CHANAKYA LAW REVIEW (CLR)

VOL. IV (ISSUE II), JULY-DEC, 2023, pp. 28-37

INTERNALIZATION OF INTERNATIONAL AGREEMENTS IN INDIA: A STUDY WITH SPECIAL REFERENCE TO THE ROLE OF THE EXECUTIVES

Kirti Rashmi[1]

Abstract

Internalization of international agreements holds in its ambit, an embargo of things, among which, the prominent one is who should be the proper authority for the incorporation of such agreements and what should be the procedure to fuse them into the domestic legal system. Addressing such questions depends upon the legal framework and the policy decision of each nation and so, there are deviating responses for the same. In India, the Constitution itself imbibes in its provisions, the duty of the State to honor international law. However, in want of explicit provision covering all nuances of such admittance, the appropriate authority and procedure for the assimilation of international agreements in India is still a conundrum. The other reason can be appended to the inconsistent judicial decisions that fall short of providing a precise guideline regarding the assimilation of international law in India. The article thus aims to focus on the enigma attached to the topic and stresses the possible legal recourse for the same.

Keywords: International Law, International Instruments, Treaty, Binding nature of Treaty, Treaty Internalization.

Introduction

A. Overview of Treaty and other International Instruments

In a world where different nation-states resort to their separate norms, there is a need for a guiding framework that suits all. The reasons for resorting to such universal principles are to define and manage the relationship among the States, manage the global economy, and sort global issues in front of them. These guidelines take the shape of international agreements, which can be written or unwritten, the written form is generally a treaty, and the latter one does not enjoy the status of a treaty. However, at times, some oral international agreements also

[1] Research Scholar, School of legal Studies, Cochin University of Science & Technology, Kerala.

have the effect of a treaty if the participating parties intend so or if the negotiation reflects so. The agreements other than treaties, which are verbal or may be written at times, are other international instruments that are not defined specifically but are usually informal and non-binding agreements such as declarations of intent, unilateral commitments, MOUs, open joint statements by venturing States, and others. Even though these instruments do not create legal obligations, they stand as valid instruments[2] and the States still enter into such arrangements to meet their certain needs, arrive at some mutual understanding, and adhere to moral or standard practice. So, non-adherence to such instruments may have no legal remedies unless manifested as binding but have certainly political repercussions. However, at times, they may have indirect legal effects, for instance, a Memorandum of Understanding (MOU) between States that is signed before any treaty as a precondition, might be used for legal interpretation to understand the intent of the parties. Helsinki Accord is such an international instrument, which is not a treaty, but nearly all European states U.K., and Canada signed for human rights protections after World War II.

On the other hand, treaty is a formal agreement among States and in some cases, between other international actors such as international organizations, that establishes rights and obligations and carries a binding effect among the venturing parties. It, however, does not create any obligation for any third party, without its consent[3]. According to the 1969 Vienna Convention,

"treaty means an international agreement concluded between the States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation[4]*"* (emphasis added)

So, following the definition stated above, all treaties qualify as international agreements and not otherwise, however, the 1969 Vienna Convention mandates a treaty to be in writing in order to bring such treaty under its ambit, but at the same time, the Convention does not negate the legal validity or application of unwritten agreements[5]. Treaties outline the negotiations of the parties, reflect the outcome of their complex interaction, and emancipate the rights and liabilities of the signatory parties. A treaty is designated with different names such as a convention, charter, protocol, covenant, or declaration. The labeling of various names for treaties reflects the character of the particular instrument or habitual usage by the nation-states,

[2] The 1969 Vienna Convention on Law of Treaties, art. 4.
[3] The 1969 Vienna Convention on Law of Treaties, art. 34.
[4] The 1969 Vienna Convention on Law of Treaties, art. 2(1)(a).
[5] See n.1. VCLT, art. 4.

but the same 1969 Vienna Convention, applies to them. Though India had not signed the said Convention, however it follows and ought to follow its provisions as a practice, in treaty-making and implementation. The 1969 Vienna Convention covers several other aspects of the treaty such as the creation, termination, validity, invalidity, or suspension of treaties, irrespective of the nomenclature it holds.

B. Binding Nature of a Treaty

A treaty is accorded legally binding status only when it creates such obligations. To understand if it is manifested to have a binding character, a treaty is interpreted according to its ordinary meaning with reference to its objective and purpose, unless special meaning to its terms has been accorded by the parties[6] or the terms of such agreements are ambiguous or absurd[7]. In the latter situation, *travaux preparatoires i.e.,* the preliminary drafts corresponding to such treaty, are referred to denote if the treaty creates such obligations or not.

The authority asserting the binding nature of the treaty is *pacta sunt servanda*[8]*,* enshrined in the 1969 Vienna Convention which stresses that every treaty in force is binding upon the parties consenting to it and must be performed by them in good faith[9]. The States are not expected to vitiate their consent to treaty entered unless such consent leads to a violation of its internal law of fundamental importance[10]. There are certain exceptions to this rule as well, clearly stated in the said Convention, for instance, the State may invoke an error in the treaty as a ground for non-adherence when such an error relates to a fact or situation that was an essential basis for consent and was assumed by the State to exist at the time when the treaty was concluded, or when the State was fraudulently induced by the other party to enter into such agreement, or when the consent taken was through corruption or coercion[11]. A treaty is also considered invalid if it conflicts with *jus cogens*[12]. In summary, it can be said that treaties are binding as they represent a formal and voluntary agreement between States or international organizations as the case may be, to be bound by their mandates. The treaties, understood as the foundation of the international legal regime, are thus obligatory and can attract legal and diplomatic consequences when violated.

[6] The 1969 Vienna Convention on Law of Treaties, art. 31.
[7] The 1969 Vienna Convention on Law of Treaties, art. 32.
[8] See I.I. Lukashuk, "The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law", 83 *ASIL* 513 (1989).
[9] The 1969 Vienna Convention on Law of Treaties, art. 11, 18, 26.
[10] The 1969 Vienna Convention on Law of Treaties, art. 46.
[11] The 1969 Vienna Convention on Law of Treaties, art. 48-52.
[12] The 1969 Vienna Convention on Law of Treaties, art. 53, 71.

The Need for Entering into a Treaty

In a world where no nation-state is self-sufficient to meet all of its needs or resolve all of its crises and concern areas, it becomes necessary to seek help from the other States. In such a situation, the States enter into a treaty to bring into being rules and norms that regulate their interplay and maintain relations between them. According to the Charter of the United Nations[13], every treaty or international agreement entered by the member States of the United Nations shall be registered with the Secretariat and then it should also be published.[14] The multilateral treaty which is sponsored by any U.N. organ covering the interests of nearly all nation-states is deposited with the Security General (a.k.a. Open Multilateral treaty) and others not deposited with the same are managed by the various nation-states among themselves (such as Bilateral or Closed Multilateral treaties)[15].

Entering into any treaty serves many other purposes as well such as fulfilling common interests, maintaining cooperation and coordination to fathom out global concerns such as promoting peace, security, human rights, environment, and trade; assisting in technological and economic growth; extending helping and providing amenities to each other in situations of war, rebellion, or any aggression. The treaties thus affect international relations by promoting common interests and resolving disputes between them. India, therefore, by the reason of the aforesaid ascendence of entering into a treaty, has entered into many treaties.

Nevertheless, the benefits of treaty-making are enormous, States are, however, not obligated to sign and ratify each treaty, they participate in. The reasons appended for the same differ from the nation's preferences, political ideologies, legal framework, national policies, foreign relations with other states, approaches for resolving international problems, and the need for creating foreign institutions. The commitment to a treaty also depends upon the economic interests of the States and the extent of cooperation that any State is willing to gain or provide in the world community[16]. This reiterates the sovereignty of the States in deciding whether or not to enter or ratify any treaty. India, by virtue of the same reason, has not ratified many treaties

[13] United Nations, *available at: https://www.un.org/en/about-us/un-charter* (Visited on October 15, 2023).
[14] United Nations Charter, 1945, Chapter XVI, art. 102.
[15] Thomas J. Miles & Eric A Posner, "Which States Enter into Treaties, and Why" (John M. Olin Program in Law and Economics Working Paper No. 420, 2008).
[16] Yonatan Lupu, "Why Do States Join Some International Treaties but Not Others? An Analysis of Treaty Commitment Preferences" 60 *TJCR* 1221.

that have been ratified by the other States, for instance, many torture-related treaties[17], refugee treaties[18], and other United Nations pacts[19].

Once the State has entered into any treaty, as in India, it has to be honored by their legal regime. As already mentioned, this is attributed to the principle of *pacta sunt servanda*[20], and in the Indian case, both this principle and the constitutional provisions as discussed in the forthcoming segment, are the reasons for honoring such treaties.

The Authority and the Procedure to Internalize Treaty in India

A. The Authority to enter into a Treaty

It is pertinent to note that the authority and procedure to enter into any treaty depends upon the internal laws of a nation. The U.S. Constitution states that a treaty is enforceable once it is ratified, and the ratification can be done by the Executives upon the pre-approval by two-thirds of the Senate present and concurring on the same[21]. The agreements not requiring such approval requisites are called Executive Agreements in the U.S. The Indian legal regime, however, differs from such differentiation, and all instruments are covered under the brackets of international agreements.

In India, the Constitution drives the State, to foster respect for international law and treaty obligations[22], however, the authority to internalize a treaty is understood by a combined reading of a few of its provisions. Article 246(1)[23] of the Constitution empowers the Parliament to make laws for the matters enumerated in List I[24]. The matters related to international arenas are covered under entries 10 to 21 of the said schedule, namely, Foreign affairs, all matters which bring the Union into relation with any foreign country; Diplomatic, consular, and trade representation; United Nations Organization; Participation in international conferences, associations, and other bodies and implementing of treaties, agreements and conventions with foreign countries; War and peace; Foreign jurisdiction; Citizenship, naturalization and aliens; Extradition, Admission into, and emigration and expulsion from, India, passports and visas;

---

[17] Outlook, *available at:* https://www.outlookindia.com/website/story/india-among-9-nations-that-havent-ratified-un-convention-against-torture/298749 (Last Modified 04 May, 2017).
[18] UNHCR Global Appeal 2011 Update, *available at:* https://www.unhcr.org/sites/default/files/legacy-pdf/4cd96e919.pdf (Visited on October 15, 2023).
[19] The Economic Times, *available at:* 'https://economictimes.indiatimes.com/news/politics-and-nation/india-has-not-signed-or-ratified-over-200-un-pacts-government/articleshow/58149826.cms?from=mdr (Last Modified 12 April, 2017).
[20] See n. 7. The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law.
[21] The Constitution of the United States 1789, art. II (2).
[22] The Constitution of India 1950, art. 51(c).
[23] The Constitution of India 1950, art. 246(1).
[24] The Constitution of India 1950, VII schedule, List I.

Pilgrimages to places outside India; and Piracies and crimes committed on the high seas or in the air, offenses against the law of nations committed on land or the high seas or in the air[25]. As mentioned, the items stated above are related to international relations and are the part of Union List, therefore, the Union Legislature is the competent authority to make laws on the said areas and such laws are applicable throughout India. Again the Indian Constitution suggests that for implementing any treaty, agreement, or convention, Parliament can make law for the whole nation [26]. Further, the Parliament can also legislate on the matters in the state list[27] to make a law for implementing a treaty[28]. Now reading of these provisions all together, it can be shown that the Parliament can make law on matters pertaining to international agreements application on the whole nation. Now reading these articles as a corollary with Article 73(1)(a)[29], it can be derived that the Executive's power extends to the matters over which the Parliament is empowered, which means that the Executive also has the power and authority of treaty-making and implementation, and as laws made by the Legislature is a binding obligation, such treaty made by the Executives have a force of law as well.

As a result of this, the President, under whom the Executive power of the Union resides[30], can sign and ratify the treaty with the international actors. Implementation of such a treaty may affect domestic legislation, however, the President can make adaptations and modifications to such law, which shall not be questioned in any court of law[31]. The reason for barring inquiry by the court is that making any law is the legislative domain of the Parliament, and the President being the head of the Parliament, can also legislate. The other reason is that, by virtue of the Separation of Power doctrine[32], the other organs of the State can't intervene in their exclusive domain. Certain other treaties and international agreements are also barred from interference by the courts subject to discussion on the question of law or fact[33]. It implies thus, that the President can enter and ratify treaties for the State, which is applicable throughout the country

[25] *Ibid*.
[26] The Constitution of India 1950, art. 253.
[27] The Constitution of India 1950, art. 246(3).
[28] See observation of Justice Shah in *Maganbhai Ishwarbhai Patel v. Union of India* (2002) 3 SCC- "the effect of Article 253 is that if a treaty, agreement or convention with a foreign State deal with a subject within the competence of the State Legislature, the Parliament alone has, notwithstanding Article 246(3), the power to make laws to implement the treaty, agreement or convention or any decision made at any international conference, association or other body. In terms, the Article deals with legislative power: thereby power is conferred upon the parliament which it may not otherwise possess"
[29] The Constitution of India 1950, art. 73(1)(a) 'Subject to the provisions of this Constitution, the executive power of the Union shall extend to the matters with respect to which Parliament has the power to make laws'.
[30] The Constitution of India 1950, art. 53(1).
[31] The Constitution of India 1950, art. 372(2).
[32] See The Constitution of India 1950, art. 50.
[33] The Constitution of India 1950, art. 363(1).

and it can also repeal and make necessary amendments in laws to make such treaties applicable in India. It can be, therefore, said that the authority to internalize treaties and international agreements lies with both the Executives and Legislature as incarnated in the Constitutional provisions.

B. The Procedure of Treaty Making and Internalization

Now, the procedure to implement any treaty varies according to the practice of each State. The parties to any treaty can decide if it can be made applicable just after signing or if it has to pass through the pre/post ratification process by the legislative agency to have a binding effect. In want of explicit provision in the Constitution, the procedure for entering into and internalizing any treaty in India can be explained through the Standard Operating Procedures (SOP) with respect to MOUs/Agreements, issued and updated by the Ministry of External Affairs released in the year 2018[34]. According to the SOP, it is the Legal and Treaties (L & T) division of the Ministry of External Affairs (MEA) that assists in delegations and negotiations for entering into treaties, and then it is approved by the Union Cabinet. It is pertinent to note that only in exceptional situations, for instance, any cultural treaty not hampering the nation's security or any commercial agreement that is already approved by the concerned ministry, such approval is not needed. After it is approved, the President or the person authorized by him executes the treaty, and the treaty is implemented. Such implementation can also be done without framing new legislation or without making any amendments to the prevailing legislation to incorporate the provisions of the treaty[35]. However, if required, a legislative action i.e., legal amendments or new legislation can be done, after signing the treaty but before ratification[36]. In such a scenario, the L& T division again lends a hand to the Parliament in drafting legislation or making amendments. After the L&T division is done with its work, it is sent to the Cabinet for approval, and then ratification takes place while submitting it to the repository of the treaty and the treaty concludes[37].

Thus, the provisions reflecting the procedure to internalize international law are kept with the Executives in line with the Legislature as Parliamentary intervention is required at times for passing or amending laws for including these treaty provisions in the domestic law domain.

[34] Ministry of External Affairs, Revision of Standard Operating Procedures (SOPs) with respect to MoUs/Agreement with foreign countries, 312/AS(MD)/17, (04 April, 2018).
[35] *Pratap Singh v. State of Jharkhand* (2005) 3 SCC.
[36] See n. 44. 81st Report of Parliament, 5.
[37] See n. 33. Revision of Standard Operating Procedures (SOPs) with respect to MoUs/Agreement with foreign countries.

These processes reflect that again, there is the involvement of both the Executives and the Legislature in the treaty-making process.

Legislative Oversight: An Issue in Internalizing Treaty in India

A. Legal Issues in Treaty Internalization

Treaty internalization in India attracts several intricacies. As stated earlier, since the Constitution mandates both the Legislature and the Executive's participation in treaty-making and its internalization, the contention involved herein is, over-emphasizing the Executive's power and sidelining the Legislature in such process.

The reason is, that the Executives can also by virtue of the Constitution, exercise the powers similar to the Parliament in treaty-making, but that doesn't imply that they solely have this power. The Executives do not enjoy such power in isolation, as the Parliament in the first place is empowered by the Constitution to exercise such right, a part of which is shared with the Executives. However, ignoring the Parliament is depicted while venturing into treaty-making when such a treaty is signed without Parliamentary discussion or pre/post-approval.

Again, the SOP mentioned above, also reflects that treaty-making is mainly the domain of the Ministers as the Ministry of External Affairs is the nodal agency for treaty-making and there is a comparatively minor role of the Parliament in treaty-making and implementation.

Further, as per the schedule of The Government of India (Allocation of Business) Rules[38], pertaining to the distribution of subjects among the departments, the MEA has the authority to negotiate political treaties with foreign countries.

Furthermore, corollary from the same can be attributed to the fact that since the President acts on the aid and advice of the Council of Ministers[39], with the Prime Minister as the head, effectively it is the ministers who decide if the State should enter into any such agreement or not. Acquiring the fact that the ministers originate from the Parliament and sit in the Parliament, it can be lucidly stated that there is no specific deliberation in the Parliament before signing any treaty. The ministers being people's representatives sometimes fail to understand the public opinion in want of proper discussion on the same and ultimately rights of citizens are affected when such a treaty is signed.

[38] The Government of India (Allocation of Business Rules) 1961, rule 3, Sch. II.
[39] The Constitution of India 1950, art. 74.

Treaty making thus, has been understood as more of a political act than a collective act of Legislature and Executives[40].

B. Bills Corroborating Such Issues

These issues are reflected by many Parliamentarians in their respective bills. A bill moved by M.P. Veerendrakumar suggested for insertion of a proviso to Article 253 requiring a prior approval of the Parliament before entering into any treaty, agreement, or convention[41]. The bill warranted the knowledge and confidence of the Parliament before accepting any obligation under any agreement.

Another bill introduced in the Lok Sabha by M.P. Chandrappan also advocated amending and improvising Article 253, by stating that the government while entering into any treaty or agreement with a foreign country, commits itself and the people of India to many obligations, such exercise, however, is done without the connivance of the Parliament, which is not a healthy practice[42].

Again, the Lok Sabha bill initiated by M.P. Prabodh Panda in the year 2009 stated that before treaty implementation, it should be ratified by the Parliament[43].

In addition, the Lok Sabha Bill of 2017 moved by M.P. Adv. Joice George also endorsed ratification before implementation[44].

Further, the report of the National Commission to Review the Working of the Constitution (NCRWC) set up by the Ministry of Law & Justice in February 2000[45], also suggested that the Parliament must make a law to regulate the treaty-making power.

Furthermore, the Second Commission on Centre-State Relations headed by former Chief Justice of India, M.M. Punchhi also recommended in his report in March 2010 that the Parliament should enact a law to streamline the procedures involved in treaty-making[46].

In a nutshell, all these bills and reports reflected the absence of consultation with the Parliament before entering into any treaty. They also cogitated that there is very little room for

[40] See n. 27. *Maganbhai Ishwarbhai* case.
[41] The Constitution (Amendment) Bill (2005) (Bill No. 79).
[42] The Constitution (Amendment) Bill (2006) (Bill No. 12).
[43] The Constitution (Amendment) Bill (2009) (Bill No. 115).
[44] The Constitution (Amendment) Bill (2017) (Bill no. 9).
[45] The Parliament of India, 81st Report on Role of Ministry of Law and Justice in Framing/Approving the Provisions of International Covenants/Multilateral/bilateral Treaties or Agreements (15th March 2016).
[46] *Ibid*.

Parliamentary scrutiny as even without a legislative backup for the same, the treaties once entered can be applied in the domestic legal regime[47].

Thus, the will of the people, which could have been reflected by the Members of Parliament is also neglected, as a discussion on the same is jumped over, and the people are left clueless, oblivious, and unaware if their rights have been marginalized when any treaty is signed by India. Such an act is thus reflective of the executive overreach over the powers of the Legislature.

The Remedial Measures

As discussed, treaty-making plays a pivotal role in shaping international relations that affect the country as a whole. Therefore, it should be attended to mindfully with utmost caution as there is a possibility that some provisions might impede the rights and interests of its people and hamper the country's growth as well. This can be mitigated if there is proper deliberation on the same before agreeing to any such convention, agreement, covenants, and treaties. The State should thus, transpire into practice, the involvement of Parliament while entering into any treaty. The Executive powers of treaty-making should be, therefore, exercised in consonance with the Parliament. The author further opines that in line with the suggestions of the bills, the Parliament should first, incorporate in the Constitution, explicit provisions to internalize treaties and agreements in India, to remove such ambiguities of authorities and procedures. Also, as suggested by the 81st Report of the Parliament, treaty negotiations and drafting should be supported by legal experts, particularly international law and politics[48]. Lastly, in a parliamentary democratic country like India, the power of the Parliament should not be undermined.

****

[47] *Gramophone Company of India Ltd. v. Birendra Bahadur Pandey & Ors.* (1984) SCR (2) 664.
[48] *Ibid*.