International Law? The Wire, <https://thewire.in/law/supreme-court-international-law> (last visited Sep 20, 2020).

<sup>7</sup> *A.P. Pollution Board v. Prof. M. V. Nayudu*, (1997) 1 SCC 301.

<sup>8</sup> *People's Union Of Civil Liberties (PUCL) v. Union Of India*, (1997) 2 SCC 710.

considered the treaties and CIL practices. This majorly happened in the cases of nations violating the settled norms of human rights law, environmental law and humanitarian law.

Article 51<sup>9</sup> of Indian Constitution mandates the State to act accordingly, to promote international peace and respect the principles of international law, while building good relations in international arena. Article 253<sup>10</sup> empowers the Parliament to make laws in consistence with the International treaties or any other international decisions taken by India vis-à-vis other nations. However, there is no concrete proviso in the Constitution that expressly speaks and clarifies about the position of International Law, including its application and its principles, including CIL in domestic law. It also makes it clear the kind of relation that exists between the customary law and domestic law or even international law and domestic or municipal law, for that fact. Unfortunately, there is no active debate going on about this topic in parliament or in the judiciary as such. This quietness by the Constitution gave a leeway to the judiciary to apply the International law and CIL in a controlled way. It needs to be examined whether such method is being implemented in a progressive way or is it being used as a tool to avoid important aspects of the law. Nonetheless, in the case of *Kesavananda Bharati*,<sup>11</sup> Justice Sikri has stated that in case the municipal law is vague on a particular issue or law, then the courts can refer to international authorities and apply accordingly.

According to Reputation Theory in international law, one of the reasons for the nations to follow international law and customary practices is because they value their reputation in the international arena. It is in the interest of the nations to follow international law. But the problem with CIL is that there is no concrete agreement between the nations. In CIL, there might arise a problem of information. Nations might not construe a customary practice same as the other. Some nations may not even be aware that a customary principle even exists. Under such blanket of ignorance, one cannot expect a nation to not violate a customary principle. In common practice, the states show indication of a customary practice to other states and thus a cooperation is expected from the other states with respect to that customary principle. This helps a nation to not incur the international sanctions because of the ignorance of a particular customary principle, which might affect the reputation of that nation among the others. Unless a nation particularly and explicitly objects to a particular customary practice, its assent to that customary practice is presumed.

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<sup>9</sup> Constitution of India, 1950, Art. 51.

<sup>10</sup> Constitution of India, 1950, Art. 253.

<sup>11</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

In *Vishakha guidelines case*,<sup>12</sup> which addressed sexual harassment of working women, the Apex Court used many international conventions to back its decision, which is primarily derived from Article 32 of Indian Constitution.<sup>13</sup> The definition of the term “sexual harassment” itself was contested in this case and its vagueness was questioned. There is no legislation in municipal law that explicitly addresses sexual harassment that happens to working women. Therefore, the Apex Court referred to International Conventions and other international norms for an unambiguous and uncontentious definition and interpretation of terms like sexual harassment, gender discrimination and gender-based treatments of people. The guidelines laid down in this case have their basis in International Conventions, as there were no domestic laws as such in India to lay down these guidelines or address the sexual harassment faced by working women. One of the conventions used by the court is Convention on Elimination of All Forms of Discrimination Against Women, under which the signatory states shall take actions to eradicate the discrimination that women face. The court referred to Articles 11 to 24 of this convention in order to design the guidelines to address sexual harassment against working women at their places of work.<sup>14</sup> These sections place responsibility on state parties to protect women from sexual harassment, inequality and gender-based discrimination at their work places. Article 11 of this Convention places a duty on the state to curtail such sexual harassment against women, while asserting the right of women to work and their right to have protection and safe working conditions, which also includes the safeguarding of their reproductive function.<sup>15</sup> Article 12<sup>16</sup> of the Convention ascertains that States should take measures to ensure the equality of men and women and their access to health care. Article 24 of the same Convention asserts again, that the state parties shall take “*all necessary measures at national level*”<sup>17</sup> to achieve the aims recognized in this convention. The Supreme Court in here, looked at these Articles and their ambit in the Articles of Constitution of India to ensure gender equality and address sexual abuse and held that it is a fundamental right. In the absence of any domestic law enacted to address these issues, then these International Conventions should be read into the law, in case there are no inconsistencies found for the same.

With the very few instances where CIL has been used by Indian judiciary, it can be said that CIL principles has been used in the cases only to justify a stance taken or principle decided or

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<sup>12</sup> Vishakha v. State of Rajasthan, (1997) 6 SCC 241.

<sup>13</sup> Constitution of India, 1950, Art. 32.

<sup>14</sup> Role of International Conventions In “Vishaka Guidelines” iPleaders, <https://blog.iplayers.in/role-international-conventions-vishaka-guidelines/> (last visited Oct 2, 2020).

<sup>15</sup> Convention on Elimination of All Forms of Discrimination Against Women, 1979, Art. 11.

<sup>16</sup> Convention on Elimination of All Forms of Discrimination Against Women, 1979, Art. 12.

<sup>17</sup> Convention on Elimination of All Forms of Discrimination Against Women, 1979, Art. 24.

applied by the courts. In *Nilabati Behera's case*,<sup>18</sup> the court used a provision in ICCPR, to support the stance that enforceable compensation right is not a new concept and comes under the enforcement of guaranteed right which is already provided under the Public law (Article 32 of Indian Constitution). This is different from what is provided under the torts, which is a remedy in private law. This is the application of Legitimate Expectation Doctrine where an enforceable right exists. Thus, this case set an example where, International Conventions are used to construe the fundamental rights that the Constitution guarantees, expressly. In this case, the right that is guaranteed by the Constitution is the right of gender equality in general and not just in places of work.

One of the cases in which discussed the relation between CIL and municipal law, is the case of *Gramophone Co. v. Birendra Bahadur Pandey*.<sup>19</sup> In this case, the court discussed the Doctrine of Incorporation. No clarification or test or theory is promulgated by the court with respect to the Indian Constitution's provisions vis-à-vis the relation between the existing municipal laws in Indian domestic sphere and the norms of CIL. Though the Court held that Indian law incorporates the Doctrine of Incorporation, however, this decision was not made by direct consideration of any norm of principle of CIL. In this case and *Vellore Citizens case*, the courts considered these principles by saying that these have been already accepted as practices in CIL, and thus the courts did not see any objection or problem as such in accepting these as part of the Indian domestic law. However, there a failure of Supreme Court to establish any principle on the principles or norms of CIL being incorporated automatically into the municipal laws in domestic sphere. In *Gramophone*, a CIL principle was not used as principle of rule of law, but used only as a tenet of statutory interpretation.<sup>20</sup>

These applications of International conventions application by courts, opens chances for the CIL to be applied by the Indian courts. Though CIL and International Conventions are mainly used to support the stance taken by the courts or as backup for the existing provision or to expand and clear the unambiguity that existed in the laws that are in action in domestic sphere. However, India is yet to use these norms of CIL and International Conventions to make certain laws, which haven't existed before in domestic sphere and use these in deciding the cases solely to decide the cases without any municipal law in existence to use as a basis for the decision in a particular case and International norms are only used to support the

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<sup>18</sup> NILABATI BEHERA V. STATE OF ORISSA, (1993) 2 SCC 746.

<sup>19</sup> GRAMOPHONE CO. V. BIRENDRA BAHADUR PANDEY, AIR 1984 SC 667.

<sup>20</sup> NISHANT KUMAR SINGH, THE INDIAN CONSTITUTION AND CUSTOMARY INTERNATIONAL LAW: PROBLEMS AND PERSPECTIVES, [http://kailash.pairserver.com/kailash/wordpress/wp-content/uploads/2016/07/The-Indian-Constitution-and-Customary-International-Law\\_Problems-and-Perspectives\\_Nishant-Kumar-Singh.pdf](http://kailash.pairserver.com/kailash/wordpress/wp-content/uploads/2016/07/The-Indian-Constitution-and-Customary-International-Law_Problems-and-Perspectives_Nishant-Kumar-Singh.pdf).

decision made, which is primarily based on domestic law. It can be anticipated that there would be some changes with the incorporation of judicial activism, which is already happening in the cases of environmental law in India. The courts have been looking at the norms of International law, though not CIL as such, to deal with and adjudicate upon the issues of environment. Nevertheless, the utmost care exercised by the judiciary in incorporating the CIL into domestic law can be termed as 'necessary evil'.

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