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PROCESS OF INCORPORATING INTERNATIONAL LAW IN INDIAN LEGAL SYSTEM

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ABSTRACT

Bridging the Global and the Local: The Path of International Law into India's Legal Framework. India, as a former British colony, inherited a dualist approach to international law, requiring domestic legislation for treaty enforcement. Post-independence, the Indian Constitution provided mechanisms for integrating international law, with Article 253 empowering Parliament to legislate on treaties and agreements. Over time, judicial interpretations have played a key role in aligning domestic laws with international commitments. India remains a dualist state where treaties do not automatically become law unless legislated upon. Courts have, however, increasingly relied on international conventions, particularly in human rights and environmental law, even in the absence of formal legislative enactment. Despite constitutional provisions, inconsistencies in implementation persist due to executive discretion and lack of a structured treaty incorporation process. The absence of a clear framework for treaty incorporation creates legal uncertainty, inconsistent judicial application, and gaps in international obligations. There is a need to assess whether India's existing legal mechanisms are sufficient or if reforms are necessary to ensure seamless integration of international law into domestic jurisprudence. A structured and mandatory legislative framework for the incorporation of international treaties will enhance legal certainty, improve compliance with international obligations, and strengthen India's global legal standing. Introduction of a Treaty Incorporation Act to establish a standardized process. Mandatory parliamentary approval for key treaties impacting fundamental rights and governance. Enhanced judicial guidance on the applicability of customary international law. Creation of a dedicated Treaty Implementation Authority for monitoring and compliance. To analyze the effectiveness of India's current approach to incorporating international law. To assess the role of the judiciary in interpreting international obligations. To identify gaps and challenges in treaty implementation. To propose legal and institutional reforms for a more structured approach. To strengthen India's commitment to global legal standards while ensuring constitutional integrity. It reflects a balance between constitutional provisions, judicial decisions, and legislative actions.

Keywords : Constitution, Customary International Law, Dualism, Fundamental Rights, Global Legal Standards, International Law, Judiciary, Legal Framework, Legislative Incorporation, Parliamentary Approval, Reform, Sovereignty Treaty, Implementation Treaty, Incorporation Act, Treaty Obligations

1. INTRODUCTION

"Bridging the Global and the Local: The Path of International Law into India's Legal Framework."⁵⁸³

1.1 Relevance of the Topic:

International law plays a crucial role in shaping domestic legal frameworks across the world. As globalization intensifies, nations are increasingly influenced by international treaties, conventions, and legal norms. In India, the interaction between international law and domestic law has gained significance in areas such as human rights, trade, environmental protection, and criminal justice. The extent to which India incorporates international legal obligations into its domestic system directly impacts governance, policymaking, and judicial decisions. Understanding this relationship is essential to ensure India's legal framework aligns with global standards while safeguarding national interests and constitutional principles.⁵⁸⁴

1.2 Objective of the Seminar:

This seminar aims to provide an in-depth analysis of how international law is integrated into India's legal system, focusing on the following key areas:

1. Mechanisms of Integration:

○ Constitutional Provisions:

Article 253 of the Indian Constitution empowers Parliament to enact laws necessary for implementing international treaties, agreements, or conventions. This provision ensures that international obligations are given effect within the domestic legal framework.⁵⁸⁵

○ Judicial Precedents:

Indian courts have played a pivotal role in interpreting and applying international law. While traditionally adhering to a dualist approach—where international law requires domestic legislation to be enforceable—courts have, in certain instances, directly applied international norms, especially when they align with constitutional principles.⁵⁸⁶

○ Legislative Actions:

Parliament enacts legislation to fulfill international obligations. For example, the Protection of Human Rights Act, 1993, was enacted to align with international human rights standards.⁵⁸⁷

2. Challenges and Gaps:

○ Dualist Approach:

India's dualist system necessitates domestic legislation to enforce international treaties. This approach can lead to delays or inconsistencies in implementing international obligations, especially when there is a lack of political will or legislative inertia.

○ Judicial Inconsistencies:

The judiciary's reliance on international law has been inconsistent. While some judgments have embraced international norms, others have been reticent, leading to unpredictability in the application of international law.

⁵⁸³ S.K. Verma, *An Introduction to Public International Law*, (New Delhi: Prentice-Hall, 2019),

⁵⁸⁴ J.G. Starke, *Introduction to International Law*, 11th ed. (London: Butterworths, 1994).

⁵⁸⁵ V.G. Hegde, "The Implementation of International Law in India: An Overview," *Indian Journal of International Law*, vol. 50, no. 1, 2010, pp. 1-20.

⁵⁸⁶ *Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey*, (1984) 2 S.C.C.

⁵⁸⁷ The Protection of Human Rights Act, 1993, No. 10, Acts of Parliament, 1994 (India).

○ **Implementation Framework:**

There is an absence of a clear and consistent framework for treaty implementation across various sectors, resulting in fragmented enforcement and compliance issues.

3. **Need for Reforms:**

○ **Assessing the Current System:**

A critical examination is required to determine if India's legal system adequately accommodates international legal obligations. This involves analyzing existing mechanisms and identifying shortcomings.⁵⁸⁸

○ **Recommendations for Structured Integration:**

Proposing a more streamlined and coherent approach to treaty incorporation, possibly through comprehensive legislation or amendments to existing laws, to ensure timely and effective implementation.⁵⁸⁹

○ **Roles of Parliament and Judiciary:**

Enhancing the roles of Parliament and the judiciary is crucial. Parliament should proactively legislate to implement international obligations, while the judiciary should consistently interpret domestic laws in harmony with international norms, provided they do not conflict with constitutional provisions.

By delving into these aspects, the seminar seeks to foster a comprehensive understanding of India's navigation through its international legal

obligations and to highlight potential areas for legal and policy reforms to ensure better integration and compliance.

2. HISTORICAL BACKGROUND:

Colonial Influence: British-era Dualist Tradition

During the British colonial rule, India inherited the dualist approach to international law from the British legal system. In a dualist system, international treaties and agreements do not automatically become part of domestic law unless they are incorporated through specific legislation. This principle was followed by British courts and subsequently applied in colonial India.⁵⁹⁰

Key Aspects of the British-Era Dualist Tradition:

- International treaties signed by the British Crown did not directly create enforceable rights or obligations in domestic courts.
- Domestic legislation was required to transform treaty obligations into enforceable law.
- The Government of India Act, 1935, which laid the foundation for India's constitutional structure, did not provide for direct incorporation of international treaties.⁵⁹¹

Post-Independence Developments

Article 253: Empowering Parliament to Implement Treaties :After independence, India continued the dualist approach. However, Article 253 of the Indian Constitution explicitly empowers Parliament to make laws for implementing international treaties, agreements, and conventions.

- **Text of article 253:** "Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement, or convention

⁵⁸⁸ S.K. Verma, *International Law in India: Trends and Developments*, (2000)

⁵⁸⁹ V.G. Hegde, *The Implementation of International Law in India: A Need for a Comprehensive Framework*.

⁵⁹⁰ Oppenheim, *International Law: A Treatise* 54

⁵⁹¹ *Rustomjee v. The Queen*, (1876)

with any other country or any decision made at any international conference, association, or other body.”

• **Implications of Article 253:**

- It provides Parliament with exclusive power to enact laws for treaty implementation, even on subjects that otherwise fall within the State List.
- Treaties do not become automatically binding; legislative action is required for enforcement.
- Parliament can override State List subjects if necessary for treaty implementation, ensuring international obligations are met.⁵⁹²

Seventh Schedule: International Agreements and the Division of Legislative Powers :The Seventh Schedule of the Constitution divides legislative powers between the Union and the States through three lists:

- **Union List** (List I): Covers subjects of national and international importance, including foreign affairs, treaties, and agreements with foreign countries (Entry 14).
- **State List** (List II): Contains matters of local or regional importance. However, if treaty implementation requires legislation on a State subject, Parliament can legislate under Article 253.
- **Concurrent List** (List III): Contains subjects on which both the Union and State governments can legislate. In case of conflict, Union law prevails (Article 254).

Thus, international agreements have influenced federalism by allowing the Union to legislate on subjects beyond its usual jurisdiction when treaty obligations require it.

Initial Judicial Approach: Reluctance to Apply International Law Without Enabling Legislation :

In the early years post-independence, Indian courts were hesitant to directly enforce international treaties unless they were incorporated into domestic law through legislation. Some key aspects of the judicial approach include:

- **A Dualist Stance:** Courts followed the British tradition, holding that treaties do not automatically create legal rights and obligations in India.
- **Enforcement Requires Legislation:** Unless Parliament enacted a law implementing an international treaty, courts were reluctant to apply its provisions.
- **Early Cases Reflecting This Approach:**
 - In *State of West Bengal v. Kesoram Industries Ltd. (2004)*, the Supreme Court reaffirmed the principle that international treaties require domestic legislation for enforcement.⁵⁹³
 - In *Jolly George Varghese v. Bank of Cochin (1980)*, the Supreme Court held that the International Covenant on Civil and Political Rights (ICCPR) could not be directly enforced in Indian courts without legislative backing.⁵⁹⁴

Over time, the courts evolved their stance and started interpreting domestic laws in harmony with international obligations, but the early approach remained largely restrictive.

3. CONSTITUTIONAL AND LEGAL FRAMEWORK:

1. Article 51(c): Directive for Respect of International Law

Article 51 of the Indian Constitution is part of the **Directive Principles of State Policy (DPSP)** and

⁵⁹² *Maganbhai Ishwarbhai Patel v. Union of India*, (1969) 3 S.C.C 400

⁵⁹³ *State of W.B. v. Kesoram Indus. Ltd.*, (2004) 10 S.C.C. 201 (India).

⁵⁹⁴ *Jolly George Varghese v. Bank of Cochin*, (1980) 2 S.C.C. 360 (India).

emphasizes India's commitment to international law.

- **Text of Article 51(c):** *"The State shall endeavor to foster respect for international law and treaty obligations in the dealings of organized peoples with one another."*
- **Implications:**
 - Although not justiciable (i.e., not enforceable in courts), Article 51(c) serves as a guiding principle for the government in treaty implementation.
 - Courts may use it for **interpretative purposes** to align domestic laws with international legal principles.
 - It reflects India's broader commitment to global legal norms and international cooperation.

2. Article 253: Parliamentary Power to Legislate on Treaties

Article 253 provides Parliament the authority to enact laws necessary for implementing international treaties, agreements, and conventions.

- **Text of Article 253:** *"Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement, or convention with any other country or any decision made at any international conference, association, or other body."*
- **Implications:**
 - **Overrides Federal Division of Powers:** Parliament can legislate on any subject (including those in the **State List**) if it is necessary for treaty implementation.

- **No Prior State Consultation Required:** The Union does not need approval from States before legislating on treaty matters.

- **Example of Article 253 in Action:**

- The **Environmental Protection Act, 1986** was enacted under Article 253 to fulfill India's obligations under the **Stockholm Conference on Human Environment, 1972**.

3. Seventh Schedule (Union List, Entry 14): International Treaties Under Union Jurisdiction: The Seventh Schedule of the Constitution classifies subjects into three lists: **Union List, State List, and Concurrent List**.

- **Union List (Entry 14):** *"Entering into treaties and agreements with foreign countries and implementing treaties, agreements, and conventions with foreign countries."*
- **Implications:**
 - Confirms **exclusive jurisdiction of the Union Government** over treaty-related matters.
 - Even without Article 253, the Union List gives Parliament broad power over foreign affairs and treaties.
 - States have **no independent authority** to enter into or implement international treaties.

Legislative Process for Treaty Incorporation

1. Requirement for Enabling Legislation

India follows a **dualist approach** to international law, meaning treaties do not automatically become part of domestic law.

- A treaty must be incorporated into national legislation before it can be **enforced in Indian courts**.

- Without a specific law, treaties remain **binding only at the international level**, not in domestic courts.

- Example:**

- The **United Nations Convention on the Rights of the Child (UNCRC)** was ratified by India in 1992. However, its provisions were **implemented through domestic laws** like the **Juvenile Justice (Care and Protection of Children) Act, 2000**⁵⁹⁵.

2. Role of Parliament in Enacting Laws to Implement Treaties

- Parliament is the primary body responsible for transforming treaty obligations into enforceable law.
- The **legislation process follows standard procedures:**
 - Proposal of a Bill** (usually by the executive).
 - Debate and Approval** in both Houses of Parliament.
 - Presidential Assent** before becoming law.
- Key Examples of Treaty-Based Legislation in India:**
 - The Geneva Conventions Act, 1960** → Implemented the **Geneva Conventions on the Laws of War**.
 - The Protection of Human Rights Act, 1993** → Incorporated principles from the **Universal Declaration of Human Rights (UDHR)**.

Role of the Executive in Treaty Making

1. Power to Negotiate and Sign Treaties

- Treaty negotiation and signing** is an **executive function** under Article 73,

which grants the Union executive power over all matters within the Union List.

- The **Ministry of External Affairs (MEA)**, under the Prime Minister's guidance, conducts treaty negotiations.
- Examples of Treaties Negotiated by the Executive:**
 - The Indo-US Nuclear Deal (2008)**
 - The Paris Agreement on Climate Change (2015)**

2. Lack of a Structured Ratification Process

Unlike some countries where treaties require legislative ratification (e.g., the **U.S. Senate ratifies treaties**), India does not have a structured ratification process.

- Current Practice:**

- The **executive signs treaties** without needing Parliament's approval.
 - Parliament only gets involved when **legislation is required** for implementation.

- Criticism & Concerns:**

- Lack of **parliamentary oversight** over important treaties.
 - Potential issues with **transparency and democratic accountability**.
 - Some scholars argue for **mandatory parliamentary ratification**, especially for treaties affecting fundamental rights or state subjects.

4. ROLE OF JUDICIARY IN INCORPORATING INTERNATIONAL LAW

The judiciary plays a crucial role in interpreting and incorporating international law into domestic legal frameworks. In India, courts have frequently relied on international treaties, conventions, and customary international law while delivering judgments, particularly in areas

⁵⁹⁵ *Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey*, (1984) 2 S.C.C. 534 (India)

where domestic legislation is silent or ambiguous. The Indian judiciary has maintained that international treaties and customary norms can be applied in domestic law, provided they do not contradict constitutional provisions or statutory laws.

Judicial Interpretations & Precedents

1. Vishaka v. State of Rajasthan (1997)

In *Vishaka v. State of Rajasthan*, the Supreme Court addressed the issue of workplace sexual harassment in the absence of specific domestic legislation. The case arose from the gang rape of a social worker, Bhanwari Devi, highlighting the inadequacy of existing laws in protecting women from workplace harassment.

- The petitioners invoked the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which India had ratified in 1993.
- The Supreme Court held that, in the absence of domestic law, international conventions and treaties to which India is a signatory can be applied, provided they do not contravene fundamental rights or statutory provisions.
- The Court formulated the Vishaka Guidelines, which set forth mandatory workplace sexual harassment prevention measures, later codified in the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.⁵⁹⁶

This case established a significant precedent where international treaties were used to fill legislative gaps in protecting fundamental rights.

2. Jolly George Verghese v. Bank of Cochin (1980)

Treaty obligations vs. Fundamental Rights

This case dealt with a conflict between India's international treaty obligations and the

fundamental rights guaranteed under the Constitution.

- The petitioner, Jolly George Verghese, was facing civil imprisonment due to non-payment of a debt under a court decree. He argued that this violated Article 11 of the International Covenant on Civil and Political Rights (ICCPR), which prohibits imprisonment for the mere inability to fulfill a contractual obligation.
- The Supreme Court ruled that while India is a party to the ICCPR, treaties do not automatically become enforceable law unless incorporated through domestic legislation.
- The Court upheld the enforceability of the civil imprisonment provisions under the Civil Procedure Code, 1908, stating that fundamental rights under the Constitution take precedence over international treaty obligations unless domestically implemented.⁵⁹⁷

This case reaffirmed the principle that international treaties require domestic legislation to be enforceable and cannot override constitutional rights.

3. Gramophone Company of India v. B.B. Pandey (1984)

Treaties cannot override domestic law without legislation

In this case, the Supreme Court addressed the issue of whether an international treaty could be used to override domestic law in a dispute concerning the import and distribution of gramophone records.

- The petitioner, Gramophone Company of India, argued that its rights under an international copyright treaty should be upheld.
- The Court ruled that treaties entered into by the Indian government do not automatically become binding domestic

⁵⁹⁶ *Vishaka v. State of Rajasthan*, (1997) 6 S.C.C. 241 (India).

⁵⁹⁷ *Jolly George Verghese v. Bank of Cochin*, (1980) 2 S.C.C. 360 (India)

law unless incorporated into legislation by Parliament.

- It emphasized that India follows the dualism approach, where international law is not self-executing but requires legislative incorporation.

This case established a firm precedent that treaties do not override domestic law unless explicitly legislated by Parliament.

Application of Customary International Law

Apart from treaty law, Indian courts have also relied on customary international law—general practices accepted as law—to adjudicate cases, particularly in environmental protection and human rights matters. Courts have invoked customary norms to uphold the principles of sustainable development, precautionary measures, and intergenerational equity.

Environmental Law

- In **Vellore Citizens Welfare Forum v. Union of India (1996)**, the Supreme Court applied the precautionary principle and polluter pays principle, which are customary international norms, to address industrial pollution.
- In **MC Mehta v. Kamal Nath (1997)**, the Court used the public trust doctrine, a principle recognized in international environmental law, to protect natural resources from private exploitation.

Human Rights Law

- Courts have relied on customary human rights norms, such as the prohibition of torture and fair trial principles, even when domestic laws were silent.
- In cases concerning refugee rights, courts have acknowledged the principle of non-refoulement (protection from forced return), a well-established customary norm, even though India lacks specific refugee legislation

5. Challenges in the Incorporation of International Law

1. **Absence of a Structured Treaty Incorporation Framework:** Many countries lack a well-defined legal framework for the ratification and enforcement of international treaties. While some nations follow a dualist approach (where treaties must be incorporated into domestic law through legislation), others adopt a monist system (where treaties become binding upon ratification). However, in the absence of clear constitutional or statutory provisions outlining how international treaties should be domesticated, there is uncertainty in their legal status and applicability. This can lead to selective enforcement, legal ambiguities, and conflicts between domestic and international legal obligations.
2. **Judicial Inconsistencies:** Courts often struggle with the interpretation and application of international law due to inconsistent precedents and varying judicial philosophies. Some judges adopt a progressive stance, integrating international legal norms into domestic jurisprudence, while others are more conservative, prioritizing domestic laws over international obligations. This results in a lack of uniformity in case law, making it difficult to predict how international legal principles will be applied. Additionally, some courts refuse to recognize international treaties unless explicitly incorporated by domestic legislation, further complicating their enforcement.
3. **Executive Discretion:** In many legal systems, the executive branch exercises significant discretion in negotiating, signing, and ratifying international treaties, often without adequate parliamentary oversight. This limits

democratic accountability and may lead to situations where treaties are signed in ways that do not align with national interests or public will. The lack of legislative involvement in the treaty-making process can also result in weak implementation, as parliamentarians may not feel obligated to support or enforce treaties they were not involved in approving.

4. **Lack of Awareness & Implementation**

Issues: Government agencies, law enforcement bodies, and even the judiciary often have limited awareness of international legal principles and their relevance to domestic law. This lack of knowledge results in ineffective implementation, where international obligations remain largely theoretical rather than being actively enforced. Bureaucratic inertia, inadequate training, and a lack of political will further contribute to non-compliance, reducing the practical impact of international law within domestic jurisdictions.

5. These challenges highlight the need for a more structured and transparent approach to incorporating international law into domestic legal frameworks, ensuring consistency, accountability, and effective enforcement.

6. NEED FOR REFORMS IN THE INCORPORATION OF INTERNATIONAL LAW:

1. **Proposal for a Treaty Incorporation Act:**

A comprehensive Treaty Incorporation Act would establish a structured framework for the domestication of international treaties, addressing legal ambiguities and ensuring their effective implementation. Such an act should include:

- **Uniform Procedure for Treaty Enforcement:** Clearly defining the steps for incorporating international treaties into

domestic law, ensuring consistency in their application across different branches of government.

- **Guidelines for Treaty Ratification and Implementation:** Setting legal parameters for treaty approval, defining the role of the executive, legislature, and judiciary in the process. The Act should specify whether treaties automatically become law upon ratification (monist approach) or require additional legislation (dualist approach).
- **Legal Status of Treaties:** Clarifying the hierarchy of international treaties in relation to domestic laws and constitutional provisions to prevent conflicts and ensure smooth enforcement.⁵⁹⁸

2. **Mandatory Parliamentary Approval for Key Treaties:**

Strengthening democratic oversight in treaty-making is essential to prevent unilateral executive action that may not align with national interests. This reform would:

- **Require Legislative Scrutiny for Significant Treaties:** Treaties related to human rights, trade, defense, environmental protection, and other crucial areas should be subjected to parliamentary debate and approval before ratification.
- **Ensure Transparency and Public Accountability:** Parliamentary discussions would provide a platform for diverse perspectives, ensuring that international commitments reflect the interests of the citizens.

⁵⁹⁸ V.G. Hegde, *Parliament and Treaty-Making in India: Need for a New Framework*, 2007

- Balance Executive and Legislative Roles: While the executive retains negotiation powers, the final approval should rest with the legislature, ensuring a democratic check on international commitments.⁵⁹⁹
- 3. **Enhanced Role of Judiciary:** Courts play a crucial role in interpreting and enforcing international law. Reforms should focus on:
 - Developing a Standardized Judicial Approach: Establishing guidelines for judges on how to interpret international treaties, ensuring uniformity in legal decisions.
 - Training and Capacity Building: Educating judges on international legal principles to improve their understanding and application of treaty provisions in domestic cases.
 - Integration of International Law in Constitutional Interpretation: Encouraging courts to refer to international treaties when interpreting fundamental rights and legal obligations, thereby aligning domestic law with global standards.
- 4. **Creation of a Treaty Implementation Authority:** A specialized Treaty Implementation Authority (TIA) should be established to oversee and monitor the execution of international treaties at the national level. This body would:
 - Ensure Compliance: Monitor whether domestic laws and policies align with international treaty obligations.
 - Coordinate with Government Agencies: Work with different ministries and departments to integrate international law into administrative and regulatory frameworks.
 - Address Implementation Gaps: Identify areas where treaty commitments are not being met and recommend corrective actions.
 - Report to Parliament and the Public: Provide periodic updates on treaty compliance, ensuring accountability and transparency.⁶⁰⁰

7. SUMMARY:

The incorporation of international law into India's domestic legal framework faces several challenges, including the absence of a structured treaty incorporation framework, judicial inconsistencies, executive discretion in treaty negotiations, and a lack of awareness leading to weak implementation. These issues create ambiguity in treaty enforcement, unpredictability in judicial decisions, and limited parliamentary oversight, ultimately hindering India's compliance with international legal commitments. Addressing these gaps is essential to ensure a more structured and transparent approach to integrating international law into domestic jurisprudence. Strengthening the incorporation of international law is crucial for improving India's legal standing on the global stage. A well-defined framework would enhance India's credibility in international diplomacy, facilitate smoother trade relations, and improve compliance with human rights and environmental agreements. Furthermore, a structured system would bring greater legal certainty and consistency, reducing conflicts between domestic and international law while ensuring that global commitments align with India's constitutional values and national interests. Going forward, India must implement key reforms to enhance

⁵⁹⁹ *Ram Jawaya Kapur v. State of Punjab*, (1955) 2 S.C.R. 225 (India)

⁶⁰⁰ P. Chandrasekhara Rao, *The Incorporation of International Law into Municipal Law: The Indian Perspective*.

its treaty incorporation process while safeguarding its constitutional sovereignty. Enacting a Treaty Incorporation Act would provide a structured mechanism for treaty ratification and enforcement, ensuring clarity and consistency. Mandating parliamentary oversight for key treaties would enhance democratic accountability and prevent unilateral executive decisions. Strengthening the judiciary's role by developing a standardized approach to applying international law would bring greater uniformity to legal interpretations. Additionally, the establishment of a Treaty Implementation Authority could ensure systematic monitoring and coordination among government agencies, improving overall compliance. These reforms would allow India to balance its global commitments with national sovereignty, positioning the country as a responsible participant in the international legal order while reinforcing the rule of law at home.

