



India and International Law: Part-1

About

- The [Standing Committee on External Affairs](#) presented its report on 'India and International Law including extradition treaties with foreign countries, asylum issues, international cyber-security and issues of financial crimes' on September 10, 2021.
- The Committee's examination, however, is limited to International Law as relates to Extradition, Asylum, Cyber-security and Financial Crime Laws.

Background

- The Indian constitution and international law have links dating back to the pre-independence days when India was a separate member of the [League of Nations](#) even during the times of British rule.
- The Indian Constitution which was adopted on 26th November 1950 was greatly influenced by the values imbibed in The [Universal Declaration of Human Rights \(UDHR\)](#) which is an international document adopted by the [United Nations General Assembly](#) with the basic motive to protect and preserve the basic fundamental rights which all human beings are entitled to.
 - The [Fundamental Rights in Part III](#) of the constitution and the [Directive Principles of state policy in Part IV](#) of the constitution can be compared with the **UDHR** and many common points can be seen.
 - Further it can be seen that the [International Covenant on Civil and Political Rights \(ICCPR\)](#) is reflected in Part III of the constitution whereas [The United Nations Economic and Social Council \(ECOSOC\)](#) is reflected in Part IV and the Preamble to the constitution, thus greatly benefiting the scope of human rights law in India.
 - **Fundamental Duties:** [Article 51 A](#) of the constitution of India gives force to Article 29(1) of the UDHR which mentions the duties of the citizens towards the state which help to build the nation and understand the importance of individual responsibility.
- India is a party to more than **one hundred and sixty treaties and conventions** dealing with various fields of law like air law, space law and maritime law.
- The Government is responsible for implementation of the international treaties and agreements to which India is a party.
- The **Legal & Treaties Division** was established in the **Ministry of External Affairs** in 1957 as a nodal point to deal with all aspects of international law advice to the Government of India.
 - It advises the Ministry of External Affairs in particular and other Ministries and Departments on issues pertaining to international law and treaty, including treaty negotiations, practice and interpretations.

Constitutional Provisions

- **Article 51:** According to the provisions in this Article, the state has the responsibility to promote international peace and security in the nation and maintain just and honourable relations with other nations.
 - The Article specifically mentions that the state shall respect all the provisions related to

international law and shall make its best efforts to fulfill its treaty obligations and also encourage the settlement of international disputes with the help of arbitration.

- This Article tells the state to respect international law but does not explicitly make it a part of the Indian laws.
- Article 51 of the constitution is a directive principle which is to be understood with Article 37 of the Constitution of India.

▪ **International law and the powers of the Executive:**

- **Article 53:** It says that the **executive power is conferred to the president of India** and the president shall exercise them directly in accordance with the constitution of India or through the officers subordinate to him.
 - When exercising his power directly, the president should take the advice of the council of ministers.
 - Although all executive functions are said to be executed in the name of the president they are subject to the provision that they must not infringe the powers of the legislature and the judiciary.
 - Also, every contract entered into by India shall be made in the president's name.
- **Article 73:** The executive power of the union is extended to all the matters with respect to which the parliament has the power to make laws subject to the provisions of the constitution or to any other laws made by the parliament.
 - Since Article 73 of the Constitution of India puts no restriction on the powers of the executive with relation to international law, this allows the executive to enter into any type of treaty obligations.

▪ **Legislative powers of the government:**

- **Article 253** is the specific Article that gives the parliament the special power to legislate and pass laws in order to implement international agreements.
 - According to Article 253, the parliament has the sole right to make laws for the whole or any part of the territory of India with the motive of executing an international treaty, agreement or convention with other countries or any decision made at any association or conference.
 - Thus Article 253 empowers the parliament to pass laws on matters mentioned in list II of schedule VII in order to execute international treaties, agreements and conventions.

Indian Judiciary and International Law

- Although the Indian judiciary does not have the power to make laws, it interprets the obligation of India in international law by adjudicating domestic cases concerning issues of international law.
 - In this respect, the Indian judiciary has played a very active role in the implementation of India's international obligations under international treaties especially, in the areas of environmental law and human rights.
- The role of international treaties in the implementation of domestic laws cannot be undermined. International treaties have been used for the following purposes:
 - To fill a gap in the existing law.
 - To aid interpretation of the law.
 - To support and defend a stand taken.
 - To implement international conventions when they are not inconsistent with domestic laws.
 - To honor international treaty ratifications and international law.
- The question that has come up very frequently in front of the Indian courts with regard to the implementation of international law treaties is whether such treaties are binding automatically or they require any enabling legislation.
- The supreme court has reflected a dualist approach of the Indian legal system.

- In the case of **Jolly George Verghese vs Bank of Cochin (1980)**, it is stated that unless the municipal law is altered to accommodate the treaty, what is binding on the court is the former and not the latter.
- Further, the supreme court in the case of **State of West Bengal vs Kesoram industries (2004)** reemphasized that India obeys the doctrine of dualism and stated that any treaty that has been entered into by India cannot become the law of the land unless the parliament passes a law as under section 253 of the constitution of India.
- In the landmark case of [Vishaka vs the state of Rajasthan\(1997\)](#), the court while drafting the guidelines on sexual harassment of women at the workplace referred to many international conventions and norms which were relevant for the purpose of guaranteeing gender equality, right to work with dignity and the adherence to **Article 14, 15, 19(1)(g) and 21** of the constitution.
- In the case of **Neelabati Behera vs. State of Orissa(1993)**, the court relied upon Article 9(5) of the Covenant on Civil and Political Rights (1966) while granting compensation to the victim for the matter of custodial death.
- In the case of **Chairman Railway Board vs. Chandrima Das(2000)**, the court utilized the principles of the **Universal declaration of human rights** while widening the scope of Article 21 of the constitution by providing security to rape victims of foreign nationals.
- Thus it can be observed from the above cases that the court has the liberty to apply international treaties to domestic law provisions if they are not inconsistent with the existing municipal laws.

Key observations and Recommendations of the Committee

▪ Applying International Law:

- The Committee noted that India follows the **principle of dualism** (that is, international law is not directly applicable domestically, and must be implemented through a law by Parliament).
- It observed that on certain occasions, the Supreme Court has digressed from this principle.
- To ensure coordination between different institutions of the State, the Committee recommended the **Ministry of External Affairs to coordinate** with the concerned Ministries regarding matters where there is a vacuum in domestic law.
- Further, it recommended setting up a **Working Group in close coordination** with concerned ministries to strengthen India's capacity and expertise in International Law.

▪ Extradition treaties:

- **Extradition** is a process for surrender, upon request, of a person who is alleged to have committed an offence and is wanted for trial in one country, and is found residing in another.
 - India has signed extradition treaties with 50 countries and extradition arrangements with 11 countries.
- The Committee took note of the delays in extraditing offenders who take refuge in countries with which India already has an extradition treaty or arrangement.
- Further, it observed that offenders take advantage of the absence of such treaties with certain countries where they can get citizenship or residency through investment.
 - The Committee recommended identifying such countries and signing extradition treaties with them on priority.
- The Committee noted that India has signed **Mutual Legal Assistance Treaties (MLATs)** with 40 countries.
 - Under MLATs, requests can be made for assistance in matters such as identifying and locating persons, taking evidence, and obtaining statements.
- The Committee observed that 845 such requests are pending with various countries.
- It recommended: (i) instituting a task force to identify the reasons and suggest solutions for the issue of pendency of such requests, and (ii) entering into more MLATs with other countries on a priority basis.

▪ Asylum issues:

- An individual seeking international protection from persecution is called an **asylum** seeker. A country may grant refugee status to an asylum seeker.
- The Committee observed that existing domestic laws regulating the entry, stay and exit of foreign nationals in normal circumstances are inadequate to deal with refugees.
- It recommended that, in the **absence of a domestic law for refugees** and **asylum**

seekers, there should be a **domestic protocol** on their status, assigning specific responsibilities to specific agencies. This will ensure prompt response and enhance accountability.

- The Committee found the Government of India's stance on the issue, that India's Domestic laws are adequate to effectively handle refugee crises facing the country, as demonstrated in the past crises involving Tibetan refugees and Tamil refugees, not fully convincing.
 - The Domestic Laws like the **Foreigners Act, 1946**, the Registration of Foreigners Act, 1939, the Passport (Entry into India) Act, 1920 are legislations that govern the regulation of entry, stay and exit of foreign nationals during normal times and under normal circumstances, whereas a refugee situation demands prompt and specified response owing to the crisis nature and the urgency of response required to avoid potent humanitarian crises resulting therefrom.
- India is not a signatory to the **United Nations' 1951 Convention on the status of refugees** and the 1967 Protocol amending it.
- The Committee noted that India believes in the concept of shared responsibility of all countries in refugee crises, however, the Convention and the Protocol do not contain this concept.
- It recommended the Ministry to make a strong case for reviewing these instruments by advocating India's stand on shared responsibility.

▪ **Cyber Security:**

- India follows a multilateral and multi-stakeholder approach on the matters related to **Cyberspace**, including on cyber crime, internet governance etc., guided by our democratic values.
- India's stand has been that while International Law does apply to cyberspace, however, it is insufficient in its current form to **address the issues of attribution in cyberspace, violation of sovereignty in cyberspace**, and the threshold for reaction and proportionality of counter- measures when it comes to a cyber incident, and hence more deliberations would be necessary to define further modalities to deal with these issues.
 - While the objectives and principles of these provisions of International Law remain the same in cyberspace, their applicability, modality and usability would have to be customized for cyberspace.
- India acknowledges that States must observe sovereignty, sovereign equality, the settlement of disputes by peaceful means and non-intervention in the internal affairs of other States and comply with their obligations under international law to respect and protect human rights and fundamental freedoms.
- India endorses that common understanding on how international law is applicable to State use of ICTS is important for promoting an open, secure, stable, accessible, inter-operable and peaceful ICT environment.
 - The **European Convention on Cybercrime (Budapest Convention)**, is an initiative of the Council of Europe.
 - Many European Countries and a few non-EU countries are Party to the Convention.
 - India is not a Party to the Convention.
- The Committee noted India's diplomatic efforts to design a global architecture for cybersecurity.
 - It recommended leveraging India's IT resources to collaborate on cybersecurity with various regional instruments.
- Further, the Committee took note of India's lack of control over root servers.
 - Root servers allow countries to regulate, modify, or block internet traffic.
- The Committee noted that out of 13 root servers in the world currently, none are in India.
 - It recommended: (i) strengthening domestic laws on cyber security in line with international norms, (ii) focusing on preventing and pre-empting cyber attacks, and (iii) leveraging our algorithm development capabilities to achieve data localisation.
- The Committee note that the **Computer Emergency Response Team (CERT-In)** and the Information Technology Act are the administrative and legal mechanisms in the country to respond against cyber attacks and to tackle cyber crimes.
 - The Committee are concerned with the reactive disposition of CERT-In since the benefit is greater in pre-empting and preventing possible fraud, cyber attacks and such other cyber crimes.
 - The Committee appreciates the efforts to make the CERT-in mechanism more

proactive, but desire that more effort needs to be devoted and the Ministries concerned must work together to attract adequate talent in IT and software engineering to strengthen the capabilities and capacity of CERT-In.

- They also recommend that the IT Act, and rules under the Act must be constantly reviewed to address fast changing requirements due to ever evolving technology and progress in the information technology realm to keep the country safe and in a leadership position for international mechanisms and instruments of cooperation.

▪ **Financial Crimes:**

- India has several mechanisms in place for domestic coordination and cooperation at both the policy and operational levels to identify new and emerging trends and to formulate appropriate responses to tackle financial crimes.
- India is a member of the **Financial Action Task Force (FATF)**, **Asia Pacific Group (APF)** and **Eurasia Group (EUG)**.
 - India has always been fully complying with the FATF recommendations from time to time.
- The Anti Money Laundering / Counterfinancing of Terrorism (AML/CFT) regime in India is relatively young.
 - The **Prevention of Money Laundering Act, 2002 (PMLA)**, which came into force in 2005, was further amended in 2009 following an assessment of vulnerabilities in the financial sector, to include Full Fledged Money Changers (FFMCs), Money Transfer Service Providers (MTSP), such as Western Union, and International Payment Gateways (IPG), such as Visa and Master Card.
 - Thus, since mid-2009, India has increased its focus on money laundering and the use of the ML provisions and has progressively expanded and strengthened its preventive measures for the financial sector.
- India continues to be a significant target for terrorist groups and has been the victim of numerous attacks.
 - The **Unlawful Activities (Prevention) Act, 1967 (UAPA)** was amended in 2004 to criminalise, inter alia, terrorist financing.
 - The UAPA was further amended in December 2008 to broaden its scope and to bring the legislation more in line with the requirements of the **United Nations Convention for the Suppression of the Financing of Terrorism (FT Convention)**.
 - The amendment also established the **National Investigation Agency (NIA)** which, among other actions, further strengthened the fight against terrorism and its financing.
 - UAPA was further amended in August, 2019 to provide special procedures to deal with terrorist activities, including designation, as a terrorist, of an individual or organisation.
 - The amendment also broadened the scope of terrorist acts dealt by the Act by adding the **International Convention for Suppression of Acts of Nuclear Terrorism (2005)** in its Schedule.
 - The 2019 amendment also empowered NIA to attach properties acquired from the proceeds of terrorism.
- India signed the **United Nations Convention against Corruption (the Merida Convention)** on 9 December 2005.
 - Corruption is one of the predicate offences for money laundering. The Government of India has taken steps at both the policy and law enforcement levels to limit corruption.
 - To that end, India has established a high-level **Central Vigilance Commission (CVC)**.
 - It is an independent statutory body responsible for laying down strict vigilance norms, which issues guidelines and conducts inquiries in this regard. In principle, the jurisdiction of the CVC extends to all the organisations to which the executive power of the Union Government extends.
- The Committee recommended having an international legal framework to tackle financial crimes, which are increasingly trans-border in nature.
- It also recommended increasing the network of countries with which India has MLATs in

criminal matters (presently, there are 42 such countries).

- Further, it noted that under the **Fugitive Economic Offenders Act, 2018** (seeks to confiscate properties of economic offenders who have left the country to avoid facing criminal prosecution or refuse to return to the country to face prosecution):
 - (i) the judicial process for declaring a person a fugitive offender has been very slow,
 - and (ii) for proceeding against offenders, the money involved should be at least Rs 100 crore.
- The Committee recommended reviewing this lower limit to enable proceeding against smaller offenders.

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