

CONCURRING OPINIONS AND THE DEVELOPMENT OF HUMANITARIAN NORMS IN INDIA: JUDICIAL CREATIVITY BEYOND THE MAJORITY

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ABSTRACT

International humanitarian law (IHL) has traditionally developed through treaties, international tribunals, and state practice articulated at the international level. The role of domestic courts in this process has received growing scholarly attention; however, the specific contribution of concurring opinions remains largely under-examined. This article argues that concurring opinions of the Supreme Court of India function as important sites of humanitarian norm development, particularly in situations of internal conflict and counter-insurgency where the State resists the formal classification of armed conflict. Through doctrinal analysis of key Supreme Court decisions, including *Naga People's Movement of Human Rights v. Union of India*, *People's Union for Civil Liberties v. Union of India*, and *Extra Judicial Execution Victim Families Association v. Union of India*, this article demonstrates how concurring opinions articulate principles of civilian protection, proportionality, and state accountability. Although lacking binding force, these opinions operate as normative incubators that influence subsequent jurisprudence and contribute to the humanitarianisation of constitutional law in India. The article situates these developments within broader debates on judicial norm entrepreneurship and the role of domestic courts in the evolution of IHL, with particular relevance for the Asia-Pacific region.

Keywords: Concurring opinions; International humanitarian law; Supreme Court of India; Armed forces accountability; Asia-Pacific; Judicial norm entrepreneurship

INTRODUCTION

International humanitarian law (IHL) is conventionally understood as a body of law shaped through multilateral treaties, customary practices of states, and the jurisprudence of international courts and tribunals. The Geneva Conventions and their Additional Protocols, alongside decisions of the International Court of Justice and international criminal tribunals, are often portrayed as the primary engines of humanitarian norm development. Domestic courts, particularly constitutional courts, were historically regarded as peripheral actors in this process, tasked mainly with the internal application of international obligations rather than their creation or evolution.

In recent decades, this understanding has been increasingly challenged. Scholars have highlighted the growing role of domestic courts in interpreting, internalising, and at times expanding international humanitarian and human rights norms. Constitutional courts adjudicating cases arising from counter-terrorism operations, internal armed conflicts, and emergency powers have begun to engage, explicitly or implicitly, with humanitarian principles such as civilian protection, proportionality, and accountability for state violence. This judicial engagement has been especially prominent in jurisdictions where states deny the existence of armed conflict while exercising extraordinary coercive powers.

Within this expanding body of scholarship, however, one dimension remains under-theorised: the role of concurring opinions. Judicial concurrences are opinions that agree with the outcome but differ in reasoning, and are often treated as marginal, lacking precedential value and therefore legal significance. In the context of IHL, scholarly attention has overwhelmingly focused on majority judgments, while concurring opinions are viewed as expressions of individual judicial philosophy rather than sites of normative development.

This article challenges that assumption. It argues that concurring opinions of the Supreme Court of India have played a crucial role in developing humanitarian norms in situations of internal conflict and militarised governance. By articulating principles that the majority may be unwilling to fully endorse, concurring judges act as *norm entrepreneurs*, introducing humanitarian reasoning that gradually influences constitutional doctrine and

public discourse. In doing so, they contribute, indirectly but meaningfully, to the development of IHL-compatible norms at the domestic level.

India presents a particularly compelling case study. The country has experienced prolonged internal conflicts, including insurgencies in the North-East, left-wing extremism, and counter-terrorism operations, often governed by extraordinary legislation such as the Armed Forces (Special Powers) Act (AFSPA)¹. While the Indian State consistently resists the classification of these situations as armed conflicts, the Supreme Court has nonetheless been called upon to adjudicate allegations of excessive use of force, extra-judicial killings, and civilian harm. In this context, concurring opinions have emerged as important vehicles for the judicial articulation of humanitarian principles.

This article examines how concurring opinions in selected Supreme Court of India cases contribute to the development of humanitarian norms. It advances three central claims. First, concurring opinions function as normative laboratories in which judges articulate humanitarian principles that the majority hesitates to fully adopt. Second, these opinions play a significant role in the humanitarianization of constitutional law by integrating IHL-compatible reasoning through the language of fundamental rights. Third, despite their non-binding character, concurring opinions influence subsequent jurisprudence and contribute to broader processes of norm diffusion, with implications for IHL development in the Asia-Pacific region.

The central argument of this article is that concurring opinions act as vehicles of judicial creativity through which humanitarian principles are articulated, refined, and preserved, even when the majority adopts a cautious or minimalist approach. These opinions contribute to the gradual humanitarianisation of constitutional law and hold relevance for broader debates on the development of IHL in the Asia-Pacific region.

METHODOLOGY

This article adopts a qualitative doctrinal research methodology. It undertakes a close textual and contextual analysis of selected judgments of the Supreme Court of India, with particular emphasis on concurring opinions. Cases were selected based on their relevance to internal security operations, the use of force by state agents, and allegations of

¹ Armed Forces (Special Powers) Act, 1958, No. 28 of 1958 (India)

violations of the right to life. The analysis focuses on how concurring opinions articulate humanitarian principles consistent with IHL, even in the absence of explicit reference to armed conflict or the formal application of international humanitarian law.

The study also draws upon secondary literature on concurring opinions, judicial law-making, and the role of domestic courts in the development of international law. This combined approach enables an assessment of both the doctrinal content and the normative significance of concurring opinions within the Indian constitutional framework.

LITERATURE REVIEW

Scholarly engagement with concurring opinions has traditionally focused on their role in constitutional theory and judicial behaviour. Scholars such as Cass Sunstein² have examined separate opinions in the context of judicial minimalism, while Ronald Dworkin³ has explored the relationship between individual judicial reasoning and the integrity of law. In international law, attention has increasingly turned to the role of domestic courts in shaping international norms, particularly through the articulation of *opinio juris*.

Within the IHL framework, however, the focus has largely remained on international tribunals and treaty bodies. The contribution of domestic courts, and particularly concurring opinions, remains under-explored⁴. Existing studies on Indian constitutional jurisprudence have examined the Court's engagement with emergency powers and armed forces accountability, but few have analysed the specific normative role played by concurring opinions in developing humanitarian principles. This article seeks to address this gap.

CONCURRING OPINIONS AS NORM ENTREPRENEURS: A THEORETICAL FRAMEWORK

Concurring opinions occupy an ambiguous position within judicial decision-making. Unlike the majority opinions, they do not establish binding precedent. Unlike dissents, they do not oppose the outcome of the case. This intermediate status has led many legal

² Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999)

³ RONALD DWORKIN, *LAW'S EMPIRE* (Harvard Univ. Press 1986)

⁴ International Law Commission, *Conclusions on Identification of Customary International Law* (2018)

systems and scholars to treat concurrences as largely decorative or explanatory. Yet, a growing body of scholarship recognises that separate opinions, both concurring and dissenting, can exert substantial influence over time.

From a theoretical perspective, concurring opinions can be understood as instruments of *judicial norm entrepreneurship*. Drawing from norm diffusion theory, norm entrepreneurs are actors who seek to introduce new normative ideas into legal or political systems, often in the face of resistance. Judges writing concurring opinions are uniquely positioned to perform this role. Freed from the constraints of consensus-building that shape majority judgments, they can articulate more ambitious or principled reasoning while remaining within the institutional legitimacy of the court.

In the context of international law, domestic courts increasingly contribute to the formation of customary norms through judicial reasoning that reflects *opinio juris*. The International Law Commission has recognised that decisions of national courts may constitute evidence of both state practice and legal belief. While majority judgments carry greater formal weight, concurring opinions reflect the considered legal views of high judicial authorities and may signal emerging normative commitments within a legal system.

Concurring opinions are particularly significant in sensitive areas such as national security, emergency powers, and internal conflict. In such contexts, majorities often adopt cautious or minimalist reasoning to avoid political backlash or institutional confrontation. Concurring judges, however, may articulate broader humanitarian principles, thereby preserving them for future judicial engagement.

INDIA, INTERNAL CONFLICT, AND THE JUDICIAL ENTRY OF HUMANITARIAN NORMS

India's engagement with internal conflict is marked by a persistent reluctance to acknowledge the applicability of IHL. Insurgencies in the North-East and operations against left-wing extremism are officially characterised as matters of internal security rather than armed conflict. This classification enables the continued operation of extraordinary legal regimes, most notably AFSPA, which grants wide powers to the armed forces, including the authority to use lethal force on suspicion alone.

Judicial review of these regimes places the Supreme Court of India in a difficult position. On the one hand, it is constitutionally mandated to protect fundamental rights, including the right to life. On the other, it must navigate claims of military necessity, national security, and executive prerogative. The Court has often resolved this tension by relying on constitutional law rather than explicitly invoking IHL.

Within this constitutional framework, humanitarian norms enter judicial reasoning indirectly. Principles such as proportionality, necessity, and civilian protection are articulated through the language of Article 21 of the Constitution⁵ rather than through express references to the Geneva Conventions. Concurring opinions have been particularly important in advancing this indirect humanitarianisation of constitutional law.

CASE STUDIES: CONCURRING OPINIONS AND HUMANITARIAN NORM DEVELOPMENT

A. Naga People's Movement of Human Rights v. Union of India (1998)

The constitutional validity of AFSPA was challenged in *Naga People's Movement of Human Rights v. Union of India*⁶. The majority upheld the Act, emphasising the necessity of extraordinary powers in disturbed areas, while imposing certain procedural safeguards.

Justice J.S. Verma's concurring opinion is of particular significance. While agreeing with the outcome, Justice Verma articulated a robust framework of accountability and restraint. He emphasised that the use of force by armed forces must conform to principles of proportionality and necessity, and that civilian harm cannot be justified by mere reference to statutory authority. His reasoning echoed core IHL principles governing the conduct of hostilities, particularly the obligation to protect civilians and limit the use of force.

Justice Verma's concurrence thus introduced humanitarian reasoning that went beyond the majority's cautious validation of AFSPA. Although not binding, it established a normative reference point that would later resonate in cases addressing military accountability.

⁵ Article 21, Constitution of India, 1950

⁶ *Naga People's Movement of Human Rights v. Union of India*, (1998) 2 SCC 109

B. People's Union for Civil Liberties v. Union of India (2014)

In *PUCL v. Union of India*⁷, the Supreme Court addressed the legality of police encounter killings. While the case did not arise directly from armed conflict, it involved state use of lethal force in the name of security.

Concurring opinions in this case emphasised that the right to life is non-negotiable, even in situations involving alleged terrorists or insurgents. Judges underscored the absolute obligation of the state to investigate every instance of lethal force, rejecting claims of immunity or operational necessity. This reasoning aligns closely with humanitarian principles applicable in non-international armed conflicts, particularly the obligation to distinguish between combatants and civilians and to ensure accountability for unlawful killings.

C. Extra Judicial Execution Victim Families Association v. Union of India (2016)

The *EEVFAM* case⁸ represents one of the strongest judicial engagements with humanitarian accountability in India. The Court addressed allegations of extra-judicial killings by security forces in Manipur, a region governed by AFSPA.

Concurring reasoning in this case reinforced the principle that even in disturbed areas, the use of force by state agents is subject to constitutional and international constraints. The judges rejected the notion that extraordinary powers confer immunity, emphasising that accountability is an essential component of the rule of law.

Although the Court stopped short of explicitly applying IHL, the concurring opinions articulated principles consistent with humanitarian obligations governing internal conflicts, including civilian protection and responsibility for violations.

FROM DOMESTIC CONCURRENCE TO HUMANITARIAN NORM DEVELOPMENT

The cumulative effect of these concurring opinions is significant. Over time, humanitarian principles articulated in concurrences have influenced majority reasoning and shaped judicial expectations regarding state conduct. They have contributed to a

⁷ People's Union for Civil Liberties v. Union of India, (2014) 10 SCC 635

⁸ Extra Judicial Execution Victim Families Association v. Union of India, (2016) 14 SCC 536

gradual shift in constitutional doctrine, embedding humanitarian constraints within domestic law.

From an international perspective, these concurring opinions also contribute to broader processes of norm diffusion. As expressions of judicial belief, they may constitute evidence of *opinio juris*, particularly in a region where formal acknowledgement of armed conflict is politically sensitive.

IMPLICATIONS FOR INTERNATIONAL HUMANITARIAN LAW

Recognising concurring opinions as sites of humanitarian norm development has important implications for IHL scholarship. It challenges traditional hierarchies of legal sources and highlights the role of domestic judicial reasoning in shaping international norms. In the Asia-Pacific context, where internal conflicts and emergency governance are prevalent, constitutional courts may play a particularly influential role.

RESULTS AND DISCUSSION

An analysis of Supreme Court jurisprudence reveals that concurring opinions frequently articulate humanitarian principles more explicitly than majority judgments. In *Naga People's Movement of Human Rights v. Union of India*⁹, Justice J.S. Verma's concurring opinion emphasised proportionality, accountability, and restraint in the use of force by armed forces operating under the Armed Forces (Special Powers) Act¹⁰. Although the majority upheld the constitutional validity of the Act, the concurring opinion introduced a rights-oriented framework closely aligned with IHL principles of civilian protection.

Similarly, in *People's Union for Civil Liberties v. Union of India*¹¹, concurring reasoning underscored the absolute nature of the right to life and the obligation of the State to investigate all instances of lethal force. These principles resonate with humanitarian norms applicable in non-international armed conflicts. In *Extra Judicial Execution Victim Families Association v. Union of India*¹², concurring opinions further rejected claims of immunity for security forces and reinforced the necessity of accountability, even in disturbed areas. Taken together, these cases demonstrate that concurring opinions

⁹ *Naga People's Movement of Human Rights v. Union of India*, (1998) 2 SCC 109

¹⁰ Armed Forces (Special Powers) Act, 1958, No. 28 of 1958 (India)

¹¹ *People's Union for Civil Liberties v. Union of India*, (2014) 10 SCC 635

¹² *Extra Judicial Execution Victim Families Association v. Union of India*, (2016) 14 SCC 536

function as normative incubators. They preserve humanitarian reasoning within constitutional jurisprudence and influence subsequent judicial engagement with state violence and accountability.

CONCLUSION

Concurring opinions of the Supreme Court of India demonstrate that humanitarian norm development does not occur solely through binding judgments or international tribunals. Instead, it often begins at the margins of judicial reasoning, where individual judges articulate principles that challenge state narratives and expand the scope of legal protection. By functioning as normative incubators, concurring opinions contribute to the humanitarianisation of constitutional law and, indirectly, to the evolution of international humanitarian norms. Recognising their significance enriches our understanding of how IHL develops in practice, particularly within the Asia-Pacific region.

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