BEYOND THE MONIST-DUALIST DICHOTOMY: THE CASE FOR A DYNAMIC SPECTRUM

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This paper contests the dichotomous monist-dualist understanding of the relationship between municipal and international law. It determines that this approach is rendered limited as it proposes a sense of legal clarity, which, in fact, is non-existent. This is evidenced in the inconsistency between textual constitutional expression and practical application in written as well as unwritten constitutions. It is augmented by the contemporary critique of constitutional orthodoxy in favour of rights-based jurisprudence, a weak normative view of constitutional texts regulating the incorporation of international law, and contradictions between the textual proclamations and historical customary practices. Instead, the paper proposes a spectrum-based vision that recognises the fluid tendencies of nations and multilateral institutions in interacting with and reciprocating the laws and actions of others. The paper demonstrates the absence of pure monism and pure dualism and argues that each nation is uniquely positioned on a spectrum between these two far ends. This position itself is dynamic and relative. It may change, and it may be described in relation to another nation or the same nation in a different time period. The paper argues that, additionally to the role played by constitutional courts in altering the value attached to textual constitutional expression, the degree of institutionalisation of regional organisations is significant. It delves deep into the case of the European Union (EU) to establish the point. Finally, despite determining the EU as an exceptional body fostering monist tendencies among member states via the doctrine of direct effect, the paper focuses on the reactionary capacity of national constitutional courts in determining the degree of monism on the spectrum.

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I. INTRODUCTION

In 'The Merits of Global Constitutionalism', Anne Peters argued that the legal basis and application of international law have been undergoing seismic shifts. A central reason behind this change, as claimed by the author, is the ousting of the principle of sovereignty from the status of *Letztbegründung* or the first principle of international law, and the growing central relevance of human rights.[1] This essentially refers to the notion of 'humanised sovereignty', a form wherein international law acquires a character beyond inter-state relations and delves into protecting citizen rights in the legal arena. Deriving from modern theories of statehood, such an approach seeks to question the assumption that peace among states is an end in itself, as states are composite entities, and their stability should result in the fulfilment of citizen rights. Hence, the changing conceptions of sovereignty are transforming the landscape of international law jurisprudence, pushing it towards a justiciability-driven rights-based approach. However, despite such discourses surrounding the creation of 'global constitutions', Anne Peters-among other legal constructivists-has deemed this terminology to be of symbolic aspirational value as opposed to replacing national constitutional law. Thus, understanding the relationship between national and international law remains still pertinent.

Historically, two schools of legal thought – monism and dualism – emerged as the guiding agents to understand the incorporation of international law into municipal affairs. In 1945, the Vienna school of legal thought, led by Hans Kelsen, proposed the monist theory. It argued for a singular and uniform

[1] Anne Peters, *The Merits of Global Constitutionalism*, Vol. 16(2), Indiana Journal of Global Legal Studies, 397 (2009).

legal order wherein international laws were applied directly to the national order, without specific legislative action.[2] Kelsen integrated it within his 'hierarchy of norms' promulgation as 'all law must conform to the norm directly higher to it' and placed international law at the pedestal of the legal pyramid. While French jurist Georges Scelle identified with the monist theory, he conferred constitutional law the primacy within the hierarchy of norms.[3]

These variants of the monist approach were contested by the dualist school, as led by Anzilotti and Triepel, who considered national and international legal orders to be distinct. Anzilotti, in particular, argued that national law was complete in itself and explicit consent of the legislature was necessary for the legitimacy and internal application of international law.[4]

Here, it is important to situate these academic debates within the context of the early to middle twentieth century. The international order – specifically the League of Nations– had failed to prevent the second world war, and the post-1945 creation of the United Nations ('UN') had led to the development of a new international dynamic.[5] In the contemporary understanding, monist discourses have primarily hinted towards the development of a cosmopolitan legal culture to facilitate global governance,[6] whereas dualist proponents consider it to be of the essence for legal pluralism and the protection of self-expressed state sovereignty.[7]

While the ideals of the dualist school have witnessed greater legal practice given the supremacy of state sovereignty within multilateral organisations, such as granted by Article 2(4) of the UN Charter,[8] contemporary research indicates a shift towards monist tendencies in a wide range of legal systems. For instance, the analysis of Lord Kerr's dissenting judgement in *R.* v. *Secy. of State for Work and Pensions* (2015) by Conor McCormick summarises that the executive ratification of international treaties without parliamentary authority should not yield to lack of judicial enforcement.[9] While this perspective has not been

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2 Ryan Mitchell, *International Law as a Coercive Order: Hans Kelsen and the Transformations of Sanction*, Vol. 29(2), Indiana International & Comparative Law Review, 245 (2019).

3 Hubert Thierry, *The Thought of Georges Scelle*, Vol. 1(1), European Journal of International Law, 193 (1990).

4 Giorgio Gaja, *Positivism and Dualism in Dionisio Anzilotti*, Vol. 3(1), European Journal of International Law, 123 (1992).

5 Laurence G. Paquin, *Why Did the League of Nations Fail?*, Vol. 34(3), The Social Studies, 121 (1943).

6 Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, Vol. 115(7), Yale Law Journal, 1490 (2006).

7 Aparna Chandra, *India and International Law: Formal Dualism, Functional Monism*, Vol. 57, Indian Journal of International Law, 25 (2017).

8 Charter of the United Nations, October 24, 1945, 1 UNTS XVI, Art. 2(4).

9 R. v. Secy. of State for Work and Pensions, (2015) 1 WLR 1449 : 2015 UKSC 16 (United Kingdom Supreme Court); Conor McCormick, *Debating Constitutional Dualism*, UK Constitutional Law Blog, November 24, 2015, available at https://ukconstitutionallaw.org/2015/11/24/conor-mccormick-debating-constitutional-dualism/ (Last visited on August 28, 2023).

embedded into legal practice yet due to a stare decisis application of the House of Lords ruling in *R.* v. *Director of Public Prosecutions (2000),*[10] it has been at the forefront of the critique of constitutional orthodoxy.

In the case of India, as a function of strong executive privilege and judicial activism, the discourse against dualist rigidity has had transformative effects. For instance, in 2009, executive orders were passed without parliamentary oversight to implement a host of UN Security Council ('UNSC') resolutions for 'the freezing of assets of person/entities suspected of having links to terror,[11] and for taking other measures against such persons'.[12] While the contentions associated with the lack of legislative approval exist, such co-optation without due parliamentary process does present a swing towards monist tendencies.

Even though current research outlining a shift from dualism to monism focuses on a relevant point of the investigation, a global answer can produce results that are absolutist and that lack consideration towards the inherent diversity in institutional arrangements of legal systems. Instead, this research seeks to inquire to what extent is the classically dichotomous approach towards monism and dualism consistent with contemporary realities of constitutional and international law.

In response, this paper posits that viewing monism and dualism as a dichotomy renders limited or inaccurate findings in contemporary legal arrangements due to the inconsistency between constitutional expression and practical application in written as well as unwritten constitutions. Instead, the paper proposes a spectrum-based vision that recognises the fluid tendencies of nations and multilateral institutions in interacting with and reciprocating to the laws and actions of the other. The paper demonstrates the absence of pure monism and pure dualism and argues that each nation is uniquely positioned on a spectrum between these two far ends. This position itself is dynamic and relative. It may change, and it may be described in relation to another nation or the same nation in a different time period. The strength of regional organisations, and the concurrent interactions between national constitutional courts and international law, remain central determinants in interpreting the character of state legal arrangements.

To explore this thesis in detail, this paper under Part II will first discuss the observed lapse between constitutional expression and practice. The focus

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[10] R. v. Director of Public Prosecutions, ex p. Kebilene, (1999) 3 WLR 972 : (2000) 2 AC 326 (United Kingdom House of Lords).

[11] S.C. Res. 1267, U.N. Doc. S/RES/1267 (October 15, 1999); S.C. Res. 1333, U.N. Doc. S/RES/1333 (December 19, 2000); S.C. Res. 1363, U.N. Doc. S/RES/1363 (July 30, 2001); S.C. Res. 1390, U.N. Doc. S/RES/1390 (January 16, 2002); S.C. Res. 1455, U.N. Doc. S/RES/1455 (January 17, 2003); S.C. Res. 1526, U.N. Doc. S/RES/1526 (January 30, 2004); S.C. Res. 1566, U.N. Doc. S/RES/1566 (October 8, 2004); S.C. Res. 1617, U.N. Doc. S/RES/1617 (July 29, 2005); S.C. Res. 1735, U.N. Doc. S/RES/1735 (December 22, 2006) & S.C. Res. 1822, U.N. Doc. S/RES/1822 (June 30, 2008).

[12] Chandra, *supra* note 7.

will lie on both written and unwritten constitutions in order to contest the assumption that a lack of clear constitutional proclamation is the reason for operational gaps in legal applications. Having established this inconsistency, Part III will focus on the factors determining where a legal system is likely to be placed on the spectrum. The paper identifies that the strength of multilateral institutions, and regional organisations in particular, is a central determinant of the positioning on the spectrum.

In this part, the European Union ('EU') is discussed as a case study where the nation-states have shared attributes of their sovereignty such that the citizens are empowered to make legal claims without continuous and explicit state assent to the EU laws. This perspective will be further nuanced by arguing that the regional multilateral organisations' role is complemented by the attitude of national constitutional courts towards the organisations, which differs due to subjective judicial interpretations and the character of state constitutional identity. The scope of this section has been focused on the EU due to its advanced mechanism of direct political participation in the election of representatives to the EU Parliament. Its unique legal and political structures are in addition to the economic bases which form the premise for other regional organisations.

II. INCONSISTENCY BETWEEN CONSTITUTIONAL EXPRESSION AND PRACTICE

A. LIMITED NORMATIVE VALUE OF CONSTITUTIONAL EXPRESSION

1. Dualist Expressions Contested by Monist Practices

As asserted earlier, dualism has been the dominant approach towards applying international law into the domestic sphere if one were to follow constitutional expression across nations. For instance, Article 253 of the Indian Constitution states that the '[…] Parliament has the power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention […]'.[13] In fact, reviewing the constituent assembly debates would suggest that this article was rather uncontested. The article came to its current form when the President of the Assembly initiated an amendment to replace 'for any State or part thereof' with 'for the whole or any part of the territory of India', and a member proposed that the words 'or any decision made at an international conference, association or body' should be added at the end of the draft article. Both of these amendments were adopted without any debate.[14] Such a reading of

[13] The Constitution of India, Art. 253.

[14] *Article 253: Legislation for giving Effect to International Agreements*, Constitutionofindia.net, available at https://www.constitutionofindia.net/articles/article-253-legislation-for-giving-effect-to-international-agreements/#:~:text=Draft%20Article%20230%20(Article%20253,involving%20one%20or%20more%20countries (Last visited on November 13, 2023).

the constitutional text and historical debate would suggest that India has a clearly articulated dualist system.

However, as the Parliamentary Committee Report titled 'India and International Law' observes,[15] while India has conventionally relied on dualism, it has been moving towards monism due to the approach that 'customary international law (CIL) is valid domestically unless it is explicitly in opposition to a national law' as laid by the Supreme Court in *Vellore Citizens' Welfare Forum* v. *Union of India (1996)*.[16] This principle was witnessed in practice specifically as a function of strong judicial activism and improved institutionalisation of public interest litigations since the turn of the century.

Similarly, in the *Vishaka* v. *State of Rajasthan (1997)* case,[17] the Supreme Court promulgated guidelines pertaining to sexual harassment at the workplace-the Vishakha Guidelines-with the Convention on the Elimination of Discrimination against Women (CEDAW) as the legal basis. However, the CEDAW had not been applied domestically beforehand via any parliamentary legislation, and its application was entirely a product of judicial intervention. Another example can be observed in the *K.S. Puttaswamy (Privacy-9J.)* v. *Union of India (2017)* case,[18] wherein the right to privacy was upheld as a component of the fundamental right to life protected under Article 21 of the constitution.[19] As empirically noted by the Supreme Court Observer, around 20 percent of cases therein cited as precedents originated from the United States (USA), and they, in turn, had a legal basis in international law guidelines on privacy.[20]

In the case of the United Kingdom (UK), despite not having a written constitution, the principle of dualism has been clearly articulated in historical as well as contemporary parliamentary proceedings. This perspective was vociferously highlighted in the *J.H. Rayner case (1990)*[21] wherein Lord Oliver argued that 'treaty making is a royal prerogative' and 'unincorporated treaties are non-justiciable and lack direct effect in municipal legislation'. Further, in 2010, ex-ante parliamentary approval for ratification was made a statutory requirement under the Constitutional Reform and Governance Act.[22] As recently as 2015, the Ministerial

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15 Committee on External Affairs, Seventeenth Lok Sabha*, India and International Law Including Extradition Treaties with Foreign Countries, Asylum Issues, International Cyber-Security and Issues of Financial Crimes,* Ninth Report (December 6, 2021).

16 Vellore Citizens' Welfare Forum v. Union of India, (1996) 5 SCC 647.

17 Vishaka v. State of Rajasthan, (1997) 6 SCC 241.

18 K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1.

19 The Constitution of India, Art. 21.

20 *Which Foreign Judgments does the SC Cite?*, Supreme Court Observer (SCO Team), July 13, 2020, available at https://www.scobserver.in/journal/which-foreign-judgments-does-the-sc-cite/ (Last visited on August 28, 2023).

21 J.H. Rayner (Mincing Lane) Ltd. v. Deptt. of Trade and Industry, (1989) 3 WLR 969 : (1990) 2 AC 418 (United Kingdom House of Lords).

22 The Constitutional Reform and Governance Act, 2010, Part II (UK).

Code of the UK was amended to remove international law as a reference to be obeyed by the ministers.[23]

However, despite these proclamations, the Queen's Bench ruling in *Trendtex Trading Corpn.* v. *Central Bank of Nigeria (1977)* was used as a precedent by the Supreme Court in the series of Brexit judgements.[24] Further, Lord Kerr, in his dissenting judgement in *R.* v. *Secy. of State for Work and Pensions (2015)*,[25] contested the parliamentary heredity over the incorporation of international law in the domestic jurisdiction. His argument was rooted in a critique of constitutional orthodoxy permeated within British legal structures. It built upon the reasoning that 'the rationale of the dualist theory, which underpins the *International Tin Council case (2004)*, is that any inroad on it would risk abuses by the executive to the detriment of citizens. It is, however, difficult to see what relevance this has to international human rights treaties which create fundamental rights for individuals against the state and its agencies'.[26] This conflict between constitutional orthodoxy and judicial activism favouring rights-based justiciability signals a gradual movement towards the monist end of the spectrum.

Both these case studies have helped demonstrate that constitutional clarity in favour of dualism is not definitive and remains contested by monist tendencies. This gap between legal text and practice will be explored in the next section from the opposite lens; dualist tendencies permeating monist expressions.

2. Monist expressions contested by dualist practices

This section will focus on constitutionally proclaimed monist states of the US and France, delineating the difference between legal text and practice due to extra-constitutional customs and ordinances. A perusal of these two cases will question the notion of a 'pure monist state', suggesting instead the presence of a spectrum. Therein, traditionally, the US has exhibited stronger dualist tendencies relative to France, whereas, in recent times, France has bridged that gap, transitioning away from the monist end towards the dualist end.

Based on constitutional expression alone, the US is often classified as a monist state owing to Article VI Clause 2 of the Constitution, which reads, '[…] all Treaties made, or which shall be made, under the Authority of the US, shall be

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[23] Tim Durrant, Jack Pannell & Catherine Haddon, *Updating the Ministerial Code,* Institute for Government, July 1, 2021, available at https://www.instituteforgovernment.org.uk/publications/updating-ministerial-code (Last visited on August 28, 2023).

[24] Trendtex Trading Corpn. v. Central Bank of Nigeria, 1977 QB 529 : (1977) 2 WLR 356 [United Kingdom Court of Appeal (Civil Division)].

[25] R. v. Secy. of State for Work and Pensions, (2015) 1 WLR 1449 : 2015 UKSC 16 (United Kingdom Supreme Court).

[26] McKerr (AP) (Respondent) (Northern Ireland), In re, (2004) 1 WLR 807 : 2004 UKHL 12 (United Kingdom House of Lords).

the supreme Law of the Land; and the Judges in every State shall be bound […]'.[27] However, this supposed textual clarity is contested on three key fronts. Firstly, as noted in *Foster & Elam* v. *Neilson* (1829),[28] only self-executing treaties are directly enforceable in US courts; the others must be supported by a federal statute before judicial enforcement. Secondly, a formal process requiring the Senate's super-majority consent to a 'resolution of ratification' has been stipulated in the 'Treaty Clause',[29] limiting the automatic incorporation of international law in the domestic sphere. The Senate has refused consent on multiple occasions, including the famous rejection of the Treaty of Versailles 1919. Further, many signed treaties remain non-ratified as they await Senate resolutions, pending for years.[30] Thirdly, there are no limits prescribed by Article VI Clause 3 to indicate limitations to the incorporation of international law, which has resulted in a severely less regulated and autonomous presidential exercise of power to decide a treaty's consistency with the US Constitution and constitutional aspirations. Fourthly, there have been some contentions between the judiciary and the other organs regarding jurisdiction, as observed in the *US Supreme Court Paquete Habana* case *(1900)* which ruled that 'international custom does not confer legal rights on individuals or companies'.[31]

On the other hand, while the French reception of international treaties is significantly monist, it has avoided the third point of criticism about the lack of clear limitations due to Articles 53C and 54C of the Constitution. While all other treaties apply without any transposition into French Law (Article 52C),[32] treaties concerning specific subjects such as '*Peace treaties; International commerce [...]'*[33] (emphasis added) must be ratified by the Parliament before gaining domestic status (Article 53A). Article 54C provides another layer of limitation by creating a compulsory requirement of a priori judicial review. This article has experienced a de facto alteration after the enactment of Law No 75-17 on the Voluntary Termination of Pregnancy,[34] in which the obiter dicta proclaimed that only ordinary courts (and not constitutional courts) could review international law, with the exception of EU directives. Despite this explicit clarity, the Council of State rulings in 1997,[35] and 2000 have created a contradiction by ruling that

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27 The Constitution of the United States, 1787, Art. 6, Cl. 2 (USA).

28 Foster & Elam v. Neilson, 27 US 2 Pet 253 (1829) (United States Supreme Court).

29 The Constitution of the United States, 1787, Art. 2, §2, Cl. 2 (USA).

30 Anya Wahal, *On International Treaties, the United States Refuses to Play Ball*, Council on Foreign Relations, January 7, 2022, available at https://www.cfr.org/blog/international-treaties-united-states-refuses-play-ball (Last visited on November 20, 2023).

31 Paquete Habana the Lola, In re, 1900 SCC OnLine US SC 9 : 44 L Ed 320 : 175 US 677 (1900) (United States Supreme Court).

32 The Constitution of the Fifth Republic of France, 1958, Arts. 53C, 54C, 52C (Republic of France).

33 *Id*., Art. 53A.

34 *Law No. 79-1204 of 31 December 1979 and Related Laws (Journal Officiel, No. 1, 3)*, Berkman Klein Center, January 1, 1980, available at https://cyber.harvard.edu/population/abortion/France.abo.htm (Last visited on December 20, 2023).

35 Aquarone, Re, Stanislas Aquarone v. France, (1997) 101 RGDIP 883 (France Supreme Court of Appeal).

international custom does not prevail over national laws.[36] Furthermore, due to a change in the French election process and equal terms for the Parliament and President, cohabitation and hyper-presidentialisation have resulted in the formality of parliamentary oversight to legitimise strong executive powers, adding to a shift towards dualist tendencies.[37]

Clearly, even monist states have experienced a withdrawal from consistency in constitutional text and practice. Building on this finding, the next section will argue against the commonly held assumption that unwritten constitutions are exclusively unclear in their delineation of limits for national and international law by positing a similar trend for written constitutions. The broader argumentative endeavour is to establish that the proposed spectrum-based approach is not limited in its applicability. Rather, it encompasses all nation-states irrespective of the nature (written or unwritten) of their constitutions.

B. THE MYTH OF CONSTITUTIONAL CLARITY IN WRITTEN AS OPPOSED TO UNWRITTEN CONSTITUTIONS

1. Assumed Lack of Clarity in Unwritten Constitutions

Unwritten constitutions are generally critiqued for their over-reliance on convention and custom, resulting in unclear constitutional manifestations. This paper argues that while states with unwritten constitutions do remain ambiguous in applying international law to municipal arenas, it isn't primarily a result of the unwritten character of the constitution, as even states with written constitutions are diagnosed with a similar lack of clarity.

Whereas the UK's unique constitutional framework has been previously discussed, Canada, another state with a largely unwritten constitution based on commonwealth legal traditions, manifests similar inconsistencies. Although Canada is de jure proclaimed a dualist state, ambiguities have resulted in an anomalous monist shift. This particularity of Canada has been termed as 'dubious dualism', as the traditional perspectives of British-influenced legal orthodoxy are progressively being challenged by widespread acceptance of the direct effect of international law.[38] The most salient example of this trend can be witnessed in *Minister of Citizenship and Immigration* v. *Léon Mugesera (2005)* wherein the

[36] Paulin, Final Appeal, No. 178834, ILDC 766 (FR 2000) (France Council of State).

[37] Jack Hayward, *'Hyperpresidentialism' and the Fifth Republic State Imperative* in The Presidents of the French Fifth Republic, French Politics, Society and Culture Series (D.S. Bell & J. Gaffney eds., Palgrave Macmillan, 2013); *see also* Alexandre Lemarié, *Macron Accused of Wanting to be a "President-Prime Minister"*, Le Monde, July 12, 2018, available at https://www.lemonde.fr/politique/article/2018/07/12/macron-accuse-de-vouloir-etre-un-president-premier-ministre_5330366_823448.html (Last visited on August 28, 2023).

[38] Gib van Ert, *Dubious Dualism: The Reception of International Law in Canada*, Vol. 44(3), Val. U. L. Rev., 927 (2010).

Canadian Supreme Court averred to conform with the regulations laid down by the International Criminal Tribunals of Rwanda and former Yugoslavia (ICTY),[39] overturing its previous judgement in *R.* v. *Imre* Finta (1994).[40] Hence, Canada has demonstrably deviated from dualism, towards the monist end of the spectrum to an extent such that the application of CIL has, in some cases, superseded pre-existing domestic laws and precedents. The incumbent deficiency has propagated beyond Anglo-Saxon legal systems amongst states with unwritten constitutions. This phenomenon is prominently observed in the case of Israel, which has ostensibly emerged as a dualist regime, evidenced by court practice and legal custom. This has been augmented by the nationalist character of courts, as discussed by Kretzmer, wherein the courts have traditionally been hesitant to contest the government's actions even if inconsistency with international law is observed.[41] However, as immediately apparent form Israel's case, the inherent political character of the state serves as an impediment to applying the seemingly straightforward dualist approach. Notably, 'it has now become standard practice for the Supreme Court to apply Geneva Convention IV in cases involving the Occupied Territories, although the Convention has not been incorporated into domestic law'.[42] Israel's case strongly reaffirms this paper's thesis since the country does not occupy a static position on the monist-dualist spectrum, rather one that is variable and contingent on the changing political context.

In the following section, we build upon our analysis to suggest that such positional inconsistencies are not inherent to the unwritten character of a constitution by contrasting similar examples from states with written constitutions.

2. Written Constitutions, Extra-Constitutional Ordinances & Judicial Activism

The assumption that states with written constitutions have greater clarity and accuracy in expression is dubious. Significant gaps between constitutional expression and practice emerge as a function of weak normative language, extra-constitutional legal bases, and judicial activism coextensive to the growth of rights-based jurisprudence.

Firstly, written constitutional texts are acclaimed for their normative value. However, often, their phrasing leaves room for diverse and contradictory interpretations, and intentionally so. For instance, Article 253 of the Indian Constitution does not include a clause of essentiality, thereby, conferring the

[39] Minister of Citizenship and Immigration v. Léon Mugesera, 2005 SCC 40 : 2005 SCC OnLine Can SC 38 : (2005) 2 SCR 100 (Supreme Court of Canada).

[40] R. v. Imre Finta, 1994 SCC OnLine Can SC 24 : (1994) 1 SCR 701 (Supreme Court of Canada).

[41] David L. Sloss, *Domestic Application of Treaties* in The Oxford Guide to Treaties (Hollis, ed., 2nd edn., 2020).

[42] *Id*.

power to review an international law to parliament before transposing it to the national domain without explicitly stipulating the same as an essential precondition. Secondly, even states with written constitutions rely on unwritten customs and historical precedents on occasion. For instance, despite the provision Article VIC of the US Constitution, *United States* v. *Percheman (1833)*,[43] and *Foster & Elam* v. *Neilson (1829)* laid down the concept of non-self-executing treaties, even when the Constitution didn't explicitly express the same.[44] Thirdly, whereas classical legal theorists such as Dicey and Dworkin have argued that 'judges do not make law',[45] contemporary realities have compelled judiciaries with a rights-based orientation to engage in extensive interpretation of international law such that its justiciability is augmented for the benefit of the citizenry, heralding an increased reliance on international law. On the other hand, even in cases where the courts seek to limit the justiciability of international law, the monist character of states recedes, as with the conundrum on the right to public expression of religion and faith in France. Either way, the judiciary alters the nation's position on the monist-dualist spectrum.

Hence, through these examples, it is maintained that there remains a clear gap between textual constitutional expression and its practical application in written and unwritten constitutions alike. And this inconsistency renders it inaccurate to classify a state as purely monist or dualist since these tendencies are unorganised and manifest in erratic patterns. Instead, an approach akin to a spectrum that recognises the mutual coexistence of monist and dualist tendencies within the same legal system is more appropriate.

The following part seeks to situate regional organisations as another key determinant of a nation's positioning on the spectrum, in addition to the ones already expounded. In doing so, there shall be a specific emphasis on the EU as this case study clearly exemplifies the pitfalls of a monist-dualist dichotomy. Specifically, the implications of the consolidation of sovereign attributes within the EU, and the reactionary steps taken by national courts, are studied to justify the need to classify the relationship between national and international law on a spectrum which is neither static nor time consistent.

[43] United States v. Percheman, 32 US 7 Pet 51 (1832) (United States Supreme Court).
[44] Foster & Elam v. Neilson, 27 US 2 Pet 253 (1829) (United States Supreme Court).
[45] David Pannick, *A Note on Dworkin and Precedent*, Vol. 43(1), Mod. L. Rev., 36 (1980).

III. THE CENTRALITY OF REGIONAL ORGANISATIONS AND THE REACTIONARY CAPACITY OF NATIONAL CONSTITUTIONAL COURTS

A. REGIONAL ORGANISATIONS FUNDAMENTAL TO MONIST OR DUALIST TENDENCIES

1. EU as a Custodian of Sovereign Attributes of the State

This section recognises institutions that have the competence to apply international law in domestic arenas while maintaining a limited role of national agencies. In doing so, the relationship between national and international law lies under the custody of external bodies which legislate international law, thereby signifying monist tendencies. While there was no such variable historically, strong institutionalisation of multilateral organisations has emerged as an exception. While the UN resolutions have had limited binding effect, with the exception of the UNSC acting under Chapter VII of the UN Charter,[46] and most regional organisations have either encountered issues related to legitimacy due to internal political dynamics, such as with the South Asian Association for Regional Cooperation or are primarily of an economic character,[47] such as the Association for South East Asian Cooperation; the EU has emerged as an exception.

The exclusivity of the EU is multifaceted, with two key aspects highlighted here. First, Article 2 of The Treaty on the Functioning of the European Union (TFEU) creates a clear distinction between the competences under the jurisdiction of the EU and the member states.[48] Specifically, Article 2(1) outlines the exclusive jurisdiction of the EU,[49] and Article 2(2) specifies that in certain domains where the EU and member states share competence, the EU law shall take precedence in case of conflict unless an explicit exception exists.[50] Such legislative competences falling within the jurisdiction of a regional organisation are unique to the EU. Second, the legitimacy of such sharing of competences is maintained by the political representation of member states in the EU. According to Article 10 of the Treaty of the EU ('TEU'), 'the EU is built on the principle of representative democracy', and this is witnessed not only through the EU parliament but also through the existence of EU political groups and the representation of heads of state and cabinet ministers.[51] While many other factors can exhibit the strength

[46] Charter of the United Nations, October 24, 1945, 1 UNTS XVI, Ch. VII.

[47] K. Yhome and Tridivesh Singh Maini, *India's Evolving Approach to Regionalism: SAARC and Beyond*, Vol. 2(3), Rising Powers Quarterly, 147 (2017).

[48] *Consolidated Version of the Treaty on the Functioning on the European Union*, October 26, 2012, O. J. L., 326/47-326/390, Art. 2.

[49] *Id*., Art. 2, Cl. 1.

[50] *Id*., Art. 2, Cl. 2.

[51] *Id*., Art. 10.

of the EU, the essence remains that this regional organisation has acquired a supranational status to the extent that conventional notions of state sovereignty are transformed.[52]

Michael Troper has argued that the EU is not sovereign as it only exercises some sovereign attributes which have been shared by the nation-states and remain under their dominion.[53] He further utilises Neil MacCormick's statement that sovereignty is 'more like virginity, something that can be lost by one without another's gaining it' to explain that even if states lose sovereignty,[54] it does not imply that the EU gains the said status. Even if this argument by Troper is left uncontested, it can still be established that the extent to which these sovereign attributes are exercised by the EU is unprecedented. This, coupled with the shift of the international institutional regime from consent-based to majoritarian decision-making[55] means that individual state sovereignty is more contentious with strong regional institutionalism. And this trend has a consequential effect on the monist or dualist application of international law due to the doctrine of direct effect in favour of justiciability followed in the EU.

2. Manifestation of legal power via direct effect and justiciability of regional law

As a result of the supranational status of the EU and its strong dominion over attributes of sovereignty within its exclusive and shared jurisdiction, material effect is given to the doctrine of 'direct effect'. The principle of 'direct effect' grants the citizens of EU member states the justiciability of EU law within national courts without any complimentary national legislations. This principle was promulgated by the European Court of Justice in the *Van Gend en Loos case (1963)*.[56] Further, the application of this principle can render illegal a rule of domestic law for not being in conformity with international law.[57] While this doctrine has also been applied in courts by countries beyond the EU, such as Iceland,[58] Kenya,[59]

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[52] Roger J. Goebel, *Supranational? Federal? Intergovernmental? The Governmental Structure of the European Union After the Treaty of Lisbon*, Vol. 20, Colum. J. Eur. L., 77 (2013).

[53] Michel Troper, Hent Kalmo & Quentin Skinner, *The Survival of Sovereignty* in Sovereignty in Fragments: The Past, Present and Future of a Contested Concept, 132 (Cambridge University Press, 2010).

[54] Neil MacCormick, *On Sovereignty and Post-Sovereignty* in Questioning Sovereignty: Law, State, and Nation in the European Commonwealth, 123 (Oxford University Press, 1999).

[55] Peters, *supra* note 1.

[56] NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, Case 26-62, 1963 ECR 1 (European Court of Justice).

[57] European Commission for Democracy through Law, Veronika Bílková, Anne Peters & Pieter van Dijk, *On the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts*, 690/2012, December 8, 2014, available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)036-e (Last visited on December 21, 2023).

[58] Vatneyri Case, Public Prosecutor v. Kristjánsson, ILDC 67 (IS 2000) (Supreme Court of Iceland).

[59] Estate of Andrew Kamunzyu Musyoka, Re, Kamunzyu v. Kamunzyu, ILDC 1342 (KE 2005) (High Court of Kenya).

Bangladesh,[60] and India,[61] the lack of strong regional institutionalism therein renders limited its utility.

Interestingly, as discussed by Andre Nollkaemper, the doctrine of direct effect possesses an inherent duality. Lack of strong regional institutionalism can result in its utilisation as a 'shield' to protect the national legal order from international law.[62] In China, the doctrine of direct effect is exceptionally limited to human rights treaties which renders their justiciability crippled. Even in the US, Article VI of the Constitution,[63] which highlights self-executing treaties and imposes restrictions on their judicial enforcement, consolidates power with the political branches which subsequently apply higher thresholds for the domestic application of international law in practice. This makes the international legal order less consistent by selectively adopting the doctrine of direct effect while also altering the internal separation of powers.

Finally, there are nations such as India wherein the approach is not defensive but rather inconsistent. While jurisprudence in the instances of the right to healthcare, privacy, gender equality, clean environment, etc, has been driven by the monist application of this doctrine, salient jus cogens principles[64]– which are supposed to be implemented without any exceptions– have often been overlooked. For instance, in *Mohd. Salimullah* v. *Union of India (2021)*,[65] the Supreme Court refused to rule against the forceful deportation of Rohingya Muslim refugees to Myanmar, despite the principle of non-refoulment being central to jus cogens.[66]

Hence, states with strong regional institutionalism are likely to exhibit greater monist tendencies and lie on that side of the spectrum due to the relatively strict application of the doctrine of direct effect. In states without checks from supranational organisations, the application of this doctrine is likely to be either defensive or inconsistent, leading to the expression of dualist tendencies. But, it must be noted that not all states, even within the EU, exhibit the same level of

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60 Nurul Islam v. State of Bangladesh, 2000 SCC OnLine Bang SC (HC) 5 : (2000) 52 DLR 413 (Supreme Court of Bangladesh).

61 Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664.

62 André Nollkaemper, *The Duality of Direct Effect of International Law*, Vol. 25(1), EJIL, 105 (2014).

63 The Constitution of the United States 1787, Art. 6.

64 Marjorie M. Whiteman, *Jus Cogens in International Law, with a Projected List*, Vol. 7, Ga. J. Int'l. & Comp. L., 609 (1977); International Law Commission, *Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens)*, A/77/10 ¶43, September 22, 2022, available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf (Last visited on November 13, 2023).

65 Mohd. Salimullah v. Union of India, (2021) 19 SCC 191 : 2021 SCC OnLine SC 296.

66 M. Alvi Syahrin, *The Principle of Non-Refoulement as Jus Cogens: History, Application, and Exception in International Refugee Law,* Vol. 6, J. Indones. Legal. Stud., 53 (2021); Jean Allain, *The Jus Cogens Nature of Non-Refoulement,* Vol. 13(4), Int. J. Refug. Law, 533 (2001); Cathryn Costello & Michelle Foster, *Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test* in Netherlands Yearbook of International Law (M. Heijer & H. Van Der Wilt, NYIL Vol. 46, 2015).

monist tendencies. They can be further delineated on the spectrum. In this regard, the next section explores the reaction of national courts as the basis of intra-EU differences in terms of the application of the doctrine.

B. THE REACTIONARY CAPACITY OF NATIONAL CONSTITUTIONAL COURTS

1. Diverging Reception of EU Law Amongst its Member States

This section will explore the inconsistent and divergent reception of regional international laws within the same regional institution and legal framework, i.e. the EU.

Germany has been one of the most consistent applicants of the doctrine of direct effect. In 1987, the Federal Constitutional Court (FCC) noted, in the *Solange II case*,[67] that the supremacy of EU law would not be contested as long as its substance remained similar to the German guarantees of rights. Further, the FCC observed that Article 19 of the TEU conferred exclusive jurisdiction to the Court of Justice of the EU ('CJEU') to review all aspects of EU law.[68] This position was echoed by the CJEU in the *Foto Frost case (1987)*,[69] wherein it was ruled that national courts – ordinary or constitutional – may not review the validity of EU law as long as the EU law remained within its conferred limits. Consistent with this decision, the German reviews of conferral only concern manifest abuse of the conferral principle by EU institutions as ruled in the *Honeywell case (2011)* by the FCC.[70]

While the Italian Constitutional Court agrees with the CJEU reviewing the EU law under Article 19 of the TEU, it reserves the right to review any law or policy of the EU if it stands in opposition to Italy's constitutional identity, as expressed in the In re Taricco *case (2015)*.[71] Poland goes further by claiming that only the Polish Constitutional Tribunal exercises primacy over interpreting the constitutional provisions and, by extension, any EU law that seems to impact the Polish constitutional identity.[72] Hence, it can be concluded that Italy, and, to a

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[67] Wünsche Handelsgesellschaft GmbH & Co. v. Federal Republic of Germany, Case 69/85, ECLI:EU:C:1986:104, 339 (European Court of Justice).

[68] Consolidated Version of the Treaty on European Union, December 13, 2007, OJ C115/13, Art. 19.

[69] Foto-Frost v. Hauptzollamt Lübeck-Ost, Case 314/85, ECLI:EU:C:1987:452 (European Court of Justice).

[70] German Federal Constitutional Court: Constitutional Ultra Vires Review of European Acts Only Under Exceptional Circumstances, (2010) 2 BvR 2661/06, Honeywell decision, (German Federal Constitutional Court).

[71] Taricco, In re, Case 42/17, ECLI:EU:C:2015:555 (European Court of Justice); M.A.S. v. M.B., Case 42/17, ECLI:EU:C:2017:936 (European Court of Justice).

[72] Niels Petersen & Patrick Wasilczyk, *The Primacy of EU Law and the Polish Constitutional Law Judgment,* POLICY DEPARTMENT FOR CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS, May, 2022, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2022/734568/IPOL_STU(2022)734568_EN.pdf (Last visited on August 28, 2023).

greater degree, Poland, have applied the doctrine of direct effect conservatively as compared to the likes of Germany. Hence, despite being under the same regional regime, states within the EU each lie at different points on the spectrum.

To understand the reason behind such differences, it could be interesting to review the contemporary rhetoric surrounding monism and dualism as cosmopolitan and pluralistic visions towards human rights. It can perhaps be speculated that the human rights propositions of a nation such as Germany have found much more recognition in contemporary international law, whereas that of countries such as Poland have been underrepresented, resulting in their contrasting approaches favouring cosmopolitanism and pluralism. Nevertheless, this remains speculative, whereas the common approach of all the EU member states is that of relying on their national constitutional courts to interact with EU law rather than accepting its uncontested application. The following section will explore the legal argument to curtail the monist application of EU law, namely the preservation of state constitutional identity under Article 4(2) of the TEU.[73]

2. Constitutional identity as a justification for the limited municipal effect of regional law

As seen in the examples of Germany, Italy and Poland, preserving constitutional identity is the central argument against the frictionless application of EU law in domestic jurisdictions. While the understanding of constitutional identity is rather clear in the case of Germany due to the existence of supra-constitutionality of the basic law and the eternity clause, it is crucial to explain the theoretical underpinnings of this concept for the other cases.

Jacobsohn understands constitutional identity as shaped by the most salient features of a constitution that absorb disharmonies and produce common understandings of the pillars of the constitution. These features are not just based on the constitutional text but also the realities of the social paradigm; hence susceptible to transformations within a bounded fluidity, such that the essence of the constitutional identity remains the same despite possible amendments.[74] In the modern practice of constitutional courts of the EU member states, preserving this constitutional identity has emerged as a defence mechanism against the domestic implementation of international law.

This has been implemented by national courts acting under Article 4(2) of the TEU, which directs the Union to respect the diverse national identities and internal political structures of the member states. While it may seem that the rhetoric of constitutional identity is akin to the general defensive application of state sovereignty against the imposition of international law, the specific

[73] *Consolidated Version of the Treaty on European Union*, December 13, 2007, OJ C, 115/13, Art. 4, Cl. 2.

[74] Gary Jeffrey Jacobsohn, *Constitutional Identity*, Vol. 68(3), Rev. Polit., 361 (2006).

terminology is imperative in the case of the EU. With the growing strength of the EU as a supra-constitutional organisation, state sovereignty is no longer a viable legal argument. Instead, by using the language of the TEU, national constitutional courts seek to fulfil the dual objective of limiting the direct effect of international law and maintaining their legal legitimacy.

Yet, such a defensive approach from the courts needs to be viewed critically as well. Joel Trachtman considers this to be a weakness of international legal arrangements and CIL, as they provide an 'excessive space for auto-interpretation by states or undisciplined judges'.[75] This criticism has been most evidently actualised in *Simoncioni* v. *Germany and President of the Council of Ministers of the Italian Republic (intervening)* by the Italian Constitutional Court which ruled that state practice and opinion juris,[76] the necessary criteria for a jus cogens norm, are expressions of state sovereignty and hence subject to state approval that can be withdrawn. Further, the legal approaches opted by Poland and Italy, as seen above, remain legitimised due to such wide capacities of auto-interpretation, rendering the doctrine of direct effect limited.

Hence, even in states under the strong influence of regional organisations such as the EU, member states have retained primacy in determining the limits of the internal application of international laws by utilising principles to preserve their state sovereignty and constitutional identity. Therefore, a system with monist tendencies induced by the doctrine of direct effect remains far from the monist-dualist dichotomy. The EU member states remain widely spread on a spectrum, notwithstanding their general leaning towards the monism relative to states outside a similar strongly regionalised politico-legal context.

IV. CONCLUSION

This paper has contested the dichotomous monist-dualist approach towards understanding the contemporary relationship between national and international law. This criticism is rooted in an evident inconsistency between constitutional expression and legal practice with regard to the application of international law in domestic jurisdictions-in nations with written as well as unwritten constitutions. This is a function of weak normative language, extra-constitutional legal customs, judicial activism and the modern critique of constitutional orthodoxy favouring a rights-based jurisprudence.

Instead, this paper proposes a spectrum-based classification that recognises the co-existence of monist and dualist tendencies within the same legal

[75] Joel P. Trachtman, *The Growing Obsolescence of Customary International Law* in CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD (Curtis A. Bradley, Cambridge University Press, 2016).

[76] Simoncioni v. Germany and President of the Council of Ministers of the Italian Republic (intervening), Judgment No. 238/2014, ILDC 2237 (IT 2014) (Constitutional Court of Italy).

regime. Further, the degree of institutionalisation of regional organisations is understood as a key determinant of a country's relative position on the monist-dualist spectrum. It is observed that the supra-constitutional model of the EU, coupled with the doctrine of direct effect, leads to a greater de-facto monist tendency among EU member-states compared to legal regimes wherein monist tendencies are either limited or politically opportunistic. Yet, even within the EU, the monist side of the spectrum is endogenously delineated based on the approach adopted by the national constitutional courts, with Germany emerging as a stable monist state and Italy and Poland exhibiting diluted monism by instrumentalising the rhetoric of constitutional identity and legal plurality.

Through this paper, we recognise the need to further academic engagement with the spectrum-proposition. We intend for the stated framework to help position nation-states on the spectrum, identify shifts and patterns of shift, and analyse the relative positioning of two nation-states going forward. Nonetheless, we are also cognisant of the paper's anecdotal and inductive argumentation and the methodological limitations posed thereby. This creates scope for inspecting a wider set of evidence to test out the conclusions. There exists further scope to build upon the base of our spectrum-proposition, by identifying and analysing its features in greater depth. Additionally, economic modelling using empirical data may also be employed in future literature to identify discernible variables and predict shifts and patterns in the monist/dualist tendencies of nation-states. Also, assessing the impact of the presence or absence of strong regional institutions, the latter relevant to jurisdictions such as India, on the monist-dualist spectrum is a point for future enquiry.