NATIONAL IMPLEMENTATION OF INTERNATIONAL LAW: A STUDY OF INDIAN PRACTICE

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DECLARATION

I declare that the thesis entitled **"NATIONAL IMPLEMENTATION OF INTERNATIONAL LAW: A STUDY OF INDIAN PRACTICE"** submitted by me for the award of the degree of **Doctor of Philosophy** of Jawaharlal Nehru University is my own work. The thesis has not been submitted for any other degree of this University or any other University.

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LIST OF ABBREVIATION

AIR	All India Reporter
CBD	Convention on Biological Diversity 1992
CEDAW	Convention on Elimination of all forms of Discrimination against Women, 1979
DPSP	Directive Principles of State Policy
DTAA	Double Taxation Avoidance Agreement
DTAC	Double Taxation Avoidance Convention
FII	Foreign Institutional Investors
GATT	General Agreement on Tariffs and Trade
ICCPR	International Covenant on Civil and Political Rights
ICSECR	International Covenant on Social, Economic and Cultural Rights 1966
INC	Indian National Congress
ITR	Income Tax Reporters
NIEO	New International Economic Order
SC	Supreme Court
SCC	Supreme Court Cases
SCR	Supreme Court Reporters
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights 1948
VLCT	Vienna Convention on Law of Treaties 1969
WTO	World Trade Organisation

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CHAPTER-1

INTRODUCTION

The interface between international law and municipal law (the terms 'municipal', 'national' and 'domestic' law are used interchangeably) is a complexly interwoven subject. The study of their interface has become increasingly important as the past few decades have witnessed a systematic and normative convergence of the two legal systems. Until the 20th century international law was mainly concerned about the diplomatic conduct of the states and relationship among them. The modern international law has encroached upon subject matters which were primarily of state concern. The compliance or observance of international law necessarily means the domestication of international law. This introductory chapter sets out the backdrop of the present study, its objectives, approach and the scope.

1.1 Monist-Dualist Debate

The study of the relationship between international law and domestic law traditionally begins with a discussion of the theoretical debate between schools of monism and dualism. Monism argues for the unification of international and domestic legal systems. Its argument is based on the propositions of a common source, similar content and same sphere of regulation. Monists advance the doctrine of direct effect or incorporation which is based on the assumption of the same sphere of operation. An international norm is directly implemented within the domestic legal system without having to undergo a change into national legislation. Dualism, on the other hand, relies on the foundation that international law and municipal law are two different legal systems. It differs with regard to their source, content, and spheres of regulation. It argues that an international norm to be operative in the domestic legal system has to undergo a process of transformation into national legislation. The process is termed as the doctrine of transformation.

The monist-dualist debate has led to the development of several other alternative theories. The theory of pluralism[1] advocated by Bogdandy shares with dualism the assertion of separate legal orders but attempts to establish a link between

[1]Bogdandy, Armin Von (2008), "Pluralism Direct Effect and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law", *International Journal of Constitutional Law*, 6(3-4): 397- 413.

national constitutions and international legal phenomena by introducing the coupling doctrines. He advocates the doctrine of direct effect and consistent interpretation to be effective methods of developing the link while operating as two distinct legal systems. Likewise, Fitzmaurice and Rousseau had also attempted to resolve the conflict between monism and dualism by coining a new approach called the co-ordination approach.[2] They observed that international law and municipal law have different spheres of operation. Despite this, they have a common premise where both the international and national laws are valid. They argued that this will reduce the likelihood of conflict between the two legal systems. However, if there is a conflict between international norm and domestic law, the local law will not be void but continue in its operation within the concerned state. But the state will have incurred liability for non-observance of such international norm. The doctrine of constitutionalism also surfaced as an alternative theory after drawing its inspiration from the European Constitutionalism. This doctrine of constitutionalism holds that international law is in the process of being constitutionalised and proposes the transfer of the function of domestic constitutions to international legal order in order improve effectiveness and unity.[3] It can be argued that these alternative theories do not offer any different perspective but reiterate the principles of monism and dualism. The doctrines of pluralism and constitutionalism are similar to monist assertions, while the co-ordination doctrine resembles dualism.

International law *per se* does not prescribe any standard or uniform mode for incorporating international law into domestic legal system. It is presumed that a state is at a liberty to choose its own model of incorporating international law into its national legal system pursuant to the principle of state sovereignty. In other words, a state may implement international law by adopting the techniques of transformation, direct incorporation or both. The reason for the inclusion of 'both methods' as a means of implementation of international law is because it reflects the state practice in most of the common law systems. They use both transformation and incorporation techniques. Be that as it may, a state is required to implement international law only in accordance with its constitutional prescriptions as interpreted through judicial decisions. Thus the starting point of examining the relationship between international

[2] Owada Hisashi, (2015), Problems of Interaction between the International and Domestic Legal Orders, *Asian Journal of International Law*, 5: 246-278, p. 252
[3]Kaczorowska Alina, (2010) , Public International Law, Abingdon: Routledge, p. 131

law and a particular national legal system begins from its constitution. The position accorded to international law by the constitution of various states is not uniform. For instance, the constitutions of civil law countries hold the supremacy and pre-eminence of international law over their national laws, whereas the common law countries prioritise their national laws over international law. But the state practice of the common law systems is showing greater deference towards international law than the civil law systems.

The international rule of law demands the state to honour international law obligations. A state is further restricted from invoking provisions of domestic law as an excuse for failure to observe international law. This principle is iterated in Article 27 of the Vienna Convention on the Law of Treaties, 1969 and has been upheld by international courts and tribunals in *Alabama Arbitration,*[4]*Exchange of Greek and Turkish Population,*[5]*La Grand*[6] and *Avena*[7]cases. It is to be noted that international law cannot invalidate a national legislation contrary to the international rules but can urge a state to change its legislation in accordance with international law. When a state violates international law, it incurs liability at the international platform.

1.2 International Law in Pre- Independent India

India has adopted the British model of implementing international law which is essential a dualist model. India's association with international law began long before its attaining independence. As a token of reward for the participation in the First World War, the Crown in the Imperial War Conference 1917 announced that the Dominion status was to be granted to Australia, Canada, South Africa and New Zealand. The Dominions were considered autonomous entities within the British Empire. They enjoyed internal and external sovereignty to a limited extent. India was not granted Dominion status but merely mentioned to have special status with an adequate voice in her foreign policy and foreign relations. It is noteworthy that neither

[4]*Alabama claims of the United States of America against Great Britain 1872*, Accessed 23 December 2016, URL: legal.un.org/riaa/cases/vol_XXIX/125-134.pdf
[5]*Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Accessed 12 December 2016, URL: www.icj-cij.org/pcij/serie_AB/AB_44/01/Traitment_nationaux_polonais_Avis_consuiltatif.pdf
[6] *Germany vs. United States of America*, Accessed 12 December 2016, URL: www.icj-cij.org/docket/files/104/7736.pdf
[7] *Mexico vs. United States of America*, Accessed 14 December 2016, URL: www.icj-cji.org/docket/files/128/8188.pdf

special status nor external sovereignty was mentioned in the Government of India Act 1919. India, along with the other Dominions got its own representation in the Paris Peace Conference1919 where its plenipotentiaries participated actively. To garner more representation and voting strength, the British Crown wanted to get separate representation for its Dominions, including India. It succeeded in doing so despite the objection of several other participants. The state parties to the Conference objected to India's membership holding that only self-governing territories were to be admitted to the League. The colonies claimed for membership (with limited capacity) as they enjoyed the full power of self-governing Dominions. India was not a self-governing territory, its participation and membership in international organisations as a state party is argued as an anomaly. As a member of League, India was automatically admitted to the International Labour Organization, Permanent Court of International Justice, Committee on Intellectual Co-operation, Indian Institute of Agriculture, Bretton Wood Institutions, United Nations and other international organizations.

During the period 1919-1947, treaties were concluded on behalf of India by the representative of British Crown. This included both pre-1919 and post-1919 treaties. The post-1919 treaties 'for India' were concluded before and after in the name of the Crown and Government of Great Britain, but the application of which extended to British India. The treaties during 1919-1947 were concluded on behalf of India either by British representative or an Indian representative, mostly the Maharaja of a native state. The suzerainty of British Empire on the native rulers barred them from having treaty making authority. The Indian nationalists ridiculed the native rulers for acting as rubber stamps and mouthpieces to the British Government. However, at the time of independence, India was a party to 627 treaties and was a member of 51 international organisations.

The India Independence Act of 1947, provided for the partition of British India into Dominion of India and Dominion of Pakistan. When the Dominions were in the process of formation, the question arose whether the international legal personality had continued to exist in Dominion or both, or if the personality was to extinguish altogether. It was the intention of the British Crown to bind India with the past treaties and instruments. To give effect to the intention of the Crown, the succession of Dominions of India and Pakistan from British India was erroneously proclaimed as secession and not dismemberment. The 1947 Act broke British India into two new

Dominions making it a clear case of dismemberment. These two new dominions were to be formed by relinquishing the old international legal personality of British India and acquiring a new international personality with a clean slate. But the Crown declared that the Dominion of India would continue with the international legal personality of the British India and Dominion of Pakistan to be a newly formed state as if it were to be secession. The United Nations General Secretary endorsed this view of the British Crown. The India Independence (International Agreements) Order 1947,that was annexed to 1947 Act operated as devolution agreement making India party to international treaties and instruments.

The colonial treaties and instruments continued to be operative in independent India even after the adoption of the Constitution. Article 372 of the Constitution provides for the continuance and operation of all the pre-1950 laws existing India unless inconsistent with the provisions of the Constitution or being amended, modified or repealed. The explanation to this Article provides an expansive meaning to the term 'all the laws' so as to include statutory laws and common laws of England. It is important to note that common law treats international customary law and treaty obligations as part of municipal law unless it is inconsistent with national laws of Britain. It is by virtue of this article that an enormous corpus of international law that existed before independence became a part of Indian legal system. The colonial instruments were operative without any change in their original text. They were not checked for their compatibility. It was not until *State of Madras vs. C. G. Menon*[8], that the anomalies in the application of British statutes in India were spotted. The first Law Commission in 1955, prepared a detailed report on 'British Statutes Applicable to India' in which it listed out the British laws that were operating in India. It merely recommended deletion and nullification of few Acts for their inapplicability while amendments and modification in content were suggested for the rest. It failed to encapsulate the predicament of granting continuity to the colonial laws.

1.3 Treaty Formation and Implementation

Article 51 is the only provision in the Indian Constitution that prescribes India's conduct towards international law. This Article falls under the Part IV of the Indian Constitution which contains the Directive Principles of State Policy. Since the Article

[8] 1954 AIR 517

falls in Part IV, Article 37 renders it non- justiciable in the court of law. Article 51 reads as,

> the State shall endeavour to (a) promote international peace and security; (b) maintain just and honourable relations between the nations; (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another and; (d) encourage settlement of international disputes by arbitration.

Article 51 is criticised for being ambiguous. The ambiguities in the language and intention can be highlighted as, firstly, the positioning of Article 51 in the Part IV makes it a non-justiciable provision; secondly, there is the undefined scope of the term 'State'; thirdly, the separate mention of treaty obligations and international law causes confusion; and finally, there is the unsought attention to arbitration as an effective means of dispute resolution. The very positioning and ambiguities in the language of Article 51 reveal the absence of clarity on the part of constitutional drafters as to the role of international law.

The Indian approach towards treaty obligation like most of the common law systems can be studied at two stages, treaty making and treaty implementation. Treaty making, in India is neither an independent *sui generis* power, nor is any article in the Constitution explicitly authorizing a state organ to conclude treaties. The treaty making falls within the executive function of the Union when Article 73 is read with Article 246 and Entry 14 of the Union List in the VII Schedule of the Indian Constitution. Article 73(1) (a) states that the 'Executive Power of the Union shall extend to the matters with respect to which the Parliament has power to make laws.' Article 246 with Entry 14 in the Union List of VII Schedule authorizes the Parliament to make laws with respect to the subject 'entering into treaties, agreements and conventions with foreign countries and implementing of treaties, agreements and conventions with foreign countries'. The treaty making function of the Union Executive can be mapped out from the collective reading of the above articles. The President is the head of the Union Executive pursuant to Article 53. He is thereby authorised to conclude international treaty or agreement. However, in practice Plenipotentiaries are appointed for this purpose, and they act under the full powers issued by the President.

The Parliament, pursuant to Article 246 and Entry 14 of List I, VII Schedule of the Constitution, is empowered to make laws with regard to the procedure concerning the entering into treaties and their implementation. However, it is to note that the Parliament has not made any laws to regulate the treaty making power. This absence of regulation has conferred unfettered power on the executive to not only enter into treaties but also to decide the manner in which they should be implemented. Since, the Constitution has not expressly delegated the treaty making power to the Executive, it may be argued that treaty making falls within the collective concern of both Legislature and Executive. Accordingly, Parliamentary approval is proposed as a suitable method which may be adopted prior to the initiation of treaty negotiations. By introducing the mechanism of Parliamentary approval, it can be argued that the democratic deficit in the treaty making procedure will be minimized. This mechanism might as well ensure the collective participation from the state governments. It may also lessen the Court's anxiety as and when it has to refer to un-ratified international instruments in its decisions. Obtaining Parliamentary approval may not be practically feasible for all the international instruments. However, the international instruments having serious consequences (WTO Agreements for instance) may be subjected to Parliamentary approval.

India as a dualist state essentially requires an international treaty or agreement to undergo transformation into a domestic statute to be operative. This requirement is fulfilled through Article 253 of the Constitution. Article 253 empowers the Parliament to make an enabling legislation to implement any treaty, agreement, convention or any decision made at any international conference, association or other body. This Article vests the Parliament with the power to make laws for implementation of treaties even in the subjects that are confined to the state list. The Article gives wide power to the Parliament by enabling it to give effect to the decisions taken in the international associations or conferences. However, this requirement of the transformation of international treaties into local legislations has been moderated by the Supreme Court in various occasions. The international instruments which require transformation under Article 253 are the treaties involving the cession of territory, instruments that require modifications or alterations in the existing law and the instruments which affect the rights of the individuals. These grounds have also been relaxed by the judiciary over the time. The Indian Courts have held in cases like

Maganbhai Ishwarbhai Patel vs. Union of India[9], *P.B Samant vs. State of Bombay*[10]and others that the Executive wing is competent to incur international law obligation upon India and the legislative action is not necessary for their enforcement until the private rights of individuals are affected or there is a need for change in the national law for its operation. The un-ratified international law instruments particularly concerning human rights and environment have found a distinct spot in the Indian legal system. The underlying reason is the shift in the view of the Indian judiciary towards their direct effect. It may thereby be argued that the dualist legal system is slowly inclining towards monist approach by applying the doctrine of direct effect in implementing international laws.

1.4 Domestic Courts as Agents of International Law

The domestic courts are frequently referred as the agents of international law. The process of globalization has spurred the interaction between the domestic courts and international law. Every instance before the domestic courts having an element of international law raises the question of the relationship between international law and municipal law. The domestic courts are expected to give effect to international law when the executive and legislature fail in their compliance. The responsibility of compliance is vested in the domestic courts on the basis of the foundations of independence of judiciary and separation of power. The international rule of law generally requires all the state actors to follow international law. Consequently, it urges the domestic courts to independently implement international law. Such compliance independent from the other state organs raises the questions of legitimacy. This reservation against the international rule of law is due to its formation. The formation of international rule of law is not always democratic as it is not created by the elected world legislature but the states themselves. It often fails to capture third world narratives.[11] The call to the domestic courts to act in the service of international law can thereby be criticized as an imperialist agenda to transgress the national borders and thrust international law into domestic legal systems. The independent

[9] AIR 1969 SC 783
[10] AIR 1994 Bom 323
[11] Chimni, B.S. (2012), "Legitimating the International Rule of Law" in James Crawford and Martti Koskenniemi (eds.), *The Cambridge Companion to International Law*, Cambridge: Cambridge University Press, pp. 290-308.

implementation of international law by the domestic courts endangers the sovereignty of state and pre-condition of transformation.

The international legal order demands the application of international law as consistently and uniformly as domestic law. The method of judicial implementation is usually studied under three divisions based on the source of international law namely, international customary law, international treaty norms and informal instruments. The main stream international law observes that the decisions of the domestic courts form the evidence of state practice and few norms of state practice eventually concertize as customary international law. TWAIL (Third World Approaches to International Law) scholars argue that the principles that concretize as customary international law are sought from the state practice of the first world and not from the developing states. However, the domestic courts regard the customary international law as a part of the law of the land. The implementation of international treaty norms by the domestic courts has not created much debate in the monist traditions as it has in the dualist states. In the states that followed strict dualism, only that 'part'[12] of international law was available for domestic implementation which had gained sanction from the other states organs. The deviation from this strict dualism can be spotted in the recent decisions of the courts belonging to the dualist common law systems. The domestic courts have been adopting various interpretative and incorporative methods to implement international law that has not obtained entry through the formal sources like Legislature and Executive. The informal international instruments have also gained entry into the domestic legal systems through the domestic courts. Such adoption of the informal soft international instruments by the domestic courts may be the result of the court's understanding of these instruments as possessing persuasive value, or by the sheer misunderstanding of their non-binding character. However, informal instruments have at times been treated equivalently to the un-ratified international treaty norms by the domestic courts.

The domestic courts have over the period engaged themselves in the building of a global judicial network. They are actively participating in this network by discussing the limitations posed by their domestic legal systems and by citing each

[12] Fikfak, Veronika (2013),"International Law before English and Asian Courts: Finding the judicial Role in the Separation of Powers", *Asian Journal of International Law*, 3: 271-304, p. 272

other's decision in their respective judgements. This has developed an inter-judicial co-operation among the domestic courts. The domestic courts are also found organising and participating in various judicial colloquia outside their constitutional mandate. They have laid down various principles that they perceived to be important for the independent and effective implementation of international norms. This networking of the domestic courts has resulted in the development of a new comparative jurisprudence.

1.5 International Law in Indian Courts

The Indian Courts are engaging with international law on a regular basis. They accord different treatment to international customary law from that of international treaties. There is no provision in the Indian Constitution or any other statute regulating the implementation of international customary law. In the absence of law, the onus is on the Indian Courts to develop its own method of implementation. Consequently, the Supreme Court adopted the technique of direct incorporation after being influenced by the decision delivered by Lord Denning in *Trendtex Trading Corp. Ltd. vs. The Central Bank of Nigeria*.[13] The reliance of the Indian Courts on the Anglo-American jurisprudence is criticized as "juridical dependencia"[14]. The cases *Gramophone Co. of India Ltd vs. Birendra Bahadur Pandey*[15], *M.V. Elisabeth and others v. Harwan Investment and Trading Pvt. Ltd.,*[16]and others, reflect the Indian position on the customary international law as part of law of the land.

India is a dualist state, requiring an international treaty law to undergo a process of transformation into a domestic law to be operative in the Indian legal system. The scope of the Article 253 is restricted by the Supreme Court holding that transformation is not a pre-condition for all international agreements. It considered an executive act sufficient to give internal effect to international agreements as long as such agreements are in conformity with the domestic law.

The study has selected few sectorial regimes that have overlapping international and domestic norms. Such regimes show a frequent interaction between

[13]1977,QB 552.
[14] Baxi, Upendra (2005), "Colonial Nature of the Indian Legal System", in Indra Deva (ed.), *Sociology of Law*, New Delhi: Oxford, p. 45.
[15] AIR 1984 SC 667
[16] AIR 1993 SC 1014

the domestic and international laws. The selected areas are disputes relating to territory, human rights, gender rights, refugee claims, environment concerns, extradition, international commercial arbitration, double taxation, intellectual property rights and law of the sea. Since there is no consistency in the decision of the Indian Courts involving international law across the sectors, drawing generalised conclusions becomes difficult. The Courts exhibit flexibility concerning the implementation of international law in few regimes, while rigidity in others. The study therefore maps out few patterns in the decisions involving implementing international law which is commonly reflected across all the regimes. One of them is harmonious construction i.e. in the event of conflict between the international and domestic norm and two possible constructions are available, the preference is to be given that construction which gives effect to both the laws. However, if no two constructions are available, then the courts give primacy to the domestic norm over the international norm (exception to this is the Double Taxation Avoidance Agreement which has prevalence over domestic law according to section 90 of the Income Tax Act). The Courts have adopted many interpretative and incorporative techniques in implementing un-ratified international treaty norms into domestic law through their decisions. The justification for applying un-ratified instruments was to fill the legal lacunae in the domestic legal systems such as for instance in *Vishaka and others vs. State of Rajasthan and others*,[17]and *Vellore Citizens Welfare Forum vs. Union of India & others*.[18] Over the years, India Courts due to their internationalist disposition have begun citing consubstantial norms (both domestic and international norms on the same subject) for almost every case involving international element. The courts by various incorporative techniques have channelized the flow of un-ratified international law into the Indian legal system. This tendency of the Indian Courts has resulted towards the integration of the two legal systems.

2. OBJECTIVES AND SCOPE OF THE STUDY

The study examines the traditional monism-dualism debate and other alternative theories to understand Indian state practice on the relationship between international law and municipal law. It examines the persistence of the theoretical debate against

[17] AIR 1997 SC 3011
[18] AIR 1996 SC 2715

the state practice. The study also ventures into the pre-independence period with an attempt to examine the international legal personality of British India and its implications. It analyses the formation of Dominion of India and Dominion of Pakistan in the light of theories of state succession. It asks the question whether the formation of Dominion of India and Dominion of Pakistan was the result of dismemberment or secession and the legal consequence therewith. With the intention of examining the validity of pre-independent international instruments and laws, the study looks at Article 372 through the lens of the clean slate doctrine. The relevance of the colonial instruments both in the form of international treaties and customary international norms at the global level and common law with statutes at national are reviewed for their continuity. The study thereafter undertakes a detailed enquiry into the provisions of Constitution of India on the subject of implementation of international law. The unfettered treaty making power of the executive is studied and an attempt is made to propose a suitable treaty making model. It highlights the democratic deficit in the treaty making procedure and provides an alternative solution for minimising the same. The study proceeds to enquire the patterns of engagement between Indian Courts and international law. For this purpose, some of the sectorial regimes like human rights, gender rights, environment, refugees rights, IPRs, law of the sea, international commercial arbitration, double taxation and extradition are selected. An attempt is also be made to locate the position of customary international law by analysing relevant Supreme Court judgements. After analysing decisions of the Supreme Court involving unincorporated international law, the study addresses the question if such judicial activism is justified. Finally, the study examines if the trend of integration of national and international legal systems is beneficial to a country like India.

3. RESEARCH QUESTIONS

1. How did state succession affect the rights and obligations of India after independence? What is the constitutional validity of the pre-independent international instruments and laws under Article 372?

2. Is the Indian approach towards international law strictly dualist? Or are both transformation and incorporation methods present in Indian practice?

3. Is the language of Article 51 of the Constitution of India constructively ambiguous?

4. Does the absence of parliamentary regulation make the treaty making power of the executive absolute? Can Parliamentary approval be made mandatory before ratification of a treaty?

5. Are the domestic courts agents of international law? If so, have domestic courts been transformed into international agencies responsible for the interpretation and application of international law?

6. Can the Supreme Court under the pretext of framework of legitimate expectation give effect to treaties that have not obtained Parliamentary sanction?

4. HYPOTHESES

1. An anomalous legal personality vested upon India before independence has contributed to inheritance of colonial international law.

2. The mode of receiving international law in the Indian practice does not strictly reflect a dualist model.

3. The absence of parliamentary legislation regulating treaty making has conferred unfettered power on Indian executive.

5. RESEARCH METHODOLOGY

This is a doctrinal research that relies on both primary and secondary sources. The Constitutional provisions and decisions of the Indian Supreme Court and High Courts involving elements of international law are extensively used in this study. The decisions from the courts of other common law system are also referred to arrive at a generalization regarding the behaviour of courts in receiving international law. International instruments like Vienna Convention on Law of Treaties 1969, Vienna Convention on Succession of States in respect of Treaties 1978, Convention on Status of Refugees 1951, Convention on Biological Diversity 1992, Convention on Elimination of all forms of Discrimination Against Women 1979 and other human

rights and environmental instruments are referred during the course of study on the engagement of the sectorial regimes on Indian legal system. The Government of India Act 1935, India Independence Act 1947 and India Independence (International Arrangements) Order 1947 are referred during the course of the study. The reports of ILA, ILC and national commissions and resolutions from UN General Assembly are widely used in the study. Secondary sources like books, articles from academic journals, relevant materials from websites are also used to apply critical insights into the research topic.

6. CHAPTERIZATION

The following is the scheme of the thesis. It is divided into seven chapters including the present introductory chapter. The second chapter 'Theoretical Debate: Monism, Dualism and Beyond', aims to lay out the broad theoretical framework that describes the interface between international law and domestic law. The traditional schools of monism and dualism with their respective doctrines of incorporation and transformation are studied meticulously in the light of the changing relationship between the two legal systems. The alternative theories of pluralism, constitutionalism and coordination are investigated for their admissibility. The chapter finally proposes a suitable model to be followed by the third world.

The third chapter 'International law in 'Early Independent India: Effects of Colonial Rule and Partition' closely examines the formation of the Dominions of India and Pakistan. It tests Partition against the theories of dismemberment and secession. The chapter details the effects of the partition of the international legal personality of India. It also examines the legitimacy and continuity of the international treaties agreements concluded by British India during 1919-1947 pursuant to its international legal personality. The validity of Article 372 of the Indian Constitution in granting continuity to the colonial instruments is also analysed in this chapter.

The fourth chapter 'Treaties in Indian Legal System: Cross Roads of Treaty Formation and Implementation' studies mechanism of treaty operation in the Indian legal system. The chapter begins with highlighting the lack of the proper constitutional mechanism to address adoption of international treaty. The only provision that describes the conduct of state organs towards international law is

Article 51. The chapter makes a detailed enquiry into Article 51 for its structural ambiguities. The treaty obligations in Indian legal system are studied under two stages; treaty formation and treaty implementation. The power of the Union Executive to conclude treaties is determined under Article 73 and Article 246 read with 7th Schedule Entry 14. The chapter investigates if the treaty formation is a prerogative of the Executive or the co-responsibility of the Parliament. The reference is made to various Supreme Court decisions which uphold the Executive's right to conclude treaties. The chapter studies Article 253 of with respect to the implementation of treaties. It highlights the tendency towards direct incorporation, especially of the human rights and environment related instruments.

The fifth chapter 'Domestic Courts as Agents of International Law: Challenges and Solutions' focuses on the engagements of domestic court with international law. It begins with problematizing the idea of international rule of law and argues the elements it has to adopt for its justness and acceptability. The chapter examines the role of judiciary in its engagements with international treaties and customary norms. The glorification of the domestic courts as agents of international law by the western scholars is contested. The Colloquia on rule of law, independence of judiciary, effective administration of judiciary are referred in the chapter as the channels effectuating direct implementation of international law. The chapter also highlights the rise of new comparative jurisprudence as result of domestication of international norms.

The sixth chapter 'International Law before Indian Courts: Trends, Impact and Lessons' is dedicated to the decisions of the Indian Supreme Courts and High Courts in the cases involving foreign elements. To avoid uncertainty and disarray, the chapter is divided into sectorial regimes like human rights, gender rights, refugee rights, environment, international commercial arbitration, double taxation, IPRs, law of the sea, territorial issues and extradition. The chapter is reluctant in arriving at any generalization regarding the behaviour of Indian judiciary in implementing international law as variations in can be highlighted from one sector to another. Despite the inconsistency, the chapter attempts to draw a pattern on the basis of *ratio* and *obiter* of the decisions involving the foreign elements. The chapter features different incorporative and interpretative techniques adopted by the Indian judiciary in

implementing international law. It further has attempted to predict nature of the decisions involving foreign elements in future.

The last chapter ‘Conclusions and Recommendations’ summarizes the findings of the present study in the light of the research questions. The chapter also puts forth few recommendations for due consideration.

CHAPTER-2

THEORETICAL DEBATE: MONISM, DUALISM AND BEYOND

1. INTRODUCTION

The relationship between international law and municipal is a critical but complex issue. Starke observes that "nothing is more essential to a proper grasp of the subject of international law than a clear understanding of its relation to state law".[1]Higgins stresses on the need for a good grounding in both municipal and international law if there is to be a real understanding of the relationship between the two.[2] This chapter attempts to understand the relationship between the two legal orders from the theoretical perspective under six sections. The first section being the introductory chapter lays out the blueprint of this current chapter and the various sections discussed therein. The second section studies the two foundational theories that predominately determine the interface namely; monism and dualism. The two schools of thought and the doctrines proposed by them explain the interface between the two legal systems and the techniques of implementation from two different perceptions. By virtue of the principle of state sovereignty, a state is vested with the right to choose its own method of incorporating international law into its domestic sphere. However, with the emergence of globalization, many essential attributes of state sovereignty have being compromised. The state's liberty to choose between monist-dualist models is no exception. The third section examines the relevance of the monist-dualist debate in the contemporary period. It is argued that the these schools and the theories proposed by them are out of relevance, due to the overlapping of international and domestic norms in the same subjects. The chapter further in the fourth section introduces other theories which are proposed as an alternative to the traditional theories. The theories of co-ordination, pluralism and constitutionalism are put forth as alternatives to the traditional theories.

It is relevant to examine if these alternate theories propose a comprehensive solution or merely reiterate the premise and principles of the traditional theories. The

[1] Starke J.G. (1936), "Monism and Dualism in the Theory of International Law", *British Yearbook of International Law*, 66-81, p. 63.

[2] Kirby, Michael (1998), "The Growing Rapproachment between International Law and National Law", in A. Anghie and G. Sturgess (eds.) *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry,* Hague, Kluwer Law International: 333-354, p. 333.

fifth section investigates the primacy of law in the event of conflict between the norms of two legal systems. Though the state practice (the treatment accorded to international law by the legislative, executive and judicial organs of a state) reflects no strict adherence to monism or dualism, it is nevertheless important to study these two schools of thought. One of the main objectives of the study is to test these schools of thought and their theories through the TWAIL objective. The outcome of this test is two-fold is first, to select the best suited model for the third world countries and secondly, to examine the trends in state practice against the TWAIL perspective. The sixth section summarises the findings of this chapter and proposes a suitable model.

2. TRADITIONAL SCHOOLS OF THOUGHT

The discussion regarding the relationship between international law and municipal law begins with the theoretical understanding of such relationship by the two traditional schools of thought; schools of monism and dualism. McDougal expressing his views on monism and dualism opined that "scholarly opinion for several decades has ranged from the view at one extreme that international law is not a law at all but mere rules of morality through varying versions of dualism to a monistic conception at the other extreme that international law dictates the content of national laws."[3] Sloss describes that the monism- dualism classification is used in two different contexts; firstly, to understand the relationship between domestic law and international law and secondly, to describe a particular state's policy with regard to the effect of international law under its domestic law.[4] However, the choice of international law's model today, monist or dualist, is an expression of State's confidence in modern international law.[5]

Monism found its roots in the writings of the scholars of natural law. The early Catholic writers attached the concept of state sovereignty to monistic construction of law. Writers like Suarez and Bodin expressed the notion of superior legal order which

[3] McDougal, Myres (1981), "The Impact of International Law uponNational Law: A Policy-Oriented Perspective", in Myres S. McDougal and W. Michael Reisman (eds.) *International Law Essays: A Supplement to International Law in Contemporary Perspective,* New York : The Foundation Press, 437- 480 p. 439.

[4] Sloss, David (2009), "Treaty Enforcement in Domestic Courts": A Contemporary Analysis in David Sloss (eds.) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, Cambridge: Cambridge University Press, p. 5.

[5] Singh, Prabhakar (2010) "Indian International Law: From a Colonized Apologist to a Subaltern Protagonist", *Leiden Journal of International Law*, 23: 79-103, p. 96.

delegates the sovereignty to states. The jurists of natural law also advocated that sovereignty represented no more than a competency given by international law, identified as a part of the wider '*ius naturea*.'[6] This is one of the assertions on which the theory of monism is based viz., the supremacy of international law over the national law. However, the theory of 'delegation of sovereignty to the state by international law' was replaced by 'the will of the state' through the profound works of Vattel and Hegal. Vattel asserted that "Every sovereign state is free to determine for itself the obligations imposed upon it" while Hegel explained it further by interpreting the state as "a metaphysical reality with value and significance of its own, endowing it with the will to choose whether it should or should not respect international law."[7]

Dualism's early affiliation was in the positive law since the positivist considered international law not as law but as mere positive morality. However, dualist model gained popularity and appreciation among the Marxist scholars[8] as a suitable model for the socialist and newly independent states. Chimni argues that "at present, international law is unable to respond to the expectations of a vast majority of the peoples of the third world, both in terms of maintaining global order and despite its exponential growth in recent years, promoting social justice."[9] He further observes that "the international legal process is being used to control the content of national laws in crucial areas of economic, political and social life, as also to relocate powers from sovereign states to international institutions in order to facilitate their surveillance and development."[10] The state sovereignty forms a basic pillar for this school of thought. The third world countries can protect their sovereignty from the external intervention by adhering to dualism.

2.1 Monism

Monism found its position in the early writings of Emile Durkheim and Leon Duguit. Few recent expositors of monism are Hans Kelsen, Josef Kunz, George

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[6] Starke, *supra* note 1 at p. 68

[7] *Ibid*., p. 68

[8] Chimni, B.S. (2004), "An Outline of a Marxist Course in Public International Law", *Leiden Journal of International Law*, 17: 1- 30, p. 17

[9] Chimni, B.S. (2006), "A Just World under Law: A View from South Proceedings of the Annual Meeting , *American Journal of International Law*, 100:17-24, p. 17

[10] Chimni, B. S. (1999), " Marxism and International Law: A Contemporary Analysis", *Economic and Political Weekly*, 34(6): 337-349, p. 346

Scelle, Alfred Verdross and Hugo Krabbe. The monists contend that the existing laws are understood to be part of the law of the world community. With such an emphasis on the world community, monism has also been called "universalism".[11] Koh asserts that there is no future to nationalist jurisprudence and only transnational legal process can draw national legal systems closer.[12]

Monist theory lays its foundation in the idea of a unitary legal system i.e. the law is to be understood in unity as they are of the same system of norms.[13] Kelson arguing for the universal legal order holds that the international law and national law cannot be different and mutually independent system of norms if the norms of both systems are considered to be valid for the same space and at the same time. It is logically not possible to assume that simultaneously valid norms belong to different, mutually independent systems.[14] He contends that most of the norms of international law are incomplete norms requiring implementation by norms of national law. He claims that there exists an organic unity between international and national law and the two belong in one integral and universal legal order. Therefore, international legal order has to be a part of a universal legal order which comprises also all the national legal orders.[15]

Monism is based on three principle assumptions[16] which are:

1. The origin and the sources of national law and international law are essentially the same. Kelson argues that the source of national law are legislations and customs likewise, the treaties and customs forms the sources of international law. The method of law-making is different in national and international law but it is not different in principle.[17]

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[11] Somek, Alexander (2012), "Monism: A Tale of the Undead" in Matej Avbelj and Jan Komarek (eds.) *Constitutional Pluralism in the European Union and Beyond*, Oxford: Hart Publishing Ltd., 343- 380; Alexander Somek (2010), Monism: A tale of the Undead, U Iowa Legal Studies Research Paper No. 10-12. URL: https://ssrn.com/abstarct=1606909, p. 2.

[12] Koh,Harold (2004), "International Law as Part of Our Law", *American Journal of International Law*, 98: 43-57, p. 52

[13] Higgins, Rosalyn (1995), "*Problem and Process: International Law and How we Use It",* New York: Oxford University Press, p. 205.

[14] Kelson, Hans (1952), "*Principles of International Law*", New York: Rinehart and Company, p. 404

[15] *Ibid*, p. 403.

[16] Margolis, Emmanuel (1955), "Soviet Views on National and International Law", *The International and Comparative Law Quarterly*, 4(1): 116- 128 at p. 117

[17] Kelson, *supra* note 14 at p. 407

2. Both spheres of law simultaneously regulate the conduct of individuals, hence cannot be independent of each other. There is no difference between international and national law with respect to the subjects of the obligations and rights established by the two legal orders as the subjects are in both cases individual human beings. The national legal orders directly determine the conduct of the individuals whereas, international legal order leaves to the national legal order the determination of the individuals whose behaviour forms the content of the international obligation.[18]

3. The two systems are in their essence group of commands which bind the subjects of law independently of their will. There is no subject matter which can be regulated only by national law and not by international law. Every matter that is, or can be, regulated by national law is open to regulation by international law.[19]

Hugo Krabbe advances a concept called 'conscience of right' which is related to the individual's psychological fact. International law comes into existence when individuals from various states widen their 'conscience of right' to comprehend international law.[20] This concept of 'conscience of right' as the original source of international law was contemplated by Krabbe in late 1920's. This was the phase in which international law was primarily state centric, individuals then were barely given any importance. It was with the establishment of United Nations in 1945[21] and *UN Reparation Case*[22] that individuals were considered as subjects of international law.

Monists find that national and international law have identical subjects, sources and contents. Hans Kelsen argues that jurisprudence is science, and the object of science is formed by unity and cognition.[23] Based on this premise, he asserts that there has to be unity relation between international law and municipal law. Despite the basis assertion of one common source and subject monism has varieties.

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[18] *Ibid.*, p. 402.
[19] *Ibid.*, p. 406.
[20] Margolis, *supra* note 16 at p. 118
[21] Individuals got their mention in the Human Right laws through the United Nation Charter preamble and the other instrument that followed.
[22] Advisory opinion on Reparation for injuries suffered in service of the UN, 1941 ICJ. It was held by the ICJ that individuals are also subjects of international law.
[23] Starke *supra* note 1 at p. 74.

2.1.1 Radical Monism

This form of monism was propounded by Kelson. The theory of Stufenbau[24] which is developed by Adolf Merkl and Kelson is also the pure theory of law. Kelsen coined the proposition '*grundnorm*' which states that the sources of all laws had to be found in a basic rule. He further explains that "the *grundnorm* and the derivations of the other norms from the basic norm establishes something called validity of all lesser norms in a pyramid like series from top abstraction to the lowest abstraction"[25] Hence the source of both the legal system is common. Kelson from relating one norm to another norm eventually reaches to one supreme fundamental norm i.e. foundation of all laws which he calls scientific hypothesis.[26] Kelson while discussing the delegation the primacy of legal order encounters with the question if the hypothesis is found in the municipal or the international law. Unlike the other monist Kelson holds that the thesis of superiority of state law was perfectly legitimate.[27] In the words of Kelson,

> the choice between the primacy of international law and primacy of national law is in the last analysis, the choice between the two basic norm which is not guided by scientific but by ethical or political preference. A person whose political attitude is that of nationalism and imperialism may incline to have basic hypothesis in his own national law. A person who is for pacifism or internationalism may accept hypothesis in international law. From the view point of politics the choice becomes important as it is tied up to ideology of state sovereignty.[28]

The other monists like Scelle, Kunz, Verdross dissented from the opinion of Kelsen and held that international law has primacy over state law. As Kunz observed:

> the sovereign states are delegated partial juridical orders of the international juridical order, means that the pyramid of law does not end with the basic norm of the juridical order of a given single state but that at the top of the pyramid of law stands the international juridical order.[29]

Kunz further argues that "if international law draws its validity from state Constitution it would necessarily cease to be in force once the Constitution on which

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[24] Ohling, Theo (1999), "Unity of Legal System or Legal Pluralism: The Stufenbau Doctrine in Present Day Europe" in Antero Jyranki (eds.) *National Constitutions in the Era of Integration*, London: Kluwer.
[25] McDougal, *supra* note 3 at p. 441
[26] Starke, *supra* note 1 at p. 75.
[27] *Ibid*., p. 75.
[28] McDougal *supra* note 3 at p. 443.
[29] *Ibid.*, p. 441

the authority rested disappeared, but international law is validly operative and is independent of the change or abolition of Constitution."[30] It also becomes impossible to imagine the basis of one legal order of international law in the multitude of state constitutions. The monist further refer to the formation and cession of states which is beyond the reach of municipal law but essentially forms the subject matter of rules of international law.[31] Drawing attention towards state recognition, they hold that recognition by other states may be declaratory but not constitutive, new state gets recognition only by satisfying conditions prescribed by international law.[32] When there is a change of system of government or a revolution, it is the rule of international law that the rights and the duties of the state towards the others are unaffected because the identity of the state as an international person has not been destroyed.[33] The justification for the supremacy of international law is according to Lauterpatch, that international law is a more trustworthy repository of civilised values than the municipal law of a nation State, and thus better equipped to protect international human rights.[34]

By the above arguments monists strongly contend that international law has a status superior to that of municipal law and municipal law which is not in conformity with international law will be rendered null and void.

2.1.2 Moderate Monism

Moderate monism is not as severe as radical monism. The primacy of international law is maintained but they do not follow the delegation theory that international law delegates authority upon the state to exercise jurisdiction. Verdross emphasized on the fact that international law determines a margin of action for each state which delimits its liberty of action.[35] The municipal law which is not in conformity with the international law may be applied by the national courts only until the state fulfils the

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[30] Starke, J.G. (1994), *Introduction to International Law*, New Delhi : Aditya Books Pvt. Ltd, 10th edition p. 75

[31] Walter, Jones (1935), "The Pure Theory of International Law", *British Year Book of International Law*, 16: 5-19, p. 14.

[32] *Ibid*., p.15.

[33] The principle held by Lord Wright in *Lazard Bros v. Midland Band Ltd* 1933, A.C 289 p.307; *Ibid.*, p. 15

[34] Kaczorowska Alina, (2010) , Public International Law, Abingdon: Routledge, p. 130

[35] Partsch, Karl J. (1987), "Encyclopedia of Public International Law", *Max Planck Institute for Comparative Law and International Law*, 10: 238- 257 at p. 240.

obligation of bringing such law into conformity. Hence, municipal law which is inconsistent with international law will not be considered as null and void. The moderate monists allow provisional validity to norms which are not in conformity with international law. Cassese lists out four measures essential to bring domestic legislations in conformity with the international rules. Two of which would operate at the international level and the other two at the domestic level.

> At the international level:
> (i) there should be an international judicial body charged with authoritatively establishing (a) whether in a specific instance a state has breached a rule imposing to amend national legislation so as to make it consistent with international rules and (b) in the affirmative, enjoining the state to modify its legislation forthwith, (ii) a monitoring body should be entrusted with ascertaining whether the state has followed up that ruling.
>
> At the domestic level:
> (i) states should pass a constitutional provision stating that any time a national piece of legislation is in conflict with an international norm, such legislation is automatically repealed or, at a minimum, court, administrative bodies, and individuals are bound to disregard it, and (ii) Whenever there is a doubt or a dispute on whether national legislation conforms to international rules, national courts as well as natural and legal person should be empowered to bring the case before an international court, tasked to pass on the matter with legally binding effect.[36]

Moderate monism is claimed to have its origin during Westphalian model, when the states were not interested in the national legislation of other states unless such legislation led to a violation of a foreign state's right.[37]Chimni opines that the state structure in the Westphalian system was promoted to reduce the trade barrier to the movement of goods.[38] It can be thereby argued that since the Westphalian system, the call for the unification of the legal system is a part of the project of the mainstream international law to bring in homogeneity in laws among all states so that they may not create potential impediment to the flow of trade.

This thesis was criticised because a general procedure established by international law would be necessary in order to ensure the conformity between international law and municipal law. As long as such procedure in international law

[36] Cassese, Antonio (2012),"Towards a Moderate Monism: Could International Rules Eventually Acquire the Force top Invalidate Inconsistence National Laws?" in Antonio Cassese (ed.) Realising Utopia: *The Future of International Law,* Oxford University Press: Oxford,187-199 at p. 191-192.
[37]*Ibid*p.188
[38] Chimni, B .S. (2016), "Towards Democratic and Just Global Economic Governance", Lecture Delivered on 15 Jan 2016 at IIM: Kolkatta.

was lacking, the application of international law cannot be possible without state authority providing the basis for such application in the municipal sphere.[39]

For monist, international law is simply part of the law of the land, together with the more familiar areas of national law.[40] Since international and municipal law belong to a single legal order, international law becomes directly applicable in municipal law without any express adoption which is termed as the theory of incorporation. All international law norms i.e. treaties, customary international law or general principles will be directly applicable in municipal law without any change in their content of character. In this method, a complete unification is reached as the norms with same content are valid in all the states[41] and international norms are applicable without changing their content. The *Constitutiones Legitimae* to Gentili, Grotius, Vateel and Pufendorf all of whom devoted for the development of rules on treaty interpretation recognizing the importance of having a universal methodology independent of individuals states will. [42] The universal methodology cannot be delinked from the dominance of the western block. Universal methodology can be argued to be a new nomenclature for the domination over the developing countries. If rules of interpretation were also to be guided by a set of universal methodology, then whatsoever autonomy rested with the developing countries to transform the international norms into the domestic law in terms with their conditions shall be extinguished.

Monists regard dualism as a threat to the health and effectiveness of international law. They argue that more dualistic a state's constitutional jurisprudence, the greater the risk of slippage in that state's compliance with international law.[43]They further argue that with the supremacy of national constitutions and independence governmental entities in relation to international law and governmental entities, the compliance with international relations has weakened.

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[39] Partsch, *supra* note 35 at p. 241
[40] Kirby,*supra* note 2 at p. 333
[41] Partsch, *supra* note 35 at p. 247
[42] Aust Philipp Helmut, Rodiles Alejandro and Staubach Peter, (2014), "Unity or Uniformity? Domestic Courts and Treaty Interpretation", *Leiden Journal of International Law*, 27: 75-112, p. 80
[43] Henkin, Louis (1997), "Implementation and Compliance: Is Dualism Metastasizing", *Proceedings of the Annual Meeting (American Society of International Law)*, 91: 515-518, p. 515

The advocates of direct application advance reasons and advantageous for such application. Firstly, the effectiveness of international law can be enhanced by allowing the direct application as it decreases the likelihood that national authorities will refuse or neglect to provide the transformation to the treaty.[44] Secondly, the direct application assures that all the parties will carry out their obligations. Lastly, it assures the rights of an individual in the legal system. When a treaty contains norms designed to apply to individuals, the individuals can base their claims on the treaty norms without the need for government's intervention or an act of transformation.[45] The automatic incorporation is said to operate unless there is some clear provision of natural law such as a statute or judicial decision which precludes the application of an international norm.[46] There can hardly be any instance where the statute or judicial decision has obstructed implementation of treaty as treaty requires consent of state but it is not so in the case of customary international law. When the application of general international law are provided in state constitutions and new developments in customary international law are not recognised by such state, they can enact rules in this regard by preventing the supremacy of international law.[47]

The criticisms against monism may be summed up as, firstly, it is the policy or method devised by powerful states to direct the activities and control the weaker states. The integration of two systems can lead to the subordination of internal law to international law. The weaker states irrespective of their will can come to be governed by international law which prominently represents the interest of powerful states. So under the banner of unification of laws and international cooperation, the sovereignty of weaker states may be snatched away. The monists contend that the unification of the legal systems leads to the formation of the global state. Chimni argues that "there is now a global network of legislators, judges, bank official and police officials trying to collectively address common global problems. Such networks are the first step in aggregating the functional processes necessary for the formation of a global state".[48]

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[44] Jackson, John H. (1992), "Status of Treaties in Domestic Legal System: A Policy Analysis", *American Journal of International law*, 86(2): 310-340, p. 321.
[45] *Ibid*., p. 322
[46] Dixon, Martin (2007), *Textbook on International Law*, New York: Oxford University Press, p. 240
[47] *Ibid*., p. 247.
[48] Chimni, B.S. (2004), "International Institutions Today: An Imperial Global State in Making", *European Journal of International Law*, 15(1):1-37, p. 20.

Monism, secondly contends, that every subject of municipal law finds its source in international law.[49] Where subjects like diplomatic agents, immunity from the local jurisdiction, territorial waters etc., draw their source from international law the generalization that every subject of municipal law has its source in international law is inappropriate. Thirdly, the advocates of monism consider the primacy of international law over municipal law. Borchard explaining the dualist view states that "international law is a special variety of law operating between entities called states which are theoretically considered equal".[50]International law is applicable mainly through a state. So international law cannot claim supremacy over municipal law.

2.2 Dualism

The traditional dualist conception of the relationship between international law and municipal law was developed by Heinrich, Triepel and subsequently by Strupp, Dionisio Anzilotti, Gaetano Morelli, Angelo PieroSereni and Walter Rudolf. G. I. Tunkin has often argued that there cannot be two international laws- one socialistic and one capitalist but only one general system which, under the increasing impact of socialist states upon the international community will, through the coordination of wills, move steadily in the directions of socialism.[51]

The positivist method stresses on supremacy of the state and asserts that international law is formed by the consent of states.[52] Historically only those states that could not contribute to modern international law were found to have dualistic or sceptical approach.[53] Triepel and other supporters of dualist theory explained the relationship of international law and municipal law upon supremacy of the state and existence of two systems of legal orders. In this way the two legal orders, international and national are described as "two spheres that at best adjoin one another but never intersect".[54] Though few scholars do not support hierarchy and primacy of laws, they uphold the argument of existence of two separate legal orders.

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[49] Partsch, *supra* note 35 at p.247.
[50] Borchard Edwin, (1940), "The Relation between International Law and Municipal Law", *Virginia Law Review*, 27(2): p. 139
[51] Hazard, John N. (Jan., 1984),Kiev: Izdatel'stvoob'edineniiaVishaShkola", *Review of V.G Butkevich, The American Journal of International Law*, 78 (1): 249-250
[52] Shaw, Malcolm H. (2007), *International Law*, Cambridge: Cambridge University Press p.121
[53] Singh *supra* note 5 at p. 96
[54] Nijman, Janne and Nollkaemper, (2007), *International Perspectives on the Divide between National and International Law*, Oxford University Press: Oxford, p. 7.

Machiko Kanetake, for instance argues that as a matter of formal relations between domestic and international legal orders, the proposition of dualism to separate them has a powerful explanatory force. She draws attention to the directions in the treaty regarding its implementation under domestic law. She hold that that "the formal legal effect of international law within the domestic legal order is contingent on an authorising rule of domestic law and vice versa"[55] This theory is terms as dualism as it considers the existence of two separate orders viz., international law and municipal law. The two orders are seen as self-contained and differ from each in three respects are discussed below.

First, international law and municipal law differ with regard to their sources. The origin of the two branches is completely different. Triepel treats the two legal systems as originating from different sources. He contends that the source of international law is formed by the common will i.e., *Gemeinwille* of states.[56]The inter-relation between municipal legal system and state is based on, firstly, all the legal rules which express the will of the dominating class in the state society and secondly, that they function within the society. Hence, if an independent state exists the corresponding separate municipal legal system must also exist.[57] When independent states interact they establish an international system. Thus international legal system is not formed as result of merging of independent sovereign states but as a result of interaction of these sovereign entities. States have their internal structures and processes which do not dissolve in this international system, but maintain their sovereignty and independence being outside of the system and interact with the system through the state. In the words of G.I.Tunkin,

> It is of paramount importance to keep constantly in mind that the main components of the international system-state-exists above all outside this system. This fact makes the relations between the international system and its environment quite specific.[58]

[55] Kanetake, Machiko (2016), The Interfaces between the National and International Rule of Law: A Framework Paper in MachikoKanetake and Andre Nollkaemper(eds.)*The Rule of Law at the National and International Levels: Contestations and Deference,* Oxford: Hart Publishing Ltd. 11-41, p. 37.
[56] Starke, *supra* note 30 at p. 71
[57] Mullerson, R.A. (1984), "Functioning of International Law and Internal Law of States", *Indian Journal of International Law*, 24:40- 50,p.41
[58] *Ibid*., p. 41.

The doctrine of sovereignty and state will is regarded as the corner stone in the dualist approach. It asserts that international law and internal law coexist without uniting.

Secondly, international law and municipal law differ regarding the relations and the subjects they regulate. The municipal law is the law regulating the conduct of the individuals within its territory, whereas international law is a set of rules regulating relations between states. As D'Amato describes "the objects of domestic law are people; the objects of international law are states".[59] The growth of international law has shown that it has encroached upon subject matters which were essentially under the domestic jurisdiction. It is no longer possible to clearly define and separate exclusive fields of application of both laws. To name a few subjects matters: human rights, environment, nationality, extradition etc.[60] Various multilateral and bilateral instruments on the above mentioned subjects were earlier the subjects on which states alone had authority.

The overlapping of subject matter in both spheres raises a strong argument against the premise of separate systems of regulation. Mullerson explains that international law which is functioning within the international system contains rules aimed at regulating the subjects outside the international system are not because of same system of regulation but because of the interplay between international law and municipal has become inevitable. Firstly, it happens because the external social relations, their conditions or trends influence interstate relations to such a degree that state finds it necessary to conclude an international agreement on the framework limiting their capability to regulate such relations individually, like in human rights. State cooperated in the field because of flagrant violation of human rights.[61] Secondly, there are issues on which one state can produce a desired effect only when accompanied by similar measures in other countries like in the field of environment protection. Therefore a need for interstate cooperation arises[62] Thirdly, there are some rules in international law which are aimed at regulation of relations with the participation of individuals because such relations often move beyond state

[59] D'Amato, Anthony D'Amato (2008), "Is International Law Coercive", *Northwestern University School of Law Public Law and Legal Theory Series*, 8-25: p.6.
[60] Agrawala, S.K. (1965), *International Law Indian Courts and Legislature*, Bombay: Tripathi Pvt. Ltd., p. 269.
[61] Mullerson, *supra* note 57 at p. 44
[62] *Ibid* 45.

boundaries [63] In light of above argument it is justified that the international law and municipal co-exist, even though there has to be certain amount of convergence when required. But it does not justify the proposition that both international law and municipal law have the same sphere of operation.

Thirdly, international law and municipal law also differ with respect to their substance. International law is a law between sovereign states and is formed by common will of the states. It is thereby viewed by dualists as weaker law compared to municipal law. When the functioning of international law is analysed, it is pertinent that without municipal law it is impossible to give effect to international law. The international legal position of a state is crucial in creating rules of international law.[64] It is not international law that creates states but states that create international law. The influence of municipal law in international law is the determinant for creation of rules of international law.[65] Hence international law is dependent on municipal law for its creation and correspondingly has higher validity than international law.

Other dualists dissent from the argument that international law gets validity only through the municipal law and municipal law has correspondingly higher status than international law. Both municipal law and international law are equally important in their respective spheres of application. Lassa Oppenheim states that,

> neither can international law per se create or invalidate municipal law, nor can municipal per se create or invalidate international law. International law and Municipal law are in fact two totally and essentially different bodies of law which have nothing in common except that they are branches but separate branches of the tree of law.[66]

Oppenheim does not emphasise on will of state like other dualists who consider it important for creation of international law but asserts that there is no need for the primacy of one over the other as long as they are separate legal orders. Oppenheim also argues that international law should be treated as law of land.

However, there have been contradictions in considering international law as a law of the land. Mullerson points out that "when norms of international law are

[63] *Ibid* 45.
[64] *Ibid* 46.
[65] *Ibid* 46.
[66] McDougal, *supra* note 3 at p. 440.

designed for the regulation of international relations of non-authoritative nature the most suitable method of implementation is that of reference than declare international law to be a part of law of land."[67]

After the clear distinction between the branches of law on the basis of source, substance and subjects, it becomes important to establish a link between these two systems for providing an effective coordination. Since both international and municipal law are two separate branches of law, international law has to undergo a process of transformation into municipal law to be domestically applicable. This process of municipal legal implementation of international law can take mainly two forms, firstly, states may enact rules of municipal law which partly reproduce rules of international law to suit the socio-economic condition a state by adapting them. Secondly, state may sanction an application of international law rules for regulation such sanctions are inserted in reference rules of municipal law.[68] Partsch views that,

> the process of transformation into municipal law changes three aspects of international law; the validity of the norms are based on state authority, state as subjects of international law are replaced by the subjects of international legal order and the content of international norm is changed.[69]

On assessing both the theories it appears that the states should prefer and adhere to the dualist model as it provides the state some authority and flexibility in implementing norms of international law. In the process of transformation, the states will possess certain amount of autonomy in adopting or implementing international law in domestic sphere keeping the best interest of state than the treaties and customary international law operating in municipal sphere verbatim. The national courts are also benefited as municipal law is easily available at hand and the tedious process of investigating into the application of international law is avoided.

Soviet scholars assert that capitalist jurisprudence is dominated by the monistic school of supremacy of international law. Chatterjee points out that globalization cannot be wished away and that what is called for is 'flexible, mixed

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[67] Mullerson, *supra* note 57 at p. 48.

[68] *Ibid*., 47; for example there can be a provision inserted which states that the international treaties concluded by a state regarding a particular issue must be referred along with the provisions of its national laws regarding that issue .

[69] Partsch, *supra* note 35 at p. 246.

and variable anti-empire politics'.[70] Hazard explains that neither universality nor its promise of global order and stability make international law a just equitable and legitimate code of global governance for the Third world. Monistic theory is an open attack on the institution of national sovereignty as it supports the imperialistic political aim of establishing supranational organizations, monistic theory would justify intervention into the internal affairs of small and medium sized countries.[71]

The task is not only to restructure international law but also the municipal legal system.[72] TWAIL basically describes a response to a condition, and is both reactive and proactive. It is reactive in the sense that it responds to international law as an imperial project. But it is proactive because it seeks the internal transformation of conditions in the third world.[73] Butkevich argues that the states need to adhere to old dualistic theories to prevent their municipal systems from being held prisoner by former colonial powers under the post-independent agreements. The developing states need to be free of these agreements effects on domestic structures in order to move in the direction of socialism.[74] To ensure the confidence of the third world countries, international law has to recognise and accommodate the alternative voices of TWAIL.[75]

3. PERSISTENCE OF MONIST- DUALIST DEBATE

Many scholars have argued the relevance of the traditional monism- dualism debate in the contemporary time. There are many reasons for these notions to lose their relevance. One of the primary reasons is the expansion of international law under the globalization. As globalization advanced, the development of international law swept through the domains that were essentially state centric. This has led to the multiplicity and overlapping of norms resulting in the increased interface between the two legal systems. The idea of globalization to materialize required the establishment of international organizations with the supra-national authority. These international

[70] Chimni, B.S. (2005), "Alternative Visions of Just World Order: Six Tales from India", *Harvard International Law Journal*, 46, p. 396.
[71] Grzybowski, Kazimierz (1987), *Soviet International Law and the World Economic Order*, Duke Press Policy Studies, Durham and London, p. 18.
[72] Hazard, *supra* note 51at p. 250
[73] Makau Matua and Antony Anghie (2000), "What is TWAIL", *Proceedings of the Annual Meeting (American Society of International Law)*, 94: 31-40, p.31
[74]Hazard, *supra* note 51at p. 250.
[75] Singh, *supra* note 5 at p. 96.

organizations supplanted the domestic laws with the international normative order. As Chimni argues "the chief task of international institutions is to facilitate the operation of transnational capital by creating appropriate economic and social conditions."[76] Hegde observes that "regardless of state's intent, international legal norms embodied through various treaties and agreements have influenced domestic legal framework."[77] The notion of state sovereignty has lost its sanctity over the years with the development of international law and international organizations. The fragmentation of international law also forms an important reason for the fading relevance of monism and dualism. Few of the sectorial regimes like human rights, environment, refugee laws and extradition among others have become the subjects of transnational interest. As a response of the changing scenario, the states have deserted their orientation towards one school of thought. The state practice copes with change occupying neither monism nor dualism, but a middle ground. The above mentioned issues may appear as a chain of events resulting from globalization, but each one of them is a specific reason in itself for the losing relevance of the traditional doctrines.

The scholars have exhibited their disappointment regarding the monist-dualist debate many different ways. Although the term "monist" and "dualist" are used to describe different types of domestic legal systems, the actual legal system of many states do not fit nearly into either of these two categories.[78] Bogdandy views the theories of monism and dualism as "intellectual zombies of another time and they should be laid to rest or deconstructed because their arguments are considered as hermetic, the core assertions little developed and not linked to the contemporary theoretical debate."[79] The authors having the above opinion have tried to establish coordination between the two branches of law which according to them puts the present theoretical issues in perspective. The jurists are of the opinion that the dichotomy of monism and dualism conflicts with the way in which international and national courts behave. Denza while criticising the traditional theories states that,

[76] Chimni B. S.,*supra* note 48 at p. 2.
[77] Hegde, V. G. (2013), "International Law in the Courts of India", *Asian Yearbook of International Law*, 19: 65- 89, p. 66.
[78] Sloss, *supra* note 4 at p.5.
[79] Bogdandy, Armin Von (2008), "Pluralism Direct Effect and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law", *International Journal of Constitutional Law*, 6(3-4): 397- 413, p. 400.

> in their opinion to classify a state as monist or dualist does not greatly assist in describing Constitutional approach to international obligation, in determining how its government and Parliament will proceed in order to adopt or implement a new treaty or in predicting how its courts will approach the complex question which arise in litigations involving international law.[80]

Rosalyn Higgins argues that though monism- dualism debate provide answers for the questions regarding the relationship between international law and domestic law on the philosophical level, but the actual answers are given only when an issue is adjudicated. In reality, she opines that there is usually little explanation or discussion of the larger jurisprudential matters in the domestic court hearing. In her words,

> Whichever view you take, there is still problem of which system prevails when there is a clash between the two. One can give answers to that question at the level of legal philosophy; but in the real world the answer often depends upon the tribunal answering it (whether it is a tribunal of international or domestic law) and upon the question asked.[81]

The Court's increasing willingness to forsake dualistic certainties therefore lends support to Brownlie's observation that the theoretical constructs of monism and dualism have tended to obscure the realities of the status of international law in the domestic legal system. [82]Veronica Fikfak also argues that he monist-dualist debate fails to capture the role of domestic court in relation to international law. She further opines that the monism-dualism debate neglects the role of the domestic judges in defining the "part" in an attempt to internalise international law. She argues that,

> Traditionally, international law becoming a "part' of domestic law depends on whether a jurisdiction is considered 'monist' or 'dualist'. The labels such as "monism" and "dualism" are unhelpful because they present the question of bindingness as an issue decided extra-judicially, most often by other branches of government which make international law "part" of domestic law- by a Parliament which brings international law into domestic law, or by the Executive that assents to it at a domestic level. [83]

Crawford suggests disaggregation from the notion of "part" than fiddling with terms such as "adoption" and "transformation". He lists out four elements of Lord Mansfield's rule, later adopted by Lord Denning,

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[80] Denza Eileen, (2010), "The Relationship between International and National Law", in Malcolm D. Evans (eds.) *International Law,* New York: Oxford University Press, p. 418.
[81] Higgins, *supra* note, 13 at p. 206
[82] Hunt Murray, (1998), *Using Human Rights Law in English Courts*, Hart Publishers: Oxford, p. 42
[83] Fikfak, Veronika (2013),"International Law before English and Asian Courts: Finding the judicial Role in the Separation of Powers", *Asian Journal of International Law,* 3: 271-304, p. 272

a. Judicial knowledge- the courts acknowledge the existence of a body of international law, whose content is not a matter of evidence but of argument.

b. Judicial authority- in any matter where the courts acknowledge international law to be relevant or to govern, they may apply international law as the rule of decision.

c. Judicial integration- international law is not same in every domestic legal system but the latter should be assumed to be consistent with it.

d. Judicial precedent- a rule of international law applied in this way remains a rule of international law; it is not indigenized or domesticated. If international law changes, then so does the decision based on it.[84]

Though monism is adopted in many constitutions it only of nominal significance because when the interests of imperial government comes into conflict with the rules of international law, imperialistic lawyers rely on the rules of municipal law.[85] Somek, a firm advocate of Kelson's monism questions the existence of dualism. Dualists contend that public international law is grounded in the state constitution which means that either the customary international law or the treaty norms get their validity only after being recognised by the domestic law. Somek refers this attribute to that version of Kelson's monism which is no longer talked about, namely monism with primacy of state laws.[86] Automatic incorporation does not guarantee the applicability of international law in the domestic legal order as domestic law may allow direct effect of certain sources of international only or of some elements within such source or may permit the local constitution or even subsequent ordinary law to override international law.[87]In all circumstances the reception of international law into the domestic legal order is regulated by domestic law more or

[84] Crawford, James. (2009), "International Law in the House of Lords and the High Court of Australia 1996-2008: A Comparison", *Australian Book of International Law*, 28: 1-27, p.6.
[85]Grzybowski, *supra* note 71 at p. 18
[86]Somek,*supra* note 11 at p.9.
[87] International Law Association, (2012), *Preliminary Report, Study Group: Principles on the Engagement of Domestic Courts with International Law,* p. 6; Antonios Tzanakopoulos was Co-Rapporteur of the Study Group.

less stringently. [88]It can be further argued that there is no such thing as monism properly called.

Dualism on the other hand has lost its relevance, firstly, as most of the common law systems that had their firm roots in the dualist model have been directly incorporating customary international law into their legal systems. Secondly, the requirement of transformation has been relaxed by the domestic courts of the dualist states with respect to few international instruments, for instance human rights and environment. The domestic courts of these dualists state have also been found giving effect to the informal international instruments. It therefore appears that it is impossible for a state in this globalizing trend to hold on strict dualism.

Many states fall along a continuum between pure monism and total dualism in their approach to international law. Both these schools have failed to capture a clear picture of the prevailing trend in the state practice through a theoretical lens. As a result of this many jurists have developed alternate theories to explain the interface between the two legal systems.

4. ALTERNATE THEORIES

4.1 Doctrine of Co-ordination

There have been some theoretical attempts to harmonize the dichotomy between monism and dualism through a third approach. This approach may be called the 'co-ordination approach' put forth by Fitzmaurice and Rousseau. The relationship between international law and municipal law is explained as,

> the entire monist dualist controversy is unreal, artificial and strictly beside the point, because it assumes something that has to exists for there to be controversy at all and which in fact does not exist - namely a common field in which the two legal orders under discussion both simultaneously have their spheres of activity.[89]

They argue that the difficulty with both monism and dualism is that these two schools of thought are based on the faulty premise that international legislation and municipal legal system have one and the same sphere of operation. In reality the two

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[88]*Ibid*., Report, p.6

[89] Malanzcuk, Peter (1997), *Akehurst's Modern Introduction to International Law*, New York: Routledge, p. 64.

systems do not conflict as systems, for 'any conflict between them in the international field would fall to be resolved by international law, because in that field international law is only supreme. If a state in its conduct, goes beyond its sphere of activity, or exceeds its competence, as delimited or determined by international law, it will internationally be guilty of illegal excess and consequently of a breach of international law"[90] It means that the domestic laws that are in conflict with international law do not get automatically abrogated.[91]

The two systems simply co-exist, but on different planes. A domestic law which conflicts with an international obligation may lead to incurring state responsibility in the international legal order, but this would have no legal relevance in the domestic legal order.[92] In this reality, states, may make efforts to realize a harmonization of their domestic legal order to that of the international community whatever the legal techniques they may employ through the monist doctrine or the dualist doctrine- in order to attain a unifies legal order throughout the international legal community.[93]

The co-ordination doctrine is not totally different from the traditional theory of dualism. Though the doctrine was formulated to provide solution from the traditional doctrines it reinstates few principles of dualism. Similar to dualism, this theory argues that the municipal law and international law are separate, independent legal orders having application in their individual different fields. The interaction between them becomes necessary for the effective implementation of international law.

4.2 Doctrine of Pluralism

Armin Von Bogdandy is the chief architect of the pluralist doctrine. He considers monism and dualism to be unsatisfactory as they are little developed and dismisses the opposing views as illogical. He opines that "monism and dualism should cease to

[90] Owada Hisashi, (2015), Problems of Interaction between the International and Domestic Legal Orders, *Asian Journal of International Law*, 5: 246-278, p. 252
[91] Brownlie Ian, (2008), *Principles of Public International Law*, New York: Oxford University Press, p.33.
[92] Owada,*supra* note 90 at p. 252
[93]*Ibid.*, p. 252

exist as doctrinal and theoretical notions for discussing relationship between international law and national law."[94]

Pluralism like dualism is based on the assertion that international law and municipal law are two separate distinct legal orders. Pluralism does not strictly separate legal orders but views that there exist interactions among them. For the interaction of the legal regimes, Bogdandy devised method of coupling i.e. coupling international law and the municipal law. This process of coupling is achieved by two doctrine: 'doctrine of direct effect and doctrine of consistent interpretation'.[95] The doctrines have their bases in constitutional law. The doctrine of consistent interpretation, which is also called as the Charming Betsy doctrine[96] after a case before United States Supreme Court, where the court held that "an act of Congress ought never to neglect the law of nations if another possible construction is available."[97] This is also known as harmonious construction doctrine. This doctrine states that while interpreting a statute if two possible constructions are available, then the court must adopt the interpretation which is in harmony with the international law, thereby avoiding the conflict between two laws.

The doctrine of direct application of international law means that international law is directly implemented into the municipal law without undergoing any transformation. The direct application of international law is manifested through the direct implementation of treaties and customary international law into the domestic legal order. The courts and other government bodies will look at the international law as a source of law like the way they look at their constitution, statutes, judicial precedent or any other instrument of domestic law.

Legal Pluralism is explained differently by other scholars. It differs from Bogdandy's conceptualization of pluralism on three grounds; firstly, it asserts the existence of plurality of legal orders, rather than duality; secondly argues for the heterarchical relationship between the legal orders by embracing the diversity; and finally, it assumes frequent interaction between overlapping legal orders rather than

[94] Bogdandy, *supra* note 79 at p. 400.
[95] *Ibid.*, p. 401.
[96] *Murray v/s The Schooner Charming Betsy* 6 U S (2) 64(1804)
[97] 6 U.S.(2 Cranch) 64, Accessed 9 March 2016 URL : http://supreme.justia.com/cases/federal/us/6/64/

the separateness of legal orders and refuses to give superiority *per se* to any of them.[98] If there is instance of conflict showing deference and opposite views, then the court has to reason and enquire whether there exists a threat to the values and principles. This judicial dialogue is termed as 'alternating irritation' that in order to be constructive neither of the legal systems should impose their own view on each other and must attempt to accommodate diversity.[99]

This theory is criticised on the ground that it fails to provide a coherent system of solving conflict among the legal orders.[100] Since the theory lacks to provide systematic channels of operation, there might be uncertainty and instability in the course of interaction among the diverse legal orders.

4.3 Doctrine of Constitutionalism

Over two decades, European constitutionalists have proposed the idea of European constitutionalism. After transcending the monist school, the constitutionalism claims to be a whole new branch within the constitutional thought. The constitutional pluralism holds that the national constitutions of the states and their European Constitution are ultimately equally self-standing sources of constitutional authority that overlap heterarchically over a territory.[101] This line of thought is extended to international law too. The constitutionalisation theory holds that international law is in the process of being constitutionalised. It proposes the transfer of the function of domestic constitutions of liberal democracies to international law in order to improve the effectiveness and fairness of the international legal order.[102] It also holds that the ultimate beneficiary of the international legal order is the individual. The advocates of constitutionalism in the global level consider that the transnational constitutionalism is institutionally located in the United Nations, its Charter functioning as a written Constitution for post-war world order. International law is protected and projected as a single juristic category for the international rules like customary international law, *jus cogens*, human rights, treaties for world order. They have special facility to

[98] Preshova, Denis (2013), Legal Pluralism: New Paradigm in the Relationship Between Legal Orders, in Marko Novakovic (eds.) *Basic Principles of Public International Law: Monism and Dualism*, Belgrade: Institute of International Politics and Economics, 288- 308, p. 299.
[99] *Ibid*, p. 301.
[100] Kaczorowska, *supra* note 34 at p. 130
[101] Jaklic, Klemen (2014), *Constitutional Pluralism in the EU*, Oxford: Oxford University Press, p. 5
[102] Kaczorowska, *supra* note 34 at p. 131

organise the international order in a constitution like way by adding coherence and integrity to the whole.[103]

Kumm while arguing for constitutionalist model for legitimizing international law outlines four essential principles.[104] The first of these is the formal principle of international legality. This principle lays out the presumption in favour of authority of international law that citizens should regards themselves as constrained by international law and set domestic legal institutions to ensure compliance with international law. The second element is the principal of jurisdictional legitimacy or subsidiarity that begins with replacing the concept of state sovereignty. The third principle of procedural legitimacy ensures adequate participation and accountability. The final element is the outcome.[105]

However, the constitutionalism may be rejected for its resemblance with the monism as both emphasise on uniformity and universality and argue for the primacy of international legal order. Since the origin of this theory was in European Constitutionalism, Joerges criticizes it as "European law is often perceived as an autonomous body of law, striving for the harmonization, and often even the uniformity, of rules. Such a perception, however, is overly simplistic and incomplete. Since the uniformity of its meaning cannot be ensured through the adoption of a common text one could argue there is no such thing as a common European law."[106] Roberts further argues that there are Belgium, Dutch, English, French, German, Italian and many other versions of European law. She adds that "in essence, there are as many European laws as there are relatively autonomous legal discourses, organized mainly along national, linguistic and cultural lines".[107] Therefore arguing for a single constitution among the diversified national constitutions may result in the under-representation of few states. This argument can be extended to the international law, that constitutionalism results in the creation of global state. The creation of global

[103] Walker, Neil. (2012), "*Constitutionalism and Pluralism in Global Context*", in Matej Avbelj and Jan Komarek (eds.) *Constitutional Pluralism in the European Union and Beyond*, Oxford, Hart Publishing Ltd., 17- 38, p. 22
[104] Kumm Mattias, (2004), The Legitimacy of International Law: A Constitutionalist Framework of Analysis, *European Journal of International Law*, 15(3): 907-931, p. 917
[105] *Ibid.*, p. 917- 927
[106] Roberts, Anthea (2011), Comparative International Law? The Role of National Courts in Creating and Enforcing International Law, *International and Comparative Law Quarterly*, 60(1): 57-92, p. 79.
[107] *Ibid*, p. 79

state on the foundations of hegemonic international legal system will further facilitate the domination over the third world.

The loss of relevance of monism and dualism is due to variety of reasons. Some of them can be discussed as follows is the changing reality in international law in that international law is now fragmented and secondly by state practice. Higgins opines that "for those who think the monist-dualist debate is passé, I also think it right that the difference in response to a clash of international law and domestic law in various domestic courts is substantially conditioned by whether the country concerned is monist or dualist in its approach."[108] She argues that the monist-dualist debate is not out-dated, but "the difference in response to a clash of international law and domestic law in various domestic courts is substantially conditioned by whether the country concerned is monist or dualist in its approach".[109] She argues that not everything is dependent upon whether a country accepts monist or dualist view, even within a given country, different courts may approach differently to the problem of the relationship between international law and national law.[110]

The distinction between monism and dualism may appear not to be helpful because for the reason that both approaches are reflected in the state practice within a domestic legal system. Despite this, theories of monism and dualism continue to occupy a predominant position in the domestic courts and tribunals as and when the dispute with foreign element arises. Irrespective of their relevance, these theories are important as an orientation of a state towards international law is reflected through the school of thought it follows.

5. PRIMACY OF LAW IN AN EVENT OF CONFLICT

In an event of conflict between international law and domestic law, the international legal order ordains prevalence of the former over latter. Partsch observes that on the international level international law is supreme and that this supremacy is valid in relation to any provision of internal law whatever its ranking in the municipal order

[108] Higgins, *supra* note 13 at p. 206
[109] Higgins Rosalyn, International Law and the Avoidance, Containment and Resolution of Disputes, Recueil Des Cours: Collected Courses of the Hague Academy of International Law 1991-V, Hague : Kluwer Academic Publishers, p. 266.
[110] *Ibid.*, p. 266

may be.[111] This principle is reflected in Article 13 of the Draft Declaration on Rights and Duties of the State submitted by the ILC to the General Assembly in 1948 states that "Every state has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitutions or its laws as an excuse not to perform this duty." [112]

The Article 27 of the Vienna Convention on Law of Treaties 1969 reiterates the text of the above provision. Within the International Law Commission, three views were taken at different times in the course of its work on the law of treaties. First view of Sir Hersch Lauterpatch was that municipal law prevailed over international law. The opposite view was taken by Sir Gerald Fitzmaurice who asserted on the supremacy of international law over municipal law. In due course, the third view emerged that international law takes precedence over municipal law unless there is a manifest violation of internal law which is invoked as a ground for invalidating the consent of a state to be bound by a treaty.[113]

It was based on a Pakistani amendment at the first session of the Vienna Conference. While introducing amendment Pakistani delegation gave reasons that "states sometimes invoked their international obligations." The purpose of the amendment by Pakistan was to curb that practice by expressly stating the principles of good faith and of the pre-eminence of international law.[114] The Venezuelan, Argentinean and Iranian delegation criticized the provision for its supremacy over the domestic laws. However, Article 27 was adopted at its 72nd meeting by 73 votes to two, with 24 abstentions.[115] The high number of abstentions reflected the hesitations of some states to recognise the supremacy of international law over municipal laws and powers. The Article 27 provides that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46".

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[111] *Ibid*., p. 372

[112] The Draft declaration was annexed to the UN General Assembly Resolution 375(IV) of 1949. It is to be noted that although the UNGA commended the Draft Declaration as a significant contribution to the progressive development and codification of international law, it never concretized into a hard law. Kaczorowska, *supra* note 34, p. 131

[113] Elias, T.O. (1974), *The Modern Law of Treaties*, Sijthoff International Publishing Company: Netherland, p. 45.

[114] *Ibid.*, p. 46.

[115] Coasta Rica and Guatemala have excluded the application of Article 27 to their Constitution. Villiger Mark E.,(2009), *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden: Martinus Nijhoff Publishers, p. 371.

The exception to the compliance is only allowed when there is an internal provision that is of fundamental importance. Article 46 of the VLCT 1969 states that (1) A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. (2) A violation is manifest if it would be objectively evident o any state conducting itself in the matter in accordance with normal practice in good faith.

By the very existence of Article 27 of the VCLT 1969, it can be argued that the international legal order confirms to the dualist and pluralist understanding of international law. It considers the two legal systems totally separate and distinct from each other. This provision acknowledges the autonomy of the national legal system thereby an international norm cannot as such quash or invalidate a national piece of legislation contrary to the international rules. If inconsistence arises, international law can only enjoin a state to change its legislation and it will be for such state to decide whether or not to comply and in the affirmative through its domestic mechanism.[116] If a treaty is violated it would be a violation of an international obligation unless it is shown that there existed a manifest violation of a rule of internal law of fundamental importance.[117]

The principle of Article 27 is iterated by international court and tribunals in various instances. In Alabama Claims Arbitration,[118] the US sought damages from the Britain for the damages caused by the ship Alabama which the Britain had claimed neutral. The US claimed that the United Kingdom had breached its neutrality and violated the provision of Treaty of Washington that had stipulated the rules of neutrality. Though Britain had declared neutrality, it allowed the building of ship for the private buyers for the purpose of war. Britain referred to the English law that it could not regulate the conduct of the private contracts. The arbitral award held that

> the government of Her Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it

[116] Cassese, *supra* note 36 at p. 189

[117] Varma, Prem (1975), "Position Relating to Treaties Under the Constitution of India" *Journal of the Indian Law Institute*, 17(1): 113-130, p. 130; Article 6 of VLCT.

[118] *United States of America vs. United Kingdom*, Accessed 20 January 2016, URL: legal.un.org/riaa/cases/vol_XXIX/125-134.pdf

> possessed. It is plain that to satisfy the exigency of due diligence and to escape liability, a neutral government must take care…that its municipal law shall prohibit acts contravening neutrality.[119]

In the case Treatment of Polish Nationals and Other Persons,[120] the Poland sought from the High Commissioner a decision regarding unfavourable treatment of Polish nationals in Danzig, which was a free state formed by Treaty of Versailles 1919. This case was referred to the PCIJ by the League for advisory opinion. The PCIJ held that,

> A state cannot rely as against another state, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand, a state cannot adduce as against another state its own constitution with a view to evading obligations incumbent upon it under international law or treaties in forces. Applying these principles to the present case, it results that the question of the treatment of Polish nations or other persons of Polish origin or speech must be settled exclusively on the basis of the rules of international law and the treaty provisions in force between Poland and Danzig.[121]

However, the recent state practice has revealed that the municipal norm is given prevalence over the international norm. The US decisions in *La Grand, Avena* and *Medellin* cases hold a position opposite to Article 27 of VCLT 1969. In these cases, the US Courts exhibited reluctance in giving effect to the Vienna Convention on Consular Rights though being a state party to the Convention and the Optional Protocol (until *Medellin's* case).The *La Grand case (Germany vs. United States of America)*[122] was the proceeding that was filed by Germany against the US before I.C.J. The facts of the case are that the La Grand brothers, German nations were convicted for the offence of armed robbery and murder. The US Court had passed execution orders against them. The German government raised the issue of non-compliance with right to consular access by US thereby violation of Vienna Convention on Consular Rights. It sought the intervention of I.C.J. after one of the La Grand brothers was executed. The I.C.J. issued the provisional measures directing the

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[119] The ship Enrica, built in Birkenhead was designed as a warship. After she left the UK and sailed to the Azores, her name was changed to Alabama and was fitted with guns and loaded with ammunitions. Kaczorowska,*supra* note 34, p. 132

[120]*Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Accessed 17 January 2016, URL: www.icj-cij.org/pcij/serie_AB/AB_44/01/Traitment_nationaux_polonais_Avis_consuiltatif.pdf

[121] *Ibid*., p. 24

[122] *Germany vs. United States of America*, Accessed 21 January 2016, URL: www.icj-cij.org/docket/files/104/7736.pdf

US to take required measures to stay the execution of the convict until its decision. Despite the I.C.J. ruling, the US authorities executed the convict. The US questioned the jurisdiction of the ICJ that it cannot play the role of ultimate court of appeal in the national proceedings. The Court ruled that it had jurisdiction[123]based on Article 1 of the Optional Protocol to the Vienna Convention concerning the Compulsory Settlement of Disputes 1963[124]. The Court further held,

> there exists a violation of an international obligation. If necessary, it can hold that a domestic law has been the cause of this. But it has not found that a US law whether substantive or procedural in character is inherently inconsistent with the obligation undertaken by the US in the Vienna Convention. The case of violation in the present case was caused by the circumstance in which the procedural default rule was applied, and not by the rule as such.[125]

The Court holding US liable for international wrongful acts sought assurance that US will comply with the international obligations. It can be inferred from the case that neither a rule nor a procedure arising from a rule can be claimed as an excuse for non- compliance with the international law.

Similar to the *La Grand* is the *Avena* case (*Mexico vs. United States of America*)[126], where the US was again found liable for not complying with the Vienna Convention on Consular Rights. The Mexican government instituted proceedings against US arguing that US had failed to provide consular access to 54 Mexican nations. The US had convicted and sentences all 54 nationals. The Court issued provisional measures concerning three out of 54 cases as they faced the risk of execution in short period. It order for the stay of execution pending the final judgement.[127] The Court in its final judgement held that the US had breached its obligations under the Vienna Convention by not informing the rights under the convention and depriving the convicts from the consular access. It held that the US must by its own choice of means review and reconsider the convictions and sentences of the convicts. The court held that the "clemency process as currently practiced

[123] *Ibid*., para 36
[124] Article 1 of Optional Protocol states that "Disputes arising out of the interpretation or the application of the Convention shall lie within the compulsory jurisdiction of the International court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."
[125] *La Grand supra* note 122, p. 513, para 125
[126] *Mexico vs. United States of America,* Accessed on 22 January 2016, URL: www.icj-cji.org/docket/files/128/8188.pdf
[127] *Ibid*., p. 42, para 59

within the US does not appear to meet the requirement and that it is therefore not sufficient in itself to serve as an appropriate means of review and reconsideration".[128] The Court held that ruling in Avena has its application not just to the Mexican nations but to all the other foreign nationals.

The other case that reignited the monist-dualist debate is *Medellin v. Texas.*[129] In this case, Medellin, a Mexican nation was convicted of rape and murder in Texas. He appealed to the Supreme Court that the Texas authorities have failed to inform him of his right of consular access and such detention was unlawful under the Vienna Convention on Consular Rights. The petitioner brought a second appeal after the President of US then issued a memorandum (based on the I.C.J. decision on Avena) directing the courts to review the orders of conviction pertaining to the cases that involved foreign nations consular relations. During the proceedings of this case, two issues surface; whether the I.C.J. decisions is to be observed by the US courts, and if the US courts were to give effect to the memorandum issued by the President to honour treaties. The Court answered in negation that the I.C.J. judgement are no self-executor in nature and hence they need be given effect absence senate authorization. The memorandum issued by the President was merely an attempt of enforcement of ICJ decision which in not self-executory by nature judgements are not self-executing.

The American position is well explained as "the Supreme Court remains resistant to law which emanates from outside the American democratic process, or which lacks a clear domestic imprimatur as applicable US law."[130] The US commitments towards international is criticised to swing between the self-executory and non self-executory international instruments. The US Constitution accords international law status on par with its domestic legislations allowing the direct operation international instrument in its domestic legal system.[131] However, the US courts are found avoiding the international obligation by categorizing them into the non self-executory commitments requiring a sanction from the senate. They are adopting pick and choose approach towards international law. Although a formally

[128] *Ibid*., p. 58, para 143
[129] MANU/USSC/0067/2008
[130] Note, (2016), "Constitutional Courts and International Law: Revisiting the Transatlantic Divide", *Harvard Law Review*, 129: 1362- 1383, p. 1366.
[131] Article VI of the U.S. Constitution reads "that all the treaties made or which shall be made under the Authority of the US, shall be supreme Law of the Land; and the Judges in every States shall be bound thereby, anything in the constitution or laws of state to the contrary notwithstanding."

monist, American system has distinguished itself over the last years because of its material or jurisprudential, dualism resulting from national judge's reluctance to incorporate international law into domestic law. This tendency has been called nationalist.[132] Attitude of US towards international law is of exceptionalism, unilateralism and general distrust of international law and institutions.[133]

The debate over primacy of laws surfaced again in the *Kadi* case[134], when the European Court gave precedence to the EU law over the UN Security Council Resolution. In this case, EU was criticised for adopting a dualist approach. During 1999, the UNSC adopted resolutions requiring the member states to freeze the funds and financial resources of the people who were associated with Osama bi Laden. As a result of this UN Sanctions Committee added Yasin Kadi and the Barakaat International Foundation to the list whose assets were to be freezed. Kadi and the Foundation brought actions seeking the annulment of the EU Regulation 881/2009 which implemented UNSC measures, arguing that it breached their fundamental rights under EU law to a fair hearing, use of property and effective judicial review. The Court of First Instance of the European Communities (CFI) dismissed both actions reasoning that it lacked jurisdiction to review the EU regulation. However, the Court checked if it violated the *jus cogens* and since the resolution did not violate any of the pre-emptory norm, it dismissed the action. On appeal ECJ rejected the CFI's ruling and held that the court has the jurisdiction to lawfulness of an international obligation when such obligation breaches the European Treaty's foundational principles like that of fundamental rights. The ECJ ultimately annulled the Regulation 881/2002 on two grounds; firstly the plaintiff's rights to be heard and to secure judicial review of their rights were patently not respected and secondly, it found that the Regulation unjustifiably restricted Kadi's right to property. It observed that the law which are inconsistent with the fundamental principle of EU will be invalid.

[132] Boudouhi, Saida El (2015), National Judge as an Ordinary Judge of International Law? Invocability of Treaty Law in National Courts, *Leiden Journal of International Law*, 28:283-301, p. 291.
[133] Note, *supra* note 130 at p. 1362
[134] *Kadi P. and Al Barakaat International Foundation vs. Council and Commission* (2008) ECR I-6351, Accessed 25 January 2016, URL: https://www.asil.org/insights/volume/12/issue/22/kadi-al-barakaat-v-council-eu-ec-commission-european-court-justice.

This case received a mixed response from the international community.[135] The human rights internationalist applauded the judgement as it protected the human rights while the monist expressed their discontent. It was criticised for adopting dualist stance and being unfaithful to the international law.[136] However, it is important to note from the judgement that the ECJ gave precedence to its EU law only in situations when there was violation of fundamental rights. It can thereby be argued that if there was no threat to the fundamental principle of EU law like human rights, the UNSC resolution would continue in its operation. The European Court of Justice again in *Mox Plant* case[137] held that EU as a sovereign and its laws can override any other legal structure.

In the Indian practice, the domestic courts have given prevalence to municipal laws over the international laws in the event of conflict. However, the Supreme Court has encouraged harmonious construction than the primacy of municipal over international law. For instance, in *Additional District Magistrate, Jabalpur vs. S. Shivakant Shukla,*[138]

> Equally well established is the rule of construction that if there be a conflict between the municipal law on one side and the international law or the provisions of any treaty obligations on the other, the courts would give effect to municipal law. If however, two constructions of the municipal law are possible. The court should lean in favour of adopting such construction as would make the provisions of the municipal law to the in harmony with the international law or treaty obligations.[139]

Though international legal order holds the primacy of international law over the domestic laws, the state practice holds an opposite position. The important observation is that the first world is offering resistance to its very own modern international law. They are offering selective and sceptic deference.[140] The American and EU position is that they are reverting to conservative dualist position while urging the third world to adopt a liberal approach.

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[135] Note, *supra* note 130 at p. 1373.
[136] Kokott Juliane and Sobotta Christoph, (2012), The Kadi Case- Constitutional Core Values and International Law-Finding the Balance, European Journal of International Law, 23(4): 1015-1024.
[137] Mox Plant case, Accessed 22 July 2016, URL: www.haguejusticeportal.net/index.php?id=6164
[138] AIR 1976 SC 1207
[139] *Ibid.*, p. 1259,para 169
[140] Singh, *supra* note 5 at p. 96

6. CONCLUSION

This chapter attempts to find a suitable model for the third world countries after a detailed discussion on the theoretical debate and selected state practices. The doctrine of direct effect of a treaty is where a treaty becomes applicable in the municipal sphere without undergoing the process of transformation into natural law. The proponents of direct application advance reasons for such an application being advantageous: firstly, the effectiveness of international law can be enhanced by allowing direct application as the likelihood of national authorities refusing or neglecting to provide transformation to the treaty is reduced; secondly, direct application assures that all the parties will carry out their obligations; and finally, it assures the rights of an individual, as they can base their claims on treaty norms without any need for a government's intervention or an act of transformation.[141].

Bogdandy's pluralism also like monism aims at harmonization of the municipal law and international law for effective implementation of international law. Bogdandy's internationalization of constitutional law into a new form called pluralism is old wine in a new bottle and the Third World's take on pluralism could be for the better or worse.[142] The idea of constitutionalism aims at establishing an international order with a sole constitution. The states are expected to relinquish their sovereignty and embrace internationalism. The international norms will be applicable like any municipal law in the domestic legal order.

The chapter argues for dualism as a far suitable model than monism and its direct effect incorporation doctrine. The act of transformation and the dualist model is advantageous for the third world states for the following reasons namely; firstly dualism helps in self-preservation of the newer and younger states by minimising interference of the powerful ones; secondly treaty while being transformed into a local statute may be tailored according to the requirement and usage of an implementing state; thirdly the autonomy exists with the Parliament as to the usage of the terminology while structuring the statute like some of the ambiguity may be elaborated by the legislation while making the statute or legislator may wish to limit

[141] Jackson, supra note 44 at p. 322.
[142] *Singh, Prabhakar* (2010),"*Why Wield Constitutions to Arrest International Law?*", *Asian Yearbook of International Law*, 16: 87- 128

the application to portions of the treaties or apply it in the ways that may not fully confirm to the international obligation;[143] fourthly the Parliament may delay the transformation of treaty as per the needs of the state and finally the policy space is retained at domestic level which is of great importance for a developing country since much of its voice will be dominated by the powerful state while formation of treaty and like instruments. Most of the socialist states and the third world countries oppose monism and reaffirm the state will through dualism. Dualism is termed as an infectious disease[144] by few scholars. The role of power in the application of international law is directly proportional to the growth of scepticism among the weaker countries.[145] As a result, pluralism was coined a new theory where doctrine of incorporation is couched in other terms and pushed towards third world countries.

The directly applicability affects the countries whose constitutions provide for very little democratic participation in the treaty making process. Many constitutions do not provide a formal role to the Parliament or structuring the government and the control over foreign relations is held by certain elites.[146] When the treaty negotiations do not follow the democratic process, the transformation serves as an important democratic check on the treaty making process.[147]There is also a chance that the legislature may delay the transformation but it is not the case when the treaties are directly implemented, they come into operation as soon as they are concluded. The doctrine of direct effect is not favourable to the developing countries, as they are not democratically and equally represented during treaty making. The treaties are a compromise and are always dominated by the powerful nations. By allowing direct effect, a state loses its policy space.

Hence it can be conclusively argued that neither monism nor any alternate theory protects the weaker states from the effects of hegemonic international law.[148] Singh describes pluralism as internationalization of constitutional law into a new form called pluralism as an old wine in a new bottle and the Third World's take on

[143] Jackson *supra* note 44 at p. 325
[144] Gaja Giorgio (2007), "Dualism: A Review" in Janne Nijman and Andre Nollkeamper (eds.) *New Perspectives on the Divide between National and International Law*, New York: Oxford University Press, p. 52
[145] Singh, *supra* note 5 at p.96
[146]Jackson *supra* note 44 at p. 323
[147] *Ibid.*, p. 324
[148]*Ibid.*, p. 325

pluralism could be for the better or worse.[149] Somek argues that pluralism does not really offer any alternative than monism.[150] The act of transformation is the only method by which a state can protect its interest by utilizing the policy space to customise the laws in accordance to its needs. The weaker states rather than discussing the relevance of monism-dualism have to revert to the foundations of dualism where the sovereignty of the states is protected. The powerful states like US in *Medellin* case and the European Community in *Kadi* case have demonstrated their faith in the dualism. Such being the case, the weaker states have to resist the diversion to monist or monist-like (alternate) theories and reaffirm their belief in dualism.

[149] *Singh, supra* note 142 at p. 128.
[150] Somek, *supra* note 11.

CHAPTER-3

INTERNATIONAL LAW IN EARLY INDEPENDENT INDIA: EFFECTS OF COLONIAL RULE AND PARTITION

1. INTRODUCTION

India inherited the dualist model from the British practice. To comprehend the relationship between Indian legal system and international law, it is important to venture into the colonial history when India undertook engagements with international law as a British colony. The intention of such historical survey is to analyse India's interaction with international law during the period 1919-1947. This study is instrumental in determining the influence of colonial rule on the contemporary Indian practice. As a British colony, British India undertook international obligations in the form of international treaties and customary international law in a unique manner. The capacity to enter into international treaties and the assignment of rights and obligations were determinant of the international personality she enjoyed. British India was accorded international personality by making it an original party to various conventions and international organisations.

The current chapter analyses the international personality of India in the period 1919-1947 and examines the validity of the international obligations it undertook six different segments. The first segment is the current introductory part that introduces the theme and sections of the chapter. The second segment deals with the origin and nature international legal personality of British India and examines the capacity of India as a colony to enter into international instruments. The treaty making capacity in British India, is studied under two divisions; firstly, the treaty making capacity of British India pursuant to its acquired international legal personality; and secondly, the legal capacity of the native states under the suzerainty of British Empire. The third part examines the legal status of India (pre-independent) as an original member of international organizations. The fourth segment studies the partition of British India into Dominion of India and Dominion of Pakistan. It examines the partition of British India and its succession into international rights and obligations in the light of various theories of state succession. It argues that the partition of British India into two new Dominions was erroneous construed as

secession, while it was an explicit case of dismemberment. In the backdrop of this argument, a brief detour is taken at the very outset into the law on state succession and the theories of continuity and non-continuity of rights and obligations. The fifth segment of the chapter focuses on Article 372 of the Indian Constitution, which gives pre-1950 international obligations continuity to be a part Indian municipal law. The validity of the colonial instruments and their continued operation in the Indian legal system is interrogated. This segment also highlights the ceaseless reference to such colonial instruments by the Indian judiciary in their decisions. The clean slate theory is examined against Article 372 for its effectiveness and appropriateness as a model for the newly formed states. The final segment forms the conclusion that highlights the findings of the present chapter.

2. INTERNATIONAL LAW IN PRE- INDEPENDENT INDIA

This section traces the origin of India's international legal personality and describes the circumstances under which the British Crown vested India with such capacity. It was during 1919-1947 that India was presumed to have external sovereignty and capacity to enter into international treaties and agreements, pursuant to her legal personality. Nonetheless, it was considered as an anomaly since India had neither acquired Dominion status nor full independence. The capacity of a colony to enter into international instruments and the legitimacy of such instruments calls for a debate. Despite existence of irregularity, independent India after independence was proclaimed to continue international legal personality of British India thereby a state party to 627 treaties and member of 51 international organizations.

2.1. India's International Legal Personality

The international legal personality came to be developed as a doctrine and practice in the late 19th and early 20th centuries. The notion of international personality often came to be regarded as synonymous with the statehood.[1] In international law, the rights and obligations can be entailed upon a state depending upon the international personality it enjoys. Gerald Fitzmaurice opined "the essential factor that distinguishes international states from entities is not because of the mere fact that

[1]Crawford, James. (2009), "International Law in the House of Lords and the High Court of Australia 1996-2008: A Comparison", *Australian Book of International Law*, 28: 1-27, p. 29.

these latter entities are not independent, but the fact that they lack that capacity to enter into treaty or other international relationship which is possessed by all international persons, including international organizations".[2] But Fitzmaurice does not explain how this capacity of an 'international state' to enter into treaty arises, or how an entity becomes an 'international person'.

Lissitzyn observes that "international law does not contain any objective criteria of international personality, the very act or practice of entering into the international agreements is sometimes the only test that can be applied to determine whether an entity has such a personality".[3]Schwarzenberger defines international personality as "the capacity to be a bearer of rights and duties under international law. An intermediate state on the road from dependence to independence may also lead to a stage of limited international personality."[4]

The capacity "of entering into international engagements is an attribute of sovereignty".[5] It is observed in the international community that, a political entity cannot possess the power of entering into international agreements unless it has attained a fair measure of self-government in internal and external affairs, and succeeded in winning for itself a position in the Family of Nations as a distinct entity.[6] Therefore, an entity without formal sovereignty in the external and internal affair possessing a capacity to become a party to international agreements and organizations is an apparent irregularity. For instance, United States memorandum pointed out, that the Soviet Constitution did not permit the Soviet Republics 'to control their own foreign policy or affairs' and they were accordingly 'not sovereign states under international practice'. This analogy with India was rejected on the grounds that 'India has for some period past been gradually developing international relations, and

[2] Ghosh R.C. (1961), *Treaties and Federal Constitutions: Their Impact*, Calcutta: World Press Private Ltd, p.1.
[3] Poulose , T.T. (1970), "India as an Anomalous International Person (1919-1947)", *British Yearbook of International Law*, 44: p. 201
[4] Schwarzenberger (1967), *A Manual of International Law*, Michigan: Stevens Publishers, p. 61
[5] P.C.I.J. in the Wimbledon case (P.C.I.J., Ser.A, No.1 (1923), p. 25; Accessed on 12 March 2015, URL: legal.un.org/PCIJ/documents/English/5_e.pdf.
[6] Ghosh, *supra* note 2 at p.21.

is generally regarded as having more of the attributes of separate nationhood that the Soviet Republics.[7]

India's position before independence in international law can be understood by taking into account the sovereignty attributed to India by Britain. India began to participate in the international conferences and negotiations after the Imperial War Conference. This special position of India was first conceded by the Imperial War Conference in 1917. The Conference promised to grant Dominion status to Canada, Australia, New Zealand, South Africa and the Irish Free State under the Statute of West Minister. Keith describes the Dominion status was in furtherance of the demand by few colonies for the assistance, mostly in terms of man power during the Great War.[8] The Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926 declared that "the Dominions are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."[9]

The Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926 that described the status of Great Britain and the Dominions, excluded India from the operation of the agreement enshrined in it. British India was not a Dominion and was not included in the operative parts of the 1926 Report.[10] The Report merely referred to the 'Special Position of India' as defined in 1917 and 1919.[11] The 1919 India Act[12] had neither mention of any special status nor sovereignty that was to be conferred by Imperial War Conference. India's position

[7] Byelorussia and Ukraine were not granted international status at the San Francisco Conference; Crawford, *supra* note 1 at p. 178.

[8] Due to the military contributions during the war, the leaders of the Principle Allied and Associated Powers were prepared to give the Dominions and India a special status at the Peace Conference and ultimately, to admit them as original members of the League of Nations.

[9] Keith, A.B. (1990), *A Constitutional History of India 1600-1935*, New Delhi: Low Price Publication, p. 468. The Dominion status was first discussed in the Colonial Conference of 1907 upon the self-governing colonies to mark them out from the rest of the empire. The Imperial Conference of 1911 insisted that the Dominions should continue to be consulted in all matters of foreign policy affecting them and also should be given opportunity to associate themselves with the UK in determining the broad lines of British foreign policy.

[10] Agarwal, H.O. (1980), *State Succession: A Study of Indian Cases*, Allahabad: Allahabad Law Agency, p. 27

[11] Crawford, *supra* note 1 at p.367.

[12] Montagu-Chelmsford Reforms and Government of India Act 1919.

was not comparable to the other self-governing Dominions as Indian status was referred by the Government of India Act 1919 as an integral part of the empire. It affirmed the responsibility of the Imperial Parliament for the welfare and advancement of the Indian people. This status continued till India gained independence. It was only in 1947 that India was considered as Dominion of India.

During the partition proceeding, Lord Listowel at a press conference in London on July 4, 1947 said "The name India has certain practical advantages, as the name has been used in treaties and international documents. Retaining the name India, will make it easier for the Dominion to continue as a member of the United Nations".[13] The Dominion of India continuing as India was very awkwardly justified by the Governor General as "the fear was that a country might borrow money much in excess of her needs, then go through a formal partition and claim that neither part of divided country was responsible for the debts incurred prior to the partition".[14]

In the course of discussion of the Indian Independence Bill in the House of Commons, the Government spokesman expressed the view that,

> the question of international status of two dominions is not one which will be finally determined by the terms of this Bill. It is a matter for members of the U.N.O. and other foreign states as much as for His Majesty's Government (H.M.G) in U.K. Our own view is that the new Dominion of India continues the international personality of existing India and that she will succeed as matter of International Law to membership of the U.N.O, which existing India enjoys as an original signatory of the San Francisco Charter. Similarly the Representatives of the Dominion will in our view be entitled to the membership of existing international organisations and specialised agencies in which India has hitherto participated.[15]

It is noteworthy, that the Indian National Congress also agreed to the proposition of the Crown regarding the continuity of international legal personality. Nehru "both from a practical and legal point of view India as an entity continued to exist, except that certain provinces, and parts of certain provinces now sought to secede. The seceding areas were free to have any relation they like with foreign powers. The Government of India was intact."[16]

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[13] Poulouse T.T.,(1974), *Succession in International Law : Study of India, Pakistan, Ceylon and Burma*, New Delhi: Orient Longman, p. 13
[14] *Ibid.*, p.13
[15] Menon, V.P. (1957), *The Transfer of Power In India*, Chennai: Orient Longman, p.405
[16] Agarwal, H.O., *supra* note 10 at p. 35-36.

After adoption of the Act, a Partition Council was set up to deal with division of assets, liabilities and other issues. An Expert Committee on Foreign Relations was established by the Partition Council to examine the juridical position of the two dominions. The Committee justified its position on the international legal personality of India. In support of the continuing international legal personality, it listed out recommendations as,

i. Indian Independence Act brings out the territories under His Majesty to be included in British India. This establishes identity of India.

ii. three quarters of the territory will still be comprised in the remainder along with the Capital of the State.

iii. the partition is not there result of any revolution or the over thrown of a government for India to extinguish her international personality.

iv. Though His Majesty's Government considered that Dominion of India continued the international personality of British India, the decision was left to the international organizations to make.[17]

It is however important to highlight that in a non-unanimous and a separate opinion, Mohammad Ali, a representative of Pakistan in the Steering Committee as argued that "the present Government of India will disappear altogether as an entity and will be succeeded by two independent Dominion on equal international status; both of whom will be eligible to lay claims to the rights and obligation of this present Government of India."

One of the reasons stated by the Crown for continuance of international personality is that India is a state party to numerous international agreements and original member to international organizations and hence India has to continue the international legal personality it enjoyed before independence. The justification of British India enjoying the international legal personality during 1919-1947 is based on the faulty premises. India never had Dominion status or external sovereignty to participate in the international affairs. Hence all the international obligations incurred till 1947 in form of international agreements or membership to international

[17] *Ibid.,* p. 33-34.

organizations suffer from the patent irregularity. This being the case, the decision of the British Crown and the reasoning of the UN to confer former international legal personality on newly independent India is completely erroneous.

2.2. Treaty Making Capacity of India under the British Rule

Treaty making capacity is vested with an entity when it enjoys international personality. Schwarzenberger views that states which are heading toward independence enjoy the limited personality. There were series of discussion on the treaty making capacity by I.L.C. While discussing the Draft Articles on Law of Treaties particularly the Articles on the treaty making capacity, some state suggested that dependent states and such other entities must be empowered to conclude treaties. The representative from United States noted that "it would be paradoxical if at the present time areas approaching independence could not be encouraged by being entrusted with authority to conclude agreements in their own names".[18] However, the Special Rapporteur on Law of Treaties stated in 1950 and 1956 held to the contrary. Brierly, the first Special Rapporteur commenting on the term 'state' in the Draft Articles on the Law of Treaties observed that "the term "state" would clearly apply to all members of the United Nations or specialised agencies and all the parties to the Statute of the International Court of Justice. It would also apply to the Vatican City States. But it would not apply to such entities as cantons provinces of a federal state completely lacking an international personality".[19] The third Special Rapporteur of Law of Treaties in 1956, Gerald Fitzmaurice stated that "the crux of the problem was the possession of treaty making capacity. This involved international personality in the sense that all entities having treaty-making capacity necessarily had international personality. On the other hand, it did not follow that all international persons had treaty making capacity."[20] He also viewed that "semi sovereign or protected states can be parties to the treaties while at the same time bringing out the limitations on, and modalities of this position. Apart from international organisations, only states can be parties to the treaties; and only those entities are states that are capable as such, of

[18] Poulouse, *supra* note 3 at p. 203
[19] Report on Draft Articles on Law of Treaties, (1950), U.N. Document A/CN. 4/23, Yearbook of the International Law Commission, II, p.229, para 37.
[20] Poulouse, *supra* note 3 at p. 203

being bound by a treaty. For this reason a constituent state of a federation can never be a state internationally or, as such, party to a treaty".[21]

The final Special Rapporteur Humphery Waldock, took a slightly lenient view on the capacity of the dependent states to enter in the treaties and held that the Article on the capacity of the parties to enter into treaties shall include a provision recognising the possibility of the dependent States becoming parties to the treaties.[22] Few members expressed that this provision would encourage the states which are emerging to be independent to actively participate in the treaty formulation, where as other members dissented stating that this provision accepts and endorses the existence of colonial rule. However the position of the dependent states to make treaties remained unanswered as the Vienna Convention on Law of Treaties 1969, applied to the treaties between the states.[23] Under this Convention, only the states possess the capacity to enter into treaties.[24] The omission of the non-state entities and dependent States from the Convention leaves open the question pertaining to their capacity in general international law.

The above analysis shows that there has been adequate discussion on the capacity of the dependent and independent states in treaty making. Both of them can be distinguished from each other by the rights they enjoy and the functions which they perform. There is limitation on the part of the dependent state in treaty making and if such a state participates in treaty making, it leads to an anomaly. "India's position from 1919 - 1947 was that of an anomalous international person".[25]

2.2.1. Treaties of British India

India did not even possess outwardly the attributes of sovereignty, for it had no foreign policy and, in that respect, was legally, constitutionally subject to British control. It did not enjoy the right of independent action even in matters of intra-imperial policy and relations with the trans-Himalayan states and

[21] *Law of Treaties*, (1956), U.N. Document A/CN.4/101, Yearbook of International Law Commission, II: p.118, para 11.
[22] *Report on Law of Treaties*, (1962), U.N. Doc A/CN/144, Yearbook of International Law Commission, II: p. 36, para 3
[23] Article 1of Vienna Convention on Law of Treaties 1969.
[24] Article 6 of VCLT 1969, states that "Every State possesses capacity to conclude treaties".
[25] Poulouse, *supra* note 3, p. 210

Afghanistan.[26]International law has always been associated with process of excluding certain entities from statehood. Colonization was justified by the fact that non-Europeans political entities did not satisfy the demands of sovereignty and could not be expected to abide by the rules of international law. Megret observes that "the world of states has perhaps always been defined by an 'other' that is incapable or unworthy of sovereignty."[27] Poulose describes treaty making capacity of India as,

> The year 1919 was the critical period when India's international personality emerged. India acquired treaty making capacity in 1919 by becoming party to the Treaty of Versailles and by attaining the membership to the international organisations representing a distinct international personality. This is considered as the critical period of India's succession to international rights and obligations, although no inheritance agreement was concluded to between Great Britain and India.[28]

The India Office stated in its Memorandum submitted to the Indian Statutory Commission that "it must be emphasized that the grant of an international status to India before it was fully autonomous even in her internal affairs has resulted in a highly situation. The new status cannot by any process of reason be harmonised with the constitutional relations between India and the British Government. The precise implications of the change were not at the time fully realised".[29] The implication favoured a treaty-making capacity in the Central Government; but since treaty-making remained a Crown prerogative, specific delegation would in each instance have been required from the Crown.

The Government of India Act 1935 did not improve India's external position any further. The Foreign and Political Department which was functioning in accordance with the Act of 1919 was renamed as External Affairs Department and the

[26] Section 11 of the Government of India Act 1935 assigned to the Governor-General the function of conducting external affairs and this function was to be exercised by him in his discretion. Section 14(1) provided that the Governor-General was required to act in his discretion he shall be under the general control of and comply with such particular directions if any, as any from time to time be given to him by the Secretary of State" in Hasan, Zubeida (1965), "The International Status of Pakistan", *Pakistan Horizon*, 18(1): 45-55, p. 50.

[27] Megret Frederic, (2012), International Law as Law in James Crawford and Martti Koskenniemi (eds.) *Cambridge Companion to International Law*, London :Cambridge University Press, 64- 92, p. 65

[28] Poulouse, *supra* note 13 at p. 61

[29] Ghosh, *supra* note 2 at p. 19.

Department of Indian Overseas.[30] It was separated from the Government of India's Secretariat's control to be directly under the control of the Crown.[31]

From 1919, treaties were concluded on behalf of India by a representative of Government of India or by representative of British Crown. David Hunter Miller describes it as "an anomaly of anomalies". By the time India evolved to a perfect state in 1947, there were about as 627 treaties, conventions, agreements etc., in the name of India and was member of 51 international organizations. Ghosh explains the subject of treaties as governed partly by international and partly by municipal law. In his words "municipal law determines the competence of the government of a state that is of its treaty-making organ or organs, the procedure to be followed by them in the making of treaties, and the effects of treaties upon persons within its allegiance. International law determines the treaty-making capacity of states as well as the validity, interpretation and enforcement of treaties made by them".[32] He further argues that "The difference between the treaty-making capacity of the State as an international person and the competence of its Government under municipal law becomes further clear when it is realized that in the absence of the former the latter has no substance at all".[33]

Among 627 treaties in force in 1947, three had been concluded before 18th century, 270 treaties dated from 19th and early 20th century and more than 350 were treaties affecting India concluded after 1919.[34] Majority of the treaties affecting both Dominions were treaties applying automatically or by extension to British India as part of the colonial territory of UK.

The list of 627 treaties was not an exhaustive list, as many treaties were not included. For instance, the treaty between the Portugal and the Marathas was referred by ICJ in the Right of Passage Case. The ICJ upheld the succession of British India and subsequently by India to this treaty though it was not included in the list. The list

[30] This Department came to be known as Commonwealth Relations Department after 1944.
[31] Agarwal, *supra* note 10 at p. 28
[32] Ghosh, *supra* note 2 at p. 5.
[33] Ibid, p. 31
[34] International Law Association (1965), Report on the Effect of Independence on Treaties: A Handbook, Committee on State Succession to Treaties and other Governmental Obligations, London: Stevens and Sons, p.36.

also did not cover the treaties of the princely states that subsisted till 1947.[35] Only the treaties during the British Period found their place in the list of 627 treaties. There is no mention to the treaties made by the pre-British sovereigns and India's succession to such instruments.

India succeeded to various human right conventions, trade agreements, Hague Conventions by the virtue of the devolution agreement. However, India's approach was selective presumably to show that it is not fettered by treaties of its former political superior and acts whenever the occasion arises in the exercise of its sovereign authority.[36]

The treaties before independences could be divided into two groups: the imperial treaties which were made prior to 1919 which were deemed to devolve on India as the successor states in 1919 and the India treaties which were concluded in India's name.[37] The treaties which were specifically concluded for India as a separate international person had to continue binding India even after its political independence. International agreements concluded in the name of India fell into three categories

(a) Obligations accepted by India as a member of the League of Nations.

(b) Provisions of various bilateral and multilateral treaties and conventions to which India is a party.

(c) Commercial and similar treaties concluded by the United Kingdom with foreign countries to which India was a separate signatory or to which she has subsequently acceded.[38]

As early as 1883, India gained the right of separate accession to and withdrawal from commercial treaties, although the officers who participated in their negotiation remained responsible to the British Cabinet through the Governor-

[35] Ibid., p. 92.
[36] Poulose, *supra* note 13 at p. 68
[37] *Ibid.*, p. 62
[38] Rau B.N. (1960), *India's Constitution in the Making*, Chennai: Orient Longman, p. 417

General, unlike the representatives of the Dominions who were responsible to their own legislatures.[39]

These are some of the treaties which are binding on India as the intention of the Crown to conclude those treaties in the name of India was to make them binding even after formal independence. The Imperials treaties, the ones concluded before 1919 are also binding independence as they were binding on British India for about two decades i.e. from 1919 to 1947. The choice was not given to India to repudiate any of the treaties if she wanted to after her independence.

On separation of Pakistan from India, the treaties were apportioned between the two countries on a parent-successor state basis.[40]Agreement that gave effect to Indian Independence (International Arrangements) Order 1947 was based upon the territorial application theory.[41] The Governor- General as per Section 9 of the Indian Independence Act 1947, promulgated many ordinances to pass the rights and obligations of British India to the new Dominions. One of orders was Indian Independence (Rights, Property and Liabilities) Order 1947 that was promulgated on 14 August 1947 by the governor general in order to distribute rights properties and liabilities to the new dominion. Another order, the Indian Independence (International Arrangements) Order 1947 apportioned the rights and obligations arising from international agreements and treaties.

The Expert Committee on Foreign Relations classified treaties and agreements into three categories,

1. Those which are of exclusive interest to India
2. Those which are of exclusive interest to Pakistan
3. Those which are of common interest to both the countries.[42]

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[39] O'Connell, D. P. (1967), *StateSuccession in Municipal Law and International Law*, London: Cambridge , p. 50.
[40] *Ibid.*, p. 63
[41] Vallat, F. A. (1955), Some aspects of the Law of State Succession, *Transactions of the Grotius Society, Problems of Public and Private International Law*, Transactions for the Year 1955, 41: 123-135, p. 132
[42] Agarwala, *supra* note 10 at p. 43.

Among these treaties 15 treaties or agreements were exclusively related to the Dominion of India, 192 of them were exclusively related to the Dominion of Pakistan and 420 treaties, agreements or conventions were of common interest to both. The treaties included were both pre-1919 and post 1919 treaties which means those signed after 1919 'for India' and those concluded before and after in the name of the Crown and Government of Great Britain, but the application of which extended to British India.[43]

The Independence (Rights, Property and Liabilities) Order 1947, apportioned the contracts of British India based on the territory. The contracts of British India which were exclusively relating to territory incorporated in Pakistan were deemed to be made on behalf of that Dominion. Pakistan was to incur all the rights and liabilities arising from such contracts and also accrue in the future any obligations incurring from them.

There was no direct repatriation of the debt between the two Dominions. All the financial obligation of the British India including the loans and guarantees remained the responsibility of India. The liability of the partitioned provinces remained with the halves that were incorporated in Pakistan. However, "India continued to be the sole debtor of the central debt, Pakistan's share of this debt, proportionate to the assets it received became a debt to India."[44] The liability of the successor state to inherit a proportional part of the unsecured debt of its predecessors, while the predecessor's personality continues is not a principle of international law.[45] India, thereby had incurred liability arising out of all the debts.

The suggested view is that a successor state is to begin with a clean slate free from the treaty obligations of the parent state. McNair observes that "newly independent state which does not result from a political fragmentation and cannot

[43] O'Connell, *supra* note 39 at p. 47

[44] The outstanding public debt the Government of British India amounting to 18,03,97 lakhs was assumed by the Indian Government, whereas Pakistan's share would be include in its debt to India, O'Connell D.P. (1956), *The Law of State Succession Cambridge*, Cambridge: Cambridge University Press, p. 166.

[45] *Ibid.,* p. 166

fairly be said to involve political continuity with any predecessor, start with a clean slate in the matter of treaty obligations."[46]

McNair, however classifies the personal treaties into four categories; first there are treaties which primarily concern the political relations of state like the treaties of friendship, neutrality, former alliance and aggression; second there are treaties which establish relations of a commercial or economic nature like the treaties dealing with the tariffs, exchange of goods and services, subsidies etc.; third are the administrative treaties like the ones which regulate the mail, contraband, drugs etc.; and finally the ones which may be called judicial like the extradition, effect of foreign judgement. The treaties of the personal nature do not devolve upon a new state, like the treaties of alliance or of friendship and other personal treaties are of political, economic or administrative in character whose performance requires the continued existence of the ruler.[47] These treaties are extinguished when there is change in the international personality.[48] For commercial treaties the existence of the implied right of denunciation upon giving a reasonable notice can readily be inferred from the very nature of the treaty on the ground that it requires revision from time to time in order to bring harmony with changing condition.[49]

There are a few exceptions to the clean slate rule. Some kinds of treaties devolve upon the new state. The treaties which are of indestructible character are the rights in *rem* and they run with land like that of the boundary treaties. These treaties survive even if there is change of sovereignty as the successor state is bound by the treaties related to territory. Bilateral treaties if they are personal in nature, will not devolve upon the successor state.[50] The real or the localised treaties if they are bilateral may or may not bind the successor state. Poulose adds that,

> however, if a successor state respects a servitude, it is not due to the rules of state succession, but because they are such nature, intended to be effective universally or quasi-universally, as to impress the territory or something in it with a character henceforth inherent in the territory and irrespective of

[46] Revolutions, (1967), Treaties and State Succession, *Yale Law Journal*, 76(8): 1669-1687, p.1672.
[47] Poulose, *supra* note 13 at p. 58
[48] Revolution, *supra* note 46 at p. 1685.
[49] *Ibid.*, p. 1685
[50] Jenks Wilfred, (1952), "State Succession in Respect of Law Making Treaties," *British Yearbook of International Law*, 29: 105- 144, p. 119

whether any personal obligation in the matter has been assumed by the local sovereign.[51].

The state succession to multilateral treaties can be considered as one of the prominent exception to the clean slate view. The bilateral and the multilateral treaties which have the legislative character seem to devolve upon the successor state. The new state should be bound by those multilateral treaties which serve the interest of the society. It is not clear if the multilateral treaties which are of the administrative nature and the multilateral treaties involving the creation of the international organization will devolve upon a new successor state. Most of the international organisations require the new state to enter into the agreement in its own name after independence. For example, Pakistan had to apply to the membership of UN as the membership of British India did not devolve upon it.

2.2.2. Treaties with the Native States

India during the British rule comprised of British India i.e. the territories directly administered by the British and the territories administered by native rulers. British claim that the principles of international law have no bearing upon the relations between the Government of India and the native states under the suzerainty of Her Majesty. Crawford argues that "the paramount supremacy of the former presupposes and implies the subordination of the latter was founded on the erroneous view that international law only governed the relations of fully independent states."[52]

When India became independent in 1947 there were about 567 states. The states by the formal treaties or by the political arrangements surrendered their external sovereignty to the British Empire, though under international law they can be regarded as sovereign political communities.[53] The Regulating Act of 1773 provided that the Presidencies might not conclude any treaty with any of the Indian Princes or Powers without the consent of the Governor-General in Council, except in cases of imminent necessity.[54]

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[51] Poulose, *supra* note13 at p. 59
[52] Crawford, *supra* note 1at p. 322
[53] Baxi, Upendra (1965), "Law of Treaties in the Contemporary Practice of India", *Indian Yearbook of International Affairs*, 14: 137-176, p. 168
[54] O'Connell, *supra* note 39 at p. 49

With the paramountacy over the Indian Native States the British enjoyed a discretionary authority to intervene in or conduct the internal affairs of a territory, whether or not arises from a treaty or other consensual arrangement. This was inconsistent with the formal independence. In all the treaties that were concluded with the native states the term Crown was not mentioned otherwise the Crown was placed in the subordinate position in relation to the Indian rulers when the Company was mentioned as an agent in some of the earlier treaties.[55] This was pursuant to the juristic personality granted by the Crown through various Charters, the Company was granted the Diwani in 1765 by the Moghul Emperor whereby it became one of the territorial sovereigns in India acquiring the status of an agent of the Moghul Emperor. Therefore when the Company entered into the treaties it acted in the capacity of an agent of the Moghul Emperor and not as an agent of the British Crown.

The status of the princely state was the subject of great controversy. The Native States were not independent and their status was not that of protected states or colonial protectorates. However their status was similar to that of international protectorates.[56] For instance, Maratha Empire in India wasrecognised as independent state subject to international law as the treaty practice in reflected this position. But it did not necessarily mean that the same rules were applied to or by such states as were applied by European states between themselves.[57] McNair asserts that the criterion for the international personality is recognition. Schwarzenberger views that scope of international personality granted is the matter of intent. The Princely state could not achieve the international personality as British Government was reluctant to recognise them as sovereign states and the Indian National Congress strongly opposed their independence and forced them to accede to India. Their position is rightly explained as,

> None of the Indian States had sovereign rights in the full sense of the term; nor did they have individually the necessary resources to claim or enjoy the attributes of a sovereign independent power. If in 18th century these states did

[55] Poulouse, *supra* note 13 at p. 39

[56] Crawford, *supra* note 1 at p. 322-323.

[57] Crawford explains that position of the native rulers as "indigenous communities were regarded not only as legal occupants of their territory but as fully states in international law. Some writers required a certain degree of 'civilization' as a pre-requisite for statehood. It had long been established that the only necessary condition was a degree of governmental authority sufficient for the general maintenance of order, and subsequently practice was not sufficient consistent or coherent in the opposite direction to change that position";*Ibid*., p.260.

> not have an independent status, it was obvious in 20th century, when petty sovereignties were a patent anachronism, the assumption by States of independent status was not practical politics. There was hardly any period either during the Moghul rule or subsequent British rule, when the Indian Princely states did not owe some form of allegiance to a central authority in India".[58]

Neither the British Crown nor the other States expressed the intention of recognising the international personality of the princely states. When states lose their international personality, they are referred to as vassal states. The Indian princely states under the paramountacy of the British Crown provided the best example of vassal states.[59] The Company entered into the treaties with the Princely States upon the assumption that there would be continuance of the British rule in one form or the other. The Indian Independence Act[60] provided for the lapsing of all treaties between the Native States and the British Government. The Indian Independence Act 1947, section 7 provided only for the lapse of suzerainty over the Indian States, so that it was arguable that those states which had not acceded were rendered fully independent. The suzerainty of the British Crown over the Indian States was terminated in 1947 by the virtue of Indian Independence Act. It provided for the lapse of all treaties between the States and the British Government. By virtue of the Indian Independence Act 1947, the states associated with the Federal Republic of India in two ways namely; first, larger states were absorbed into the Federation directly; secondly, the others were merged either with the old provinces to form new administrative units, or with each other to form 'Unions'.[61]

British Government extended their control over the Native States considering them extraterritorial and accorded their rules of sovereign immunity and the general right to internal self-government. Certain rights were termed as generic including the conduct of international relations, the exercise of jurisdiction over European and Americans, interference to settle disputes as to succession to the state, the suppression of gross misrule in the state and the regulation of armaments and the strength of

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[58] White Paper on Indian States 1950.

[59] Poulouse, *supra* note 3 at p. 202

[60] Article 363 states that "Notwithstanding anything in this constitution but subject to the provisions of Article 143 neither the Supreme Court nor any other court shall have jurisdiction in any dispute arising out of any provision of treaty, agreement, covenant, engagement or other similar instrument which was entered into or executed before the commencement of this constitution by any ruler of an Indian State….."

[61] O'Connell, *supra* note 39 at p. 47

Military Forces.[62] Some of cases that highlight the status of the native rulers are discussed as follows.

In Kunwar Bishwanath Singh Diwan Nizamat, Benares State Agent to the Late Maharaja Bahadur of Benares vs. Commissioner of Income Tax, Central and United,[63] the question before the Allahabad High Court was whether Maharaja of Benares who was a ruling chief of an Indian state, could be exempted from taxation on the income from property owned by him in British India. The question also arose regarding the sovereignty of the Ruler. The Court held that the Government recognised the Maharaja of Benaras as sovereign ruler as per the Government of India Act 1935[64] but under the suzerainty of His Majesty.[65] Hence section 155 of the Government of India Act is applicable which states that a Ruler shall not be exempted from any federal taxation in respect of any personal property or income.

In *Maharaja Bikram Kishore of Tripura vs. Province of Assam,*[66] the Court reiterated and elaborated the above principle that the Maharaja of Tripura is recognised as the Ruler of State of Tripura and not as a His Majesty's subject. Though not independent, the British Government has accorded him the status of a sovereign under suzerainty of His Majesty. The court further clarify that 'internal sovereignty' is inherent in the Ruler and not something derived from British law.[67] However, in exercise of His Majesty's suzerainty the rights, authority and jurisdiction as per treaty, grant, usage, and sufferance shall be availed by the Crown. These Princely States however joined the Indian Federation through the instruments of accession. The legal effect of the Indian Independence Act was to terminate all the treaties that existed at that time between the British Government and the native states. The Constitution of India Article 363 specifically bars jurisdiction of the courts, over the treaties and other agreements entered into between the native states and the predecessor or the present Indian government prior to the commencement of the Constitution.

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[62] Crawford, *supra* note 1 at p.322.
[63] (1942) 10 ILR 43 in Annual Digest and Reports of Public International Law Cases 1941-1942, (1987) International Law Reports, Cambridge : Grotius Publications Ltd, 10: p. 43.
[64] Section 311 (I) defines 'ruler' in relation to a state as Prince, Chief or other person recognised by His Majesty as the ruler of the state.
[65]International Law Reports, *supra* note 63 at para 26
[66] (1948) 22 ILR 64
[67] Ibid., p. 7

In *Ram Babu Saxena vs. The State*,[68] one of the issues discussed by the Supreme Court was whether an Extradition Treaty between the British Government and Tonk State would subsist after a native state has joined the India Federation. The question arose regarding the status of the Standstill Agreement between the State of Tonk and Government of India. The Petition pleaded the existence of Standstill Agreement that granted immunity under the Anglo-Tonk Extradition Treaty 1869. The Supreme Court held that the merger of Tonk in the United State of Rajasthan had terminated the Standstill Agreement since the State had lost its "full and independent power of action over the subject-matter". Mukherjee J. opined that "when a State relinquishes its life through incorporation into or absorption by another State, either voluntarily or as a result of conquest or annexation, the treaties of the relinquishing state automatically terminates". He further cited Hyde's views, "when as a result of amalgamation or merger, a state loses its full independent power of action over the subject-matter of a treaty previously concluded the treaty must necessarily lapse"[69]

In *Vinayak Shripatrao Patwardhan vs. State of Bombay*,[70] The ruler of Miraj State had granted certain lands and rights to exercise civil and criminal jurisdiction to the appellant. In 1941 the jurisdictions were revoked but the land rights were restored by the British. However both political and land rights were rejected. The Court held that the mere fact that certain laws have been allowed to continue by the succeeding state does not mean that the liabilities of the citizen against the state were also recognised by the succeeding state. There must be express or implied recognition, or recognition by conduct of a specific right that has to be shown to bind the successor. A right so carried over after the Constitution when the Republic of India was formed could no longer be repudiated by a claim of 'Act of State'.[71]

In *Raj Kumar Narasingh Pratap Singh Deo vs. State of Orissa*[72]the appellant was assigned certain lands free from revenue charges by his elder brother, the former ruler of Dhenkanal State. The petitioner was authorised payment of an allowance by the Dhenkanal District Treasury. The State of Dhenkanal merged with Dominion of India after the paramountacy of the British Crown in 1947. It was later taken over by

[68] AIR 1950 SC 155
[69] *Ibid.*, p.162, para 29
[70] AIR 1961 Bom 11
[71] Ibid., para 12-13
[72] AIR 1962 Orissa 60.

the Orissa Government as the delegated authority of the Dominion of India. The allowance of the appellant was discontinued. The Court held that "it is well-settled rule of international law that, when a territory is ceded by one sovereign to another, the rights which the inhabitants of that territory enjoyed against their former ruler avail them nothing against the new sovereign except to the extent to which they have been recognised by the new sovereign."[73] The 'Act of State' was considered not justiciable in the municipal courts.

Baxi views that the treaties of the native states with the British Government lapsed. Treaties of these states with other foreign powers remained unaffected. Also unaffected were the treaties which native states made with other foreign powers to which under international law, the British Government succeeded.[74]

3. INDIA'S MEMBERSHIP OF INTERNATIONAL ORGANISATION BEFORE INDEPENDENCE

The issue of personality which underlies the kind of succession and differentiation between absorption and union would remain crucial with regard to the membership of international organizations is concerned.[75]British Crown declared that the Dominions would be given the autonomous status and they would have the right of foreign representation and voice. The Dominion status was granted to Canada, Australia, New Zealand and South Africa but not to India. Churchill on the Dominion status of India declared that India during the Great War had attained Dominion status as far as rank, honour and ceremony were concerned, but he did not foresee any reasonable time within which India could have the same constitutional freedom as Canada. The reason for denying the Dominion status was blamed on the differences in India based on race, caste, religion and on the inability of India to undertake the burden of her own defence.[76] However, he declared that the Crown conferred a special status to India and

[73] Ibid., para 6
[74] Baxi, *supra* note 53 at p. 171.
[75] Craven Matthew C.R. (1998), "The Problem of State Succession and the Identity of States under International Law", *European Journal of International Law*, 9: 142-162, p. 142
[76] Keith, *supra* note 9 at p. 469-471.

recognised her representation in the foreign affairs.[77] The exact position was clearly described by the India Office Memorandum as,

> It is obvious that India under her present Constitution cannot have a separate foreign policy of her own and that in major question of foreign policy she must be guided by His Majesty's Government. It is, therefore, not a necessary or invariable rule that she should even be separately represented at first-class political conferences outside the League.[78]

This even more controversial than in the case of Canada, Australia, New Zealand and South Africa whose were progressing towards full control over their external affairs with the Dominion status. Their participation in the international deliberations had some amount of legitimacy as they operated in the capacity of Dominions, unlike India. They attended certain international technical conferences and signed their conventions in their own names. They had also secured from Great Britain the privilege of separate accession to and withdrawal from commercial treaties concluded by her.[79]

India, along with the other Dominions got her own representation in the 1919 Paris Peace Conference where her plenipotentiaries actively participated. To garner more representation and voting strength, the British Crown wanted to get separate representation for its Dominions, including India, at the Paris Peace Conference. It succeeded in doing so even with the objection of several other participants.[80] In the Colonial Conference of 1894, Foster of Canada and Sir Henry Wrixon of Victoria observed that the claim of the Colonies for independent treaty-making power would mean a 'death-blow to imperial unity'. When the Imperial Government had allowed a colony to enter into an agreement with a foreign state, technically it meant that the Empire made the agreement.[81] Lord Ripon, the Colonial Secretary described the relation between the Imperial Government and the Colonies in the field of treaty-making as,

> to give the Colonies the power of negotiating treaties for themselves without reference to her Majesty's Government would be give them an international

[77] India was denied representation and Dominion status in the Colonial Conference in1907. It was only after the services of India in the Great War were realised, that British Government in Imperial War Conference 1917, decided to permit Indian representation in the future conferences.
[78] Ghosh, *supra* note 2 at p. 20.
[79] *Ibid.*, p. 11.
[80] Anand R.P. (2005), *Development of Modern International Law and India*, Germany: Nomos, p. 78
[81] Ghosh, *supra* note 2 at p. 11

> status as separate and sovereign states, and would be equivalent to breaking up the Empire into a number of independent states, a result which Her Majesty's Government are satisfied would be injurious to the colonies and to the mother country and would be desired by neither.[82]

President Wilson proposed at the Peace Conference that only self-governing territories shall be admitted to membership of the League; colonies enjoying full power of self-government may be admitted but India was not self-governed, the greater part was governed by the laws of Westminster and the lesser part was governed by the Princes whose power was recognised and supported by the British Government.[83] The British Government justified it stating that it was trying to make India into a self-governing territory. India was only one non self-governing territory out of 31 original members. All the Dominions were not given separate representation and were put under one roof; the British Empire. The United States expressed its dissatisfaction that Britain made her colonies as member for the League to get additional four votes otherwise it would just have one vote. Anand criticises Indian representation in League as "to many Indians the League was nothing more than an instrument of imperialism, a society for the exploitation of the east and protection of the west".[84]

Since League Covenant was the part of the Peace Treaty, India became one of the members of the League.[85] The article prescribing the requirements for the membership uses the phrase 'fully self-governed State, Dominion or Colony' was used because, some of the Members of the League such as India and (at least in 1919) the British Dominions, were not 'States'.[86]

India was admitted to the League of Nations as India without the princely states.[87] The princely states were neither eligible for membership nor were they allowed to have any foreign relations for they lacked the international personality.

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[82] Ibid.

[83] Anand R.P. (2010), "The Formation of International Organizations and India: A Historical Study", *Leiden Journal of International Law*, 23(1): 5-21, p. 9

[84] *Ibid.*, p.14.

[85] The Majority Report of the US Senate's Committee on Foreign Relations on the League of Nations (1919) objected to Indian membership- though not to that of the self-governing Dominions.

[86] Article 1(2) of the Covenant on League of Nations provides that "Any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-third of the Assembly, provided that it shall give effective guarantees of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed in regard to its military, naval and air force and amendments".

[87] British India constituted of India which was under the direct rule of Her Majesty and princely states over which the Crown exercised suzerainty.

The delegates to the League Assembly and to the other conference were selected by Secretary of State after consultation with the Governor-General-in-Council and sometimes with the Governor-General alone through private communication. Briefs and instructions to the delegates had to be approved by him and to be obeyed by them.[88] The treaties which were applied to India were expressly signed and ratified in the name of the Government of India, they were signed by the Secretary of State for India or some other representative of the Government of India holding full powers from His Majesty issued in the consultation with the Secretary of State for India.[89] Unlike the other Dominions which had responsible legislatures, all powers of government were concentrated in India in the Governor General-in-Council responsible directly to the Secretary of State for India in London.[90] There was no genuine independent policy since there was hardly any participation of Indians as advisers in the British delegation at conferences. The treaty making power that was vested with India was formal than real since Indian Legislature was not granted slightest degree of representation. It must be noted that all the invitations and correspondence regarding the treaties and conventions were received not by Government of India but by the Secretary of State for India in London.[91]

However, the princes were given an opportunity to be represented on Indian delegation and every year the Indian delegation included one of the ruling prices as India's delegate.[92] The Maharaja of Bikaner was the one who signed the Treaty of Versailles at the Paris Peace Conference as one of the plenipotentiaries empowered to act in respect of India.[93] The prince delegation occupied a very peculiar position in the League as they could not act as separate representative of the state. The British Crown selected the prince who would represent the Indian delegation. And there was keen competition among the princes to get selected. Verma describes the status enjoyed by the Indian princes as,

> The Indian nationalist ridiculed the princes who represented India in the League for they had always been nominated tools and mouthpieces, megaphones and microphones of the British Government. And this was

[88] Ghosh, *supra* note 2 at p. 19.
[89] Agarwala, *supra* note 10 at p. 25
[90] ILA Report on the Effect of Independence on Treaties, *supra* note 34 at p. 34.
[91] *Ibid*, p. 26
[92] *Ibid.* p. 9
[93] Verma D. (1968), *India and the League of Nations*, Patna: Bharati Bhavan, p. 241

considered to be shameful and disgraceful position with which no self-respecting Indian could be happy.[94]

The Majority Report of the Committee on Foreign Relations of the United States Senate stated that League vote for India was absolutely and completely a second vote for Britain since India was absolutely and exclusively under the British control. When other British colonies signed the preliminary Covenant they signed through the native statesmen. When India signed she signed through "The Right Honourable Edwin Montagu, Member of the British Parliament, and the King's Secretary of State for India. The Maharaja of Bikaner, who signed below, was only a rubber stamp, because these native princes are specifically barred from peace-making authority"[95] India was made to contribute to the League funds that were much higher than any other non-permanent. The contributed funds were being utilized by league on the European centred projects.[96]

India after acquiring her new status participated in the Washington Conference on Naval Armament in 1921 which was separately ratified by the British Crown later on India's behalf. As a member of League, India was automatically admitted to the International Labour Organization, the Permanent Court of International Justice, the Committee of Intellectual Cooperation in Paris, the International Institute of Agriculture and various other organisations. India was the original member of the International Monetary Fund, International Bank for Reconstruction and Development, International Labour Organization, International Civil Aviation Organization. She was the 'member nation' to the Food and Agriculture Organization, world Health Organization and the International Tele-Communication Union and one of the 'full member' of the United Nations Educational Social and Cultural Organizations and one of the 'contracting parties' of the International Union for the Protection of Literary and Artistic Works.[97] In the Rules of the Paris Conference, the British Empire was treated as one of five 'power with general interests'. The Dominions and India was considered among 23 belligerent Powers with special

[94] Anand, *supra* note 83 at p. 13
[95] Poulouse, *supra* note 13 at p. 23
[96] Mahajan, Sneh (2015), "The Foreign Policy of the Raj and its Legacy", in,David Malone, Raja Mohan and Srinath Raghavan (eds.), *The Oxford Handbook of Indian Foreign Policy*, Oxford: Oxford University Press, p. 60.
[97] Agarwal, H.O. *supra* note 10 at p. 47.

interests.[98] India was automatically declared a belligerent state when Britain declared Second World War without the consent of the Indian Legislature.

India's membership flowed from League of Nations to United Nations Organization as it was a signatory to the Declaration of the wartime coalition of the United Nations. India participated as British India in the United Nations Conference on International Organisation in 1945, showing its presence in San Francisco Conference, London Conference and rest of others which were instrumental in establishing the United Nation Organisation.[99] The Rapporteur (Membership) of the Committee I/2 to Commission at the San Francisco Conference regarded that original member's participation in the Organization is acquired by right, while that of future members is dependent on the fulfilment of certain condition. As the Reports delicately put it, 'certain nations' that became original members of the United Nations were not States. India, though had been a League member, its status had not changed since 1919.[100]

The Secretariat of the UN and Assistant Secretary- General for Legal Affairs also confirmed to India's continuing the international legal personality of British India. However, UN required the representative of India in ECOSOC and Indian representatives before Security Council (participating in the discussion of the Indonesian case) to submit new credentials after 15 August 1947. The question arose regarding the requirement of the new credentials when the UN regarded India to be continuing the juristic personality of British India.[101] When the UN had confirmed that India continued the personality of British- India, it is to be regarded as an original member of UN. There was no reason for India to communicate her Indian Independence (International Agreement) Order 1947 to UN. The Dominion of India acted as a new state. [102]

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[98] Crawford, *supra* note 1 at p.364. Paris Convention for the Regulation of Aerial Navigation 1919. Article 40 'the British Dominions and India shall be deemed to be states for the purpose of the present convention'.

[99] Article 3 of the UN charter provides that "The original Members of the United Nations shall be the States which, having participated in the UN Conference on International Organisations at San Francisco, or having previously signed the Declaration by UN of 1 January 1942, sign the present Charter and ratify it in accordance with Article 110".

[100] India signed the Charter on October 26, 1945 and deposited its instrument of ratification with the United States of America on October 30, 1945. Crawford, *supra* note 1 at p. 178

[101] Agarwal, *supra* note 10 at p. 46-47

[102] *Ibid*., p. 46-47

India's international status both in the period of the League and upon its becoming an original member of the United Nations was a state accorded membership for essentially political reasons. Some states expressed their reservation towards establishing their diplomatic ties. In 1941 the British Ambassador to the United States informed the Under Secretary of State that owing to the constitutional position the reception of a Diplomatic Minister in India, or the establishment of direct diplomatic representation between India and the United States is not possible at this time.

Indian National Congress was not optimistic about India's participation in international conferences, as much of the attention was given to transfer of power and the partition that was about to take place in India. Indian national opinion was very critical about the international conferences. They said that "imperialist were crying and clamouring for dominating the weaker nations for all time to come and measures were being adopted to suppress the voice of the enslaved nations of the world. These conferences therefore cannot produce much hope in the minds of Indians, still in bondage".[103] Most of the nationalists also felt that India should not participate in any international conference or organisations till her participation is free as a sovereign state. Though India participated in most of the international conferences after 1919 and gained membership to them, she was just a puppet in the hands of British Government without any independent delegation or representation. The only situation when India was allowed minimum autonomy on record, was when the Governor-General-in-Council and the Indian Legislature agreed on any tariff measure, the Secretary of State was not empowered to intervene, a right similar which Canada claimed and secured in 1859.[104]

After partition, the Indian Independence Order 1947 annexed to the 1947 Act provided that the membership of international organisations should devolve solely upon India, and that Pakistan would take steps to claim new membership to the organisations it may choose to join.[105] By the time she achieved her political independence India was the member of 51 international organisations. India enthusiastically became member to the Commonwealth nation where it acknowledged

[103] Anand, *supra* note 83 at p. 18
[104] Ghosh, *supra* note 2 at p. 18
[105] Indian Independence Order 1947 clause 2(a) Membership of all international organizations, together with the rights and obligations attaching to such membership, will devolve solely upon the Dominion of India.

King as the nominal head and undertook allegiance to the Crown. This led writers to conclude that there was a continuance of juristic personality in the case of India even after it became independent.

4. PARTITION AND SUCESSION IN BRITISH INDIA

The study of partition of British India, its occurrence and pattern are cardinal in contemplating the international legal personality of India and its successions to the rights and obligations. The pattern of fragmentation of British India into two new Dominions; Dominion of India and Pakistan is to be considered examined in the light of theories of state succession. O'Connel writes "At the present time the typical form of State succession is not annexation, cession or federation, but independence of colonial territories. The problem of succession raised by this phenomenon is novel, inasmuch as the process is not one of sudden fragmentation of a political entity, but evolution through various intermediate stages of internal autonomy to full maturity, the process extending over varying periods to time, but tending to be constant in character.[106]

The process of decolonization is argued to have occurred eventually at different stages. Similarly, India's journey towards independence is presumed to have happened at various levels. Poulose claims that India has suffered dual-succession,[107] partial succession in 1919 with respect to external sovereignty and total succession in 1947 in terms of externally and internal sovereignty. However, in true sense, the events in 1919 may not be considered as partial succession, as no semblance of external sovereignty was granted to India. It is to note that the only difference was that the post 1919 international instruments feature India as a state party. The capacity to conclude international instruments and participate in the international conferences appears to be an anomaly in itself. The British Crown proclaimed that this international legal personality of British India was to continue after independence. It is thereby of primary importance to view the partition of British India and devolution of rights and obligations in the light of different methods and theories of state succession.

[106] O'Connel, D.P. (1962), "Independence and Succession to Treaties", *The British Year Book of International Law*, London: Oxford University Press, 38: 84-180, p.84-5.
[107] Poulouse, *supra* note 13

4.1. State Succession

Defining state succession is a problem because there are no accurate and acceptable definitions that could be given to this process. The idea of succession has been derived from the municipal law where the heir takes up rights and liabilities of the deceased person. The concept is used to provide continuity with the previous legal order to the new legal order after the change of sovereignty. This idea was applied to the state succession by Grotius and later by Pufendorf and Vattel.[108] The law of state succession is complexly woven with the theories of sovereignty and of state. State succession is described as the international effects produced by a change on the personality of the sovereign or in the form of government of any state. Hershey explains state succession as "it is also about when one state takes the place of another and undertakes a permanent exercise of its sovereign territorial rights or powers".[109] However, many authors have expressed their dissent from using the term "state succession." Starke views that term State Succession is a misnomer; as it presupposes that the ideologies of private law, where on death or bankruptcy etc. rights and obligations pass from extinct or incapable persons to other individuals are applicable between state but what is involved is primarily a change of sovereignty over territory.[110] Hence he terms this subject as succession to rights and obligation. Most of the authors consider this subject and the theories as vague and confusing.

In an era of human rights, investment protection and international criminal law, everyone is at some level 'the bearer of rights and duties' under international law.[111] State Succession may be used in two senses (a) denoting succession in fact and (b) denoting succession in law. Succession in fact takes place when one state follows another in possession of territory; whereas succession in law is a judicial substitution by a successor state to its predecessor.[112] One cannot make adequate distinctions between two types of succession in practical context hence authors have purported a common doctrine. Oppenheim defines succession as "a succession of international person occurs when one or more international person take place of another and

[108] Agrawala, *supra* note 10 at p. 6.
[109] Amoss, Hershey (1911), "The Succession of States", *American Journal of International Law*, 5(2): 285-297, p. 291.
[110] Shearer, I.A. (2007), *Starke's International Law*, New Delhi : Oxford Publishers, p. 291
[111] Crawford,, *supra* note 1 at p.28.
[112] Jones Meryn (1947), "State Succession in the Matter of Territories", *British Yearbook of International Law,* (24): 360-361 p. 360.

international person in consequence of certain change in the latter's position".[113] Similar views have been expressed by Hall when he expresses that personality is the key to the problem of state succession.[114] Dietrich Rauschning introduced a new theory on the change of status of international subjects. He explains "the status of a subject of international law is its legal position determined by the scope of its international capacity to assume rights and obligations, its capacity to act and to incur responsibility".[115]

State succession is also confused with the succession of government. Makonnen views that "when state succession occurs there is a break of identity, but in the succession of government, the identity of the pre-existing legal personality of the given territory remains unchanged and continues."[116] The territories are based on the continuity of rights and obligations i.e., on the extension of rights and obligations from the predecessor to the new sovereign. The Vienna Convention on Succession of States in respect of Treaties 1978 and the Vienna Convention on Succession of States in respect of State Property Archives and Debts 1983, define state succession as "replacement of one state by another in the responsibility for the international relation of territory".[117] This definition of state succession though not comprehensive and inclusive is in usage and is often quoted by the tribunal and courts.

The codification or the conceptualization of the law of state succession into Vienna Conventions began after the establishment of the United Nations. The League of Nations, particularly the League of Nations Committee of Experts for the Progressive Codification of International Law which was set up in 1924 was requested several times by De Visscharto to include the question of succession of States and Governments that arose during the period between the two world-wars. But his efforts were not fruitful. [118] The International Law Commission in its first session in 1949 aimed at through codification of the 'Law on Succession of States and

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[113] *Ibid.,* p.361

[114] O'Connell, *supra* note 39 at p.3

[115] Buhler, Konrad G. (2001), *State Succession and Membership in International Organization: Legal Theories versus Political Pragmatism,* Hague: Kluwer Law International, p. 6

[116]Makonen Y. (1986), *State Succession in Africa: Selected Problems*, Recueil Des Cours : Collected Courses of the Hague Academy of International Law, Martinus Nijhoff Publishers: p. 102

[117] Article 2(b) of Vienna Convention on Succession of States in respect of Treaties 1978 and Article 2(a) of Vienna Convention on Succession of States in Respect of State Property Archives and Debt 1983.

[118] Agarwal, *supra* note 10 at p. 15.

Governments', but was not successful. With the process of decolonization and formation of many newly independent states, the ILC again felt the need for codification. In 1962 at its 14th Session, the ILC decided to include the topic in its programme of work as priority list on the recommendations to the General Assembly. The Commission further in its 15th Session discussed the report approved by Sub-Commission on Succession of States and Governments under three separate headings- succession in respect of treaties, succession in respect of rights and duties resulting from sources other than treaties, and succession in respect of membership of international organization. Sir Humphery Weldock Special Rapportuer submitted five reports on Succession of Treaties from 1968-1972.[119] In 1978, Convention on Succession of States in respect of Treaties was formulated. Mohammad Bedjaoud was the special rapporteur of the topic Succession in Respect of Rights and Duties other than Treaties. Of the seven reports he submitted to the Commission, the priority was given to the Economic Problems consisting of a Study of Public Property and Public Debts. [120] At its 25th session, in 1973, the Commission limited its study to one category of public property viz., property of state and in the same session it began the first reading of its draft articles.[121] The Vienna Convention on Succession of States in respect of State Property, Archives and Debts was adopted in 1983. However, the Convention did not come into force as Article 50 required fifteen instruments of accession or ratification and only seven states had deposited their instruments.[122]

Succession of state can be of two types. If the legal identity of a community is completely destroyed and a state is completely absorbed in another state either through subjugation or voluntary merger it is called total succession. The other kind is where the parent or predecessor state survives, despite the territorial changes it resulting in the formation of one or more new states. Here even if the territory is lost,

[119] In 1972, at its 24th session adopted a set of 31 draft articles were transmitted for comments. After receiving the comments, the General Assembly adopted a resolution to convene a conference to consider the draft articles.

[120] The Commission considered this topic at its 20th, 21th, 25th and from its 27th to 33th sessions, in 1968, 1969, 1973 and from 1975-1981 respectively. Succession in Respect of Rights and Duties other than Treaties, Accessed on 17 November 2015 URL: legal.un.org/ilc/guide/3_3.shtml.

[121] The Commission completed the first reading of the draft articles on succession of state in respect of state property and state debts at its 31st session in 1979 and on succession in respect of its state archives in 1980.

[122] Vienna Convention on Succession of States in respect of State Property, Archives and Debts, Accessed on 24 December 2015, URL: legal.un.org/ilc/guide/3_3.shtml.

the personality and legal responsibility remain unaffected. Partial succession is said to have occurred in following cases:

1. When a state acquires a portion of the territory of another through cession or conquest.
2. When a new state is formed in consequence of a successful revolt or declaration of independence
3. When a fully sovereign state loses a portion of its external sovereignty or independence through incorporation into a federal union or places itself under the protectorate of stronger power.
4. When the latter process is reversed and a state under the suzerainty or protectorate, or members of a federal union become fully sovereign states.[123]

The above types of partial succession especially the last three situations have occurred in the course of decolonization forming independent states. A state may succeed through cession, annexation, dismemberment or partition, separation, or secession, fusion with another state, entry into a federal union,[124] The rules and principles of succession varies and there no general principles for all of them. The succession by dismemberment and secession are of special relevance to the study on partition of British India.

State succession is explained through divergent theories which depend on the nature and degree of state succession. The theories of identity and continuity are categorized into formal and material concepts depending upon whether emphasis is put of formal, purely juridical criteria or rather material political and socio-historic criteria.[125] The material concepts of identity and continuity put main emphasis on the socio-historic elements of statehood. Alfred Verdoss and Hermann Mosler maintained that the people organised in a state constitute the international personality of a state and that the identity of the people would thus be decisive for the identity of a state.[126] Judge Jennings has argued that "what was done by a colonial government in virtue of capacities already possessed before independence, ought to continue in operation not

[123]Amoss, *supra* note 109 at p. 286
[124] Jones, *supra* note 112 at p. 361
[125] Krystyna, Marek (1968), *Identity and Continuity of States in Public International Law*, Geneva, Librairie Droz, p. 14
[126] Ibid,

because there is a succession but because there is *pro tanto* a continuing person behind it. The crux of the matter is the continuing personality of the newly independent state, not a change of personality."[127]

Among the theories on continuity and non-continuity the scholars often choose between the two extreme alternatives of universal successions and clean slate doctrine. A detailed understanding of these two opposite doctrine are of great importance for the current study as the succession of newly formed India and Pakistan to international treaties and organisations are dependent on it.

4.1.1. Theories of Identity and Continuity of Obligations

Among the theories of continuity, the universal succession is of primary focus. Hugo Grotius advocated this theory basing it on 'Haeres' of Roman law which means that the predeceased person's property will be succeeded by another individual. The sovereign personality of the state is considered to be permanent and this is transferable to the successors. The territory is considered as property estate and thus the rights and duties are attached to the inherited territory as well as to the continued personality of the state. Grotius did not make any distinction between state and government succession. Personality and legal relationship are dealt in exactly the same way as the heirs of Roman law continued the personality and legal relationships of the deceased.[128] The rights, obligations, and liabilities that attach to the territory flow from one sovereign to another without any exception. The former states assets, credits, revenue and resources subject to charges or burden devolve upon the new state and the absorbing state also succeeds to the contractual obligations of the extinguished state at least as far as the rights and obligations of the third parties are involved.[129] Mathew Craven explains it as,

> the universal succession assumes the whole of the legal clothing of the person to whom he succeeds; steps, as it were, into his shoes. He takes over his rights and liabilities of every kind; his property, his debts and other obligations owing to him, and the debts and obligations which he owes.[130]

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[127] Buhler, *supra* note 115 at p. 12
[128] O'Connel, *supra* note 39 at p. 7.
[129] Amoss, *supra* note 109 at p. 286- 287
[130] Craven, *supra* note 75 at p. 147

This doctrine of universal succession has met with a lot of criticisms and it is rejected on the ground that it cannot be compared to succession in the municipal law. Municipal law succession deals with the individuals who are real personalities but in international law succession relates to state which is a fictional identity. O'Connel defines personality as "a juridical term signifying the homogeneous and autonomous character of a community, which is not transferable. Roman law analogy is just a metaphor which cannot be sustained by examination of diplomats and judicial practice".[131]

The scope of universal succession had ended by the end of 19th century, but had found its remnants in the other theories of continuity like, theory of popular continuity and organic substitution. The popular continuity theory[132] holds that the state has two personalities, one political and other social and when the succession of state takes place only the political personality of the state is affected whereas social personality of the state remains unaffected.[133] Makonnen observes that "the social personality survives political change because the legal condition of the people remains unaffected and the territory with the men who occupy it are inseparably connected to form a permanent social personality despite the alteration of the political personality of the state."[134] Like universal succession, popular continuity theory does not terminate the state personality after succession. It only allows a part of the rights and obligations to pass on to the successor state.

Another theory that found its aspiration in universal succession is the theory of organic substitution. According to Huber is "during state succession the factual elements of people and territory are integrated in a new organic being; there is a change in the juridical element of organisation as a result of which the state loses its identity but the organic forces which previously governed it remain unaffected."[135] The successor state attains the new personality substituting the personality of the predecessor state and the successor state also assumes the rights and obligations of the predecessor state as its own. When closely observed, it may be argued that all three

[131]O'Connel, *supra* note 39 at p. 7
[132] The popular continuity theory is a new version of universal theory which was formulated during 1880s after the German and Italian national unification.
[133]Makonnen, *supra* note 116 at p. 105
[134]*Ibid.,* p. 105
[135] *Ibid.,* p. 106

theories are based on foundational principle of extending the international legal personality of the deceased state to the newly formed states.

4.1.2. Theories of Non-Continuity of Obligations

The universal succession and related theories were discarded as they did not appear to be favourable to the newly formed states. The late 19th century marked the evolution of negative theories. Abandoning the sovereignty of the predecessor state over the new territory, the negative theories hold that there is no legal tie between the two sovereignties, thereby none of the rights, obligations or liability can be imposed upon the new sovereign. O'Connell observes that "the link breaks between the expulsion of the one sovereignty and the extension of the other, so that the successor state does not exercise jurisdiction over the territory by virtue of a transfer of power from its predecessor but solely because it has acquired the possibility of expanding its own sovereignty in the manner dictated by its own will".[136] This theory therefore does not impose any rights and obligations incidents like credits, debts, revenue, resources, assets devolve upon the successor state unless it continues to accept them by will. In other words, a state is at a liberty to start fresh with the clean slate. After total succession the predecessor state personality or identity is completely extinguished with no legal connection between the predecessor and the successor state. A new state that is formed enjoys a new international personality and does not continue any of the obligations of the predecessors. Keith observes that "the occurrence of succession of state is an act of free will of the successor state and the assumption of rights and obligations is not compulsory under international law".[137]

The clean slate doctrine gained the support of the Communist or Socialist scholars. They adopted a negative attitude towards the continuity of any international obligations of the former colonial powers. The clean slate appears to be an appropriate doctrine for a newly formed state to adopt till it stabilizes. Rather than accepting the burden of obligations and liabilities of the former colonisers, it can mark the start of its journey with fresh engagements with the international community. However, some jurists who are oppose this doctrine consider it to be inconsistent and impractical, referring to attitude and practice adopted by the former Soviet Union with regard to

[136] O'Connel, *supra* note 39 at p. 8
[137] Makonnen, *supra* note 116 at p. 107

the Tsarist Russia's obligation and also the practice of People's Republic of China with regard to the old obligations. The former Soviet Union or People's Republic of China or Socialist Cuba after revolution did not claim the state succession but that there is a change in system. Social Revolution disrupts the social, economic, political and legal organisations of a society but they do not destroy the international personality and identity of a state. N.V.Zakharova, a discussing succession in the event of social revolution argued that "the state has a right to repudiate following a social revolution, those treaties which do not correspond to the basic principle of the new system of property ownership and the new economy of the country".[138] Kozhevnikov, in 1964 wrote that the Soviet Government never declared a repudiation of all the treaties of Russia. Stating Lenin's principle, he observed that,

> the predatory governments not only agreed to plunder but among such agreements they placed economic agreements and different other items concerning good neighbourly relations. We reject all items of plunder and violence but all the items which contain good-neighbourly conditions and economic agreements we happily adopt. We cannot repudiate them.[139]

It is free will of the state to repudiate the unequal treaties and the treaties which affect the basic principles. International law claims to recognise such right of new state. It widely came to be known as Nyerere Doctrine which means none of the colonial treaties became applicable unless the new state, within a specified period of time, notifies its accession to such treaties.[140]For instance Tanganyika declared to the UN Secretary- General that it was fully aware of the special character of the multilateral treaties and wished to deal with each such treaty previously applicable in its territory by specific arrangement, i.e., by reviewing each one individually and indicating to the depositary its steps to be taken in relation to the instrument.[141] Uganda and Kenya indicated similar intentions to honour existing treaty obligations within specified periods of varying length, during which relevant instruments would be subjected to legal examination for the purpose of termination which did not survive the change in sovereignty.

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[138] *Ibid.,* p.112

[139] *Ibid.,* p.109

[140] Bosnia Herzegovina *vs*. Yugoslavia ICJ Reports 1996. Separate opinion of Judge Weeramantry p. 643, Accessed 25 December 2016, URL: www.icj-cij/docket/files/91/7361.pdf.

[141] Nyerere Doctrine was proposed by the first President of Tanzania Julius Kambarage Nyerere. It was followed by other African states like Uganda and Kenya.

However, some of the multilateral instruments continue to be operative irrespective of the state's denouncement of the past instruments. As Wilfred Jenks argues that clean slate doctrine does not apply on the treaties which are multilateral or universal in character.[142] Few special categories of treaties that are universal in nature like the ones which codify diplomatic and consular relations, or treaty law especially UN human rights instruments, or the ones that protect the humanitarian principles cannot be said to be non-applicable because of change of circumstances. Human rights instruments not only encompass reciprocal commitments of the states but also protect rights and freedoms of the individuals within their jurisdiction.[143]

The PCIJ decision in German Settlers[144] held that "Private rights acquired under existing law do not cease on a change of sovereignty. Even those who contest the existence in international law of general principle of state succession do not go so far as to maintain that private rights including those acquired from the state as the owner of the property are invalid as against a successor in sovereignty." Though the Court limited the scope of acquired rights to the property rights, Mullerson went ahead to argue that the acquired right includes human rights. Human rights have become more important than the property rights. He observes that the non-participation of successor state in the international human rights treaties of their predecessors would leave the populations of these countries without the protection previously enjoyed by them.[145] The private rights may consist not only of property rights but also of claims against other individuals and state.[146] These rights and freedoms are considered as 'acquired rights' which a newly formed state is not at a liberty to remove. Another indication of the irreversible character of human rights obligations is that they do not contain any termination clause.[147] Hence these continue to be operative even with the change of personality. Christopher Weeramantry J.

> Without automatic succession to such a Convention, we would have a situation where the world wide system of human rights protection continually

[142] Jenks, *supra* note 50.
[143] Mullerson, Rein (1993), "The Continuity and Succession of States by Reference to the Former USSR and Yugoslavia", *International Comparative Law Quarterly*, 42 (3): 473-493, p. 489.
[144] Settlers of German Origin in Poland, Advisory Opinion 1923, P.C.I.J. Ser. B, No.6, p.36, Accessed on 12 December 2016, URL: legal.un.org/PCIJsummaries/documents/English/PCIJ_FinalText.pdf.
[145] Mullerson, *supra* note 143, p. 490-491.
[146] Kamminga, Menno T. (1996), "State Succession in Respect of Human Rights Treaties", *European Journal of International Law*, 7: 469-484, p. 473
[147] *Ibid.*, p. 472.

> generates gaps in the most vital part of its framework, which pen up and close, depending on the break-up of the old political authorities and the emergence of the new. [148]

Among the new states that emerged out of de-colonization, majority of them succeeded to most international treaties of a universal character.

4.2. Partition of British India

India before her independence included both British India and the princely states. The Indian Independence Act 1947,[149] provided for fragmentation forming three separate entities (1) the Dominion of India, (2) the Dominion of Pakistan and (3) the princely states. The British Parliament before adopting the Indian Independence Act sought comments from both the Indian National Congress (INC) and Muslim League. The INC pointed out that simultaneous fragmentation of India into three entities may create doubt as to whether even the Dominion of India is anything more than one of the new fragments and whether as such it can continue to represent the old entity. The INC to avoid confusion proposed two Bills, the first creating the Dominion of India and the second creating the Dominion of Pakistan but the British authorities drafted the Indian Independence Act under the assumption that the Dominion of India shall continue India's international personality. The Indian National Congress had raised doubts regarding the fragmentation as to whether the Dominion of India is anything more than one of the new fragments and whether India can continue to represent the old entity, since even the two Dominions are described in the Bill as 'new Dominions'.

Hence, they suggested the preamble of Indian Independence Act, to run as follows "a Bill to make provision for the establishment of the Dominion of India and the creation of a separate Dominion of Pakistan".[150] However, the recommendation of the INC was not accepted and the Indian Independence Act 1947 with annexed Orders were drawn up between the dominions of India and Pakistan, which took effect from the date of the separation of India and Pakistan.

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[148] *Bosnia Herzegovina vs. Yugoslavia* ICJ Reports 1996. Separate opinion of Judge Weeramantry, p. 655, Accessed 25 December 2016, URL: www.icj-cij/docket/files/91/7361.pdf.

[149] Sec 1 and 2 of the Indian Independence Act deals with formation and territories of the new dominions

[150] Hasan, *supra* note 26 at p. 51.

When the Dominions of India and Pakistan were formed, the question arose whether international legal personality had continued to exist in one state or both the Dominions, or if the personality was extinguished altogether. Agarwala argues that this was based on the premises if Dominions were created out if dismemberment or out of secession.

When dismemberment occurs, a state breaks up into fragments in the sense that two or more new states are formed within its territory. The existence of the former state comes to an end. Its personality is replaced by new state's international personality. This involves the annulment of the international treaties.[151] On the other hand, in secession, certain part of territory severs itself from an existing state and acquires a new personality. The personality of the existing state would be affected only to the extent to which the territory is severed.[152] Secession can be by the means of armed revolt, the consent of parties and conclusion of treaty. This largely affects the personality of a concern state and its continuity to the past instruments. Hence, there has to be a clear distinction between succession of state and continuation of a state.

In case of partition of British India, dismemberment it would mean that both the states acquired new international personality. It is only in the case of secession that India would continue the personality of British India and Pakistan would be regarded a new state.[153] If India sustained and Pakistan was to secede to form a new state, then Dominion of India would continue the international legal personality as British India. But the Indian Independence Act gave birth to two new Dominions, Dominion of India and Pakistan. The British India broke into the Dominion of India and Dominion of Pakistan at the same time. When these two Dominions are formed, they formed after relinquishing the old juristic personality of British India and acquiring a new personality.[154] The Partition of British India into Dominion of India and Dominion of Pakistan is through the process is dismemberment. Both India and Pakistan were to be treated as new states with the new international legal personality.

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[151] Triska, Jan F. and Slusser, Robert M. (1962), *The Theory, Law, and Policy of Soviet Treaties*, : California, Stanford University Press, p. 162

[152] Zimmermann, Andreas (2006), " Secession and the Law of State Succession", in Kohen, Marcelo G. (eds.) *Secession: International Law Perspectives*, Cambridge : Cambridge University Press, p. 209

[153] Agarwala, *supra* note 10 at p. 31.

[154] O'Connell, *supra* note 39 at p. 5.

Among the very few jurists who disputed the international legal personality of India was D.K. Sen. He opined that "there does not appear to be the slightest ground for holding the view that the international personality of India has not been extinguished. On the contrary, it cannot be legitimately disputed that India has ceased to exist as an international person in consequence of the territorial changes initiated by His Majesty's Government, and in her place two States have come into being. The principle of succession will, therefore, be applicable in determining the international obligation of these two Dominions."[155]

The Partition Council that worked through a Steering Committee took measures to prevent India from future contestation of its new international personality. The Council declared that it will not be open to the Dominion of India, even if it chooses to do so, to contend that in consequence of the setting up of the two new Dominions the identity of India as an international person has been destroyed.[156]

At the international level, the UN held the similar position. Ivan Kerno, (Assistant Secretary-General for Legal Affairs) opinion which was further adopted by Secretariat of United Nation was that "from the viewpoint of international law, the situation is one in which a part of an existing state breaks off and becomes a new state. On analysis, there is no change in the international status of India; it continues as a state with all treaty rights and obligations and consequently, with all the rights and obligations of the membership of the United Nations. The territory which breaks off, Pakistan will be a new state; it will not have the treaty rights and obligations of the old state and it therefore not have membership in the UN".[157]The United Nations Secretariat in a note regarding India's international status prior to 1947 observed that:

a. India became one of the original members of the League of Nations in 1920 and from that time forward possessed the status of an international person.
b. A foreign and political department of the government of India was organised under a Foreign Secretary to deal with Indian relations with foreign states, and was responsible to the General-General.

[155] Agarwala, *supra* note 10 at p. 39
[156] The Work of the Partition of British India was carried out by the Partition Council of India. It was set up on the basis of a 'Note' entitled 'The Administrative consequences of Partition' which was prepared by W. H.J. Christee, Additional Private Secretary to the Viceroy; H. O. Agarwala, *supra* note 175, p. 32, 35.
[157] Hasan, *supra* note 26 at p. 45.

c. The Indian Independence (International Arrangements) Order 1947 apportioned the treaties of British-India between the two Dominions. The membership of the international organisation devolved solely on India.
d. India continued membership of Common-Wealth of Nations acknowledging the King of Britain as the Head.[158]

The view that the new independent India is the same legal entity as British India is based on the assumption that Indian had an international personality prior to 1947 and therefore any change in its government, constitution or territory does not affect its position in international law. He further observed that,

> on the establishment of the two new Dominion, the position of the Dominion of India will not be materially altered. The major portion of the territory with its capital will still be included in that Dominion and the pre-existing machinery of Government will continue to carry on the administration as before..
> As for changes in the constitution, it is established beyond question that a change in the form of Government does not in any way alter the international personality of a state.
> Such being the position, it will not be open to the Dominion of India, even if it chooses to do so, to contend that in consequence of the setting up of the two new Dominions the identity of India as an international person has been destroyed and that in consequence the new Dominion of India is no longer responsible for the obligation previously assumed by India.[159]

The UN Secretariat's legal opinion was based upon an analogy between Pakistan and Belgium and the Irish Free State. The opinion of the Secretariat has been criticized for drawing improper analogy from the cases of Irish Free State and Belgium. The factor which the Secretary-General overlooked was that the Netherlands and Britain were fully sovereign states when Belgium and Irish Free State were separated from them. In case of India and Pakistan, the division which took place was not due to the secession of a part of the territory, but on account of partition by a third party. [160] In the case of Irish State and Britain, the treaty that resulted in the Irish Free State was an international treaty and not inter- Commonwealth agreement.[161] Both the parties to the Irish Treaty were independent and were

[158] ILA, Report on Effect of Independence on Treaties, *supra* note 34 at p. 35-36.
[159] The Reports of the Steering Committee in Partition Proceedings, in Hasan, *supra* note 26 at p. 48.
[160] *Ibid.*,p. 52
[161] The formation of Free Irish State was the result of Agreement for a Treaty between Great Britain and Ireland 1921.Accessed on 22 December 2016, URL: https:/openaccess.leidenuniv.nl; O'Connell, *supra* note 39 at p. 6.

competent to conclude treaties. And in case of separation of Belgium from Holland, the parent State i.e. Holland continued to exist with all rights and duties which it possessed earlier.[162] The old sovereign actively participated in both these secessions. It is important to note that in creation of Pakistan, India did not have any role to play. There was no secession of Pakistan from India but both India and Pakistan emerged from British India.

4.3. Pakistan as a Newly Formed State

The Indian Independence Act provided for creation of Dominion of Pakistan.[163] Pakistan being considered as a successor state is a misnomer as the succession of British India was wrongly construed as secession. The clean slate theory was automatically applied to Dominion of Pakistan thereby not imposing any right or obligation from the predecessor state. However, Pakistan starting with the clean slate did not materialise because of the devolution agreement. It was very widely used by the British territories on attaining independence in order to secure succession to treaties in general.[164] These agreements concluded between predecessor state and the successor state provides that the treaty rights and obligations of the predecessor state should be assigned or should devolve upon the successor state.[165] It is also the Commonwealth practice that in the absence of an inheritance agreement the successor state is not bound by the treaties of the parent state. Generally when an inheritance or devolution agreement is concluded the new state voluntarily takes over the treaty obligations. However, the Indian Independence (International Agreements) Order, 1947 applied to India and Pakistan as miniature inheritance agreement. Hence, Pakistan was bound to those pre-independent treaties having exclusive territorial

[162] Treaty of London 1839 separated Belgium, the Netherlands and the United Kingdom; Agarwala, *supra* note 10.
[163] The Article 1 and 2 of the Indian Independence Act 1947. The Article 2 of the Act marks the territory of what is to be constituted as Pakistan.
[164] Schaffer Rosalie, (1981), "Succession to Treaties: South African Practice in the Light of Current Developments in International Law", *International and Comparative Law Quarterly*, 30(3): 593- 627, p.597.
[165] *Ibid*., p.598

application i.e. all the treaties which had the exclusive application within the territory of Pakistan were binding upon her. Pakistan did not believe in starting clean slate but claimed the automatic succession to most of the multilateral treaties. Pakistan took over treaties of British India only because it was willing to do so, and it would seem from an analysis of this case that the real independence attained by the Dominions since the Statute of Westminister renders inapplicable.[166]

After partition and formation of new dominions Pakistan had to apply for membership as a new member to UN, while India continued the membership of British India in UN. The Minister of Foreign affairs of Pakistan requested Secretary General of UN to consider Pakistan as an existing member state as India with effect from 15 August 1947. The Security Council without referring this to the Committee on the Admission of new member, declared that Pakistan cannot claim automatic membership and recommended new admission. Though admission was not opposed by any state, France and Poland pointed out flaws in Pakistan being considered as new member. The French representative said that the "question of Pakistan seems to me to be a very special case, since this country was already in the UN when it constituted a part of India. The representative of Poland said, "the State of affairs is not clear because we fully do not know if Pakistan was born out of India or whether two new states have come into being".[167] The representative of Argentina viewed that India and Pakistan enjoyed an equal status, therefore they should both have automatically become members of the UN, or alternatively both of them should have applied for membership as new states. He described procedure which had been adopted by the secretariat as unfounded discrimination against Pakistan.[168] In the Security Council France adopted Pakistan's original argument and maintained that the latter had inherited along with India the original membership of British India and therefore no application for membership was necessary.[169]

Pakistan considered itself party to the Convention relating to Obscene Publications and the Traffic in Women and Children arguing that India was the original signatory and pursuant to 1947 Order, it also had become party. The Declaration and the intention of Pakistan were notified to all the signatories to these

[166] O'Connell, *supra* note 39 at p. 42.
[167] Hasan, *supra* note 26 at p.46.
[168] *Ibid.,* p. 46.
[169] O'Connell, *supra* note 39 at p. 8.

Conventions. This stance of Pakistan was not accepted by International Civil Aviation authorities with regard to Chicago Convention on Civil Aviation and required it to lodge new accession. The United States accepted Pakistan's succession to all bilateral treaties.[170]

5. STATUS OF COLONIAL INTERNATIONAL LAW UNDER INDIAN CONSTITUTION

During colonial rule, the legal systems of many Asian and African countries were shaped to serve the interests of imperialist nations. Most of the colonies continued to apply the imperialistic and hegemonic laws even after their independence. Baxi observes that "the basic concepts and structures of the new constitutions are inspired by the colonial legal systems."[171] When India became independent, the Indian Independence Act 1947 stated that both Dominions should be governed as nearly as possible in accordance with the provisions of the Government of India Act 1935 and that the law of British India should as nearly as possible be the law of both Dominions.[172] The public law of British Indian had continued to operate both in India and Pakistan after the partition. The India (Consequential Provision) Act 1949 ensured that the common laws of Britain are operative in India unless a contrary law is enacted. The Preamble of the 1949 India Act states that,

> An Act to make provision as to the operation of the law in relation to India and persons and things in any way belonging to or connected with India in view of India's becoming a Republic while remaining a member of the common wealth.

The section 1[173] of this Act deserves special attention because it reads that laws continue to be in operation as it would have had if India had not become a Republic. This reflects the colonial hegemony and attempt of British Crown to control

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[170] ILA, Report on Effect of Independence on Treaties, *supra* note 34 at p. 93.
[171] Baxi, Upendra (2004), "Postcolonial Legality" in Henry Schwarz and Sangeeta Ray (eds.) *A Companion to Postcolonial Studies*, London :Wiley- Blackwell pp.540- 555 at p. 540.
[172] O'Connell, *supra* note 44 at p. 212.
[173] Chapter 92 of Indian (Consequential Provisions) Act 1949. Section 1 of Act states that "on and after the date of India's become a Republic, all existing law, that is to say, all law which, whether being a rule of law or a provision of an Act of Parliament or of any other enactment or instrument whatsoever, is in force on that date or has been passed or made before that date and comes into force thereafter, shall until provision to the contrary is made by the authority having power to alter that law and subject to the provisions of subsection (3) of this section, have the same operation in relation of India, and to persons and things in anyway belonging to or connected with India, as it would have had if India had not become a Republic.

the affairs of India even after formal independence. However, this Act is not applicable or enforceable in India because the Indian Independence Act and Order precludes its operation. It is enforceable in British Courts, which means India or the Indian citizens would be entitled to take advantage of this statute before British Courts.

India had its own laws with respect to many matters that were dealt by the British statutes which put her in a peculiar position. In an attempt to regulate such matters, legislations were enacted having an extended application in British India overlooking the existing Indian laws. To provide the continuity of such legislation, the Government of India Act 1935 made an expression provision through section 292.[174]However, section 6[175] of the Indian Independence Act formally empowered the Dominion of India to make laws to alter, modify or repeal the laws (British laws) that had extended operation.

The pre independent laws get their validity through Article 372 of 1950 Constitution of India. Article 372 (1) provides that

> subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution, shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority.

Explanation I to the Article 372 defines the expression

> law in force to include a law passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or part of it may not be then in operation either at all or in particular areas.

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[174] Section 292 of GOI Act 1935, Existing law of India to continue in force "Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the law in force in British India immediately before the commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority."

[175] Section 6(2) of the India Independence Act 1947 provides that "no law and no provision of any law made by the legislature of either of the new Dominions shall be void or inoperative on the ground that it is repugnant to the law of England or to the provisions of any existing or future Act of Parliament of the United Kingdom…" Further section 6(4) provides that "no Act of Parliament of the United Kingdom passed on or after the appointed day shall extend or be deemed to extend, to either of the new Dominions as part of the law of that Dominion unless it is extended thereto by law of the legislature of that Dominion."

Article 372 (2) further authorised the President of India to make adaptations and modifications as might be necessary to the existing British laws within three years from the commencement of the Constitution order to bring such provisions in accord with the Indian Constitution.[176]

The intention of draftsman while drafting the Article 372 is culled out in *Keshavanada Bharati and Others v. State of Kerala*[177] The Court held that,

> Article 372(1) is similar to the provisions of Section 292 of the Government of India Act, 1935. As observed by Gwyer C.J. in the case of *The United Provinces v. Mst. Atiqa Begum and others* ([1940] 2 F.C.R.110) such a provision is usually inserted by draftsmen to negative the possibility of any existing law being held to be no longer in force by reason of the repeal of the law which authorized its enactment.[178]

The term 'all the laws' in the Article 372 (1) when read with the Explanation signifies that it includes the common laws of England, existing statutory laws and the customary laws that were in force before the commencement of the Indian Constitution. International law also existed as a part of common laws or the statutory laws. It is important to note here that the common law treats international customary law as part of municipal law unless it is inconsistent with municipal law. And also common law requires an international treaty which effects private rights, or changes the statute law to be transformed into a domestic statute by an Act of Parliament for their implementation. The rest of the treaties which are not inconsistent with municipal law and do not need legislative Act for their implementation didn't not require transforming legislature. Such international treaties also became a part of Indian legal corpus. This Article provided a channel through which the pre-Republic customary international law and the statutes giving effect to the international treaties were to have an operational force in India.

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[176] Article 372(2) of the Indian Constitution states that "for the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, s from such date as may be specified in the order, have effect subject to the adaption and modifications so made, and any such adaptations or modification shall not be questioned in any court of law". Article 372(3) provides that "to empower the President to make any adaptations or modifications of any law after expiration of three years from the commencement of this constitution."

[177] AIR 1973 SC 1461

[178] *Ibid.,* p. 1844 para 1387

Article 372 (1) and (2) requires that the laws which were existent before the commencement of the Constitution must pass the test of compatibility with the Indian Constitution. If any such law is found inconsistent with the provisions of the Indian Constitution then it shall be repudiated or altered or modified. In case of a conflict between the pre-existing international law (by virtue of the explanation I to the Article 372) and any provision of Indian Constitution, the latter shall prevail over the former.

Setalvad notes that despite of Article 372(1) and (2) that laid down the compatibility test, the British statutes were not examined for their applicability. As a result the British statutes were expressly applicable in India without any change in the text.[179] It was not until *The State of Madras vs. C.G. Menon*[180] before the Supreme Court, that the anomalies in the application of British Statutes in India were observed. It was then that the attempt was made to examine the whether the British statutes were to be directly applicable in India or if any adaptation, modification or invalidation was required. Baxi argues that "there was comparatively a far more sophisticated and solicitous debate concerning the introduction of Western legal system in India in colonial times among the British administrators than the state of debate of India on and since independence, concerning its retention."[181]

When the legal ties between India and British Crown have been dissolved, the necessary British statutes that were operating in India might have been replaced by corresponding Indian legislature. Setalvad argues that "while India was a British Dependency, she was governed like other colonies, by Acts of the Imperial Parliament in matters relating to external affairs and extra-territorial jurisdiction, such as extradition, merchant shipping, piracy and offences on the high seas, admiralty jurisdiction and like. It is but proper that after having attained a fully sovereignty status, India should have laws of her owns relating to these subjects".[182]

Under British rule in India the English common law doctrine was observed and the same has been continued in post independent period. India continues to act upon the common law in many fields and particularly in the matter of principles

[179] Government of India (1957), *Fifth Report on British Statutes Applicable to India*, Law Commission of India, New Delhi. p. 4
[180] 1954 AIR 517.
[181] Baxi, Upendra (2005), "Colonial Nature of the Indian Legal System", in Indra Deva (ed.), *Sociology of Law*, New Delhi: Oxford, p. 45
[182] GOI, Report on British Statutes, *supra* note 179 at p. 5

governing the relationship between international law and municipal law.[183] P. Chandrashekara Rao puts together the tests which are to be passed by the pre-1950 international law to become applicable in the Indian municipal law.[184] They are:

1. That the principle had become part of the common law of England.

2. That before the Indian Constitution came into force, the same principle was accepted and applied by the Indian courts.

3. That the principle so accepted as the common law of India continued to be in force by reason of Article 372 of the Constitution.[185]

Article 372 refers to international law that was incorporated in the common law or statute law before the commencement of this Constitution until altered by the legislature or other competent authority. Any changes in the English common law after that date shall not affect the Indian law, unless such change is incorporated into the Indian law.[186] The term any other competent authority includes in its ambit the Indian judiciary which can determine the validity of such laws on the basis:

a. Whether it is consistent with the other provisions of the Indian Constitution.

b. Whether a rule of international law was indeed such a rule i.e. such a norm should have gained the status of international customary law.

c. Whether such a law had gained the recognition of English common law.

d. Whether it was or it could have been part of the English common law applicable to the India condition.[187]

Common law rules became automatically unwritten constitution law of a supplement character.[188]

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[183] Alexandrowicz, C. H. (1952), "International Law in India", *International and Comparative Law Quaterly*,1(3): 289-300, p. 293.
[184] Rao P. C. (1993), *The Indian Constitution and International Law,* New Delhi : Taxmann Publishers. The author examines various cases like *Commissioner of Karnataka of Income Tax, A.P vs. Mir Osman Ali*, AIR 1981 SC 335; *State of West Bengal vs. Corporation of Calcutta,* AIR 1967 SC 1007.
[185] *Ibid*., p. 124
[186] Mani V.S. (1995), "Effectuation of International Law in the Municipal Legal Order: The Law and Practice in India", in Ko Swan Sik, M.C.W.Pinto and J.J.G. Syatauw (eds.) *Asian Yearbook of International Law*, Hague: Kluwer Law International, p. 155
[187] *Ibid.,* p 155

The laws before the commencement of Constitution in the territory of India includes the laws existing in the territory of the former Dominion of India and also the territories of the Indian rulers under British suzerainty.[189]A state however cannot unilaterally renounce their predecessors obligations, rather they must in good faith reconsider and if required make some adjustments to give effect to the obligations.[190] After independence, there were plenty of cases before the Indian Courts concerning the applicability and continuity of British laws.

In *Annakumaru Pillai vs. Muthupayal and other*,[191] a case before Madras Court arose whether the State was entitled to abolish private rights on the exploitation of chank fish in Palk's Bay. The Court came to the conclusion that the rules of the States adjacent to the sea have acquired an immemorial right to exploitation of chank fish in the bay. The Court considered Palk's Bay between India and Ceylon to be within the territorial jurisdiction of Her Majesty's dominion of India and Ceylon. It was held that the particular part of the bed of the sea, though outside the three mile limit, vested in the Crown and that according to common law principle, the government was entitled to lease the exploitation of chank fish located in it for purpose of public revenue. The High Court relied on principles of English common law as well as on corresponding rules of the law of nations relating to the maritime issues. In this case, Indian Judiciary attempted to preserve the relationship of international law and municipal law introduced in India under British rule.[192]

In *Blackwood &Sons vs. A. N. Parasuraman and others*,[193] an action to restrain infringement of the Imperial Copyright Act, in 1911 before Madras Court, the defense was raised that the Copyright Act was operative only to British possession and since India had ceased to be British possession, this act was no longer applicable. The comparison was drawn to the ceased operation of the Fugitive Offenders Act in India after independence. The Court rejected this argument and held that copyright is a matter of private law affecting the rights of property, whereas the Fugitive Offenders Act is a matter of public law affecting

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[188] Alexanderowicz, *supra* note 183 at p. 300.
[189] Mani, *supra* note 186 at p. 155
[190] Mullerson, *supra* note 143 at p. 493.
[191] (1907) I.L.R.Madras, p. 551
[192] Alexandrowicz, *supra* note 183 at p. 292
[193] AIR 1959 Madras 410; MANU/TN/0233/1959

relations between governments. The British statutory law, the term "British possession" is defined as "any part of Her Majesty's Dominions exclusive of the United Kingdom and the territories under the sovereignty of the Crown". [194] The Courts however, have construed the term 'British possessions' to include territories which have gained republican status, but which have retained British legislation.

In *Re K.R.P.L. Chockalingam Chettier*,[195] the petitioner had committed an offense in Ceylon and escaped to India. Ceylon argued that the Fugitive Offenders Act, 1881 to be applicable in its relations with India. The Court held that the Fugitive Offenders Act was no longer applicable to India but the Indian Extradition Act 1903 was applicable having been continued by Article 372 of the Indian Constitution.[196] The Court further held that "it was an acceptable via of international law that the emergence of a new state or a change of sovereign in a state does not bring about a break or interregnum in law." A law continues to be in operation unless it is changed by some competent legislative body.

India took an extreme position of holding that the Extradition Act, 1870 extends to the whole of India. In 1956, a list of 45 extradition treaties concluded before 1947 was stated to remain in force.[197] India and Ghana are also of the view that British extradition treaties which applied to their territories before independence continue to bind them.[198]

The pre-1950 international customary law incorporated in the common laws or statutes are also applicable pursuant to Article 372. The nature of international customary law is evolutionary character as held by J. Denning in *Trendex Trading vs. Bank of Nigeria,*[199] case. Hence, the term other competent authority in Article 372 to check the compatibility of the colonial instruments, include the judiciary of India. The Indian Courts are authorized to authenticate the validity of pre-independent

[194] *Ibid.*, para 12
[195] AIR 1960 Madras, 548; MANU/TN/0366/1960
[196] *Ibid*., para 53
[197] ILA, Report on Effect of Independence on Treaties, *supra* note 34 at p. 93.
[198] Kenneth, Keith J. (1967), "Succession to Bilateral Treaties by Seceding States", *American Journal of International Law*, 61(2): 521-546, p. 538
[199] (1977) QB p. 529 cited in Beaulac, Stephan (2006), "Customary International Law in Stare Decisis", in Chistopher P.M. (eds.) *British and Canadian Perspectives on International Law*, Leiden: Martinus Nijhoff, p.389

international customary law. Therefore the principles of justice, equity and good conscience de-freezes the international customary laws by recognising and taking into account the evolutionary character of international law.

The writings of the Marxist scholars exhibit scepticism with regard to the nature and international law. They criticize it to have had colonial interest at the formative stage. Tunkin, an eminent representative of the Soviet view-point in the I.L.C., had stated,

> Among many treaties in existence, there were a number which were a heritage of the colonial system or had recently been imposed by the colonial powers on new states. As the new states matured and as formal independence was transformed into real independence, the social forces working for peace were bound to rebel against certain treaties included earlier.[200]

With regard to the nature and formation of customary international law, Chimni explains the nature of customary international law as "the formation of customary international law manifests the will of powerful states. For a custom to be accepted and recognised it must have the concurrence of the major powers in that particular field generally the usual suspects, namely powerful states."[201] Koretsky views that "customary international law was too vague to be important and might moreover be fashioned into a tool to serve certain deplorable tendencies. Custom existed because states were unequal and slavery still prevailed. Customary law is bound by tradition backward and always lagged behind social development."[202] International customary law having the nature of serving the dominant interest too became a part of the Indian municipal law through the common laws and statutes by virtue of Article 372.

Soviet scholars argued that past treaties should be denounced as the instruments and expressions of imperialist and exploiting policy.[203] One of the prominent Soviet scholar Pashukanis was of the opinion that while treaties were one of the most important sources of international law, their binding force was limited exclusively to the time while they served the interest of the state. He further argued

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[200] Grzybowski, Kazimierz (1987), *Soviet International Law and the World Economic Order*, Duke Press Policy Studies, Durham and London, p. 202

[201] Chimni, B.S. (2004), "An Outline of a Marxist Course in Public International Law", *Leiden Journal of International Law*, 17: 1- 30, p. 15

[202] Grzybowski, *supra* note 200 at p. 201

[203] *Ibid.,* p.197

that state must have the right to abrogate each treaty and international obligation as soon as a change in its interests made it necessary. Many of the foreign policies of British Government were also denounced as imperialist intervention by the Indian Government. Prime Minister Nehru stated that,

> the previous Government of India took expedition to Lhasa, 55 years ago. It very much interfered, imperialist intervention. They set down there and imposed the British will. All the kinds of extra-territorial privileges were imposed on Tibet because Tibet was weak. Regardless of what happened in Tibet or China or anywhere, we could not, according to our own policy, maintain our forces in a foreign country. That was a relic of British imperialism we did not wish to continue.[204]

The similar argument can be extended to the operation of the colonial international instrument and statutes in India that they are imposed by the British will and not by formed by the due democratic process.

6. CONCLUSION

The power of a state to enter into international obligations is one of the determining factors to vest a nation with an international personality. During 1919 to 1947, India became a member to various international organizations and party to multilateral conventions with the British Crown dominating India's external sovereignty. India entered into these international instruments in its own name, despite lacking autonomy and continuing its representation under the British Crown. This created an anomalous international legal personality to India. The Crown granted such representation to garner additional votes in these organizations, especially the League of Nations.

After the partition, India was divided into the Dominion of India, the Dominion of Pakistan and the princely states. The Indian Independence Act 1947, provided for the formation of Dominion of India and Dominion Pakistan. This fragmentation was wrongly proclaimed as secession and not dismemberment by the Crown. The UN General Secretary agreed with the British Crown by drawing erroneous reference to two instances; secession of Irish Free State from Britain and secession Belgium from Holland. The same analogy was applied in the current situation and Pakistan was held to have ceded from the parent state India. But this was an explicit case of dismemberment with the formation of two Dominions i.e.

[204]ILA, Report on Effect of Independence on Treaties, *supra* note 34 at p. 95.

Dominions of India and Pakistan at the same time from the Indian Independence Act 1947. As per the Crown's intention, all the existing international instruments were to devolve upon India. The Indian Independence (International Arrangements) Order, 1947 operated as the devolution agreement.

Most of the multilateral agreements that devolved upon India were commercial in nature like the Ottawa Trade Agreements and Chicago Air Agreements. The most important of all is the Bretton Woods Agreement. The past treaties were vested with the colonial interest and were concluded in furtherance of an imperialistic objective. India, after independence, must have been selective in succeeding to colonial treaties while repudiating treaties possessing imperialist interest. In the strict terms of international law, treaties are binding on the parties only after they have given free consent. India succeeded to these international instruments, though it never got free participation or voice. After gaining independence, India carried the burden of colonial laws. Along with this, a part of customary international law, that described as manifestations of colonial hegemony too gained entry into the Indian legal corpus, pursuant to Article 372 of the Indian Constitution. Hence, this chapter argues that firstly, India should have devised its own model of incorporating international law (considering her socio-economic conditions) rather than following the British model, and secondly, India must have been selective in succeeding to international treaties and obligations and cautious in implementing customary international law instead of inheriting the whole colonial heritage after gaining independence.

CHAPTER-4

TREATIES IN INDIAN LEGAL SYSTEM: CROSS ROADS OF TREATY FORMATION AND IMPLEMENTATION

1. INTRODUCTION

A state implements international law only in accordance with its constitutional prescriptions as interpreted through judicial decisions. The starting point of examining the relationship between international law and a particular national legal system begins from its constitution. The rules in Indian Constitution with respect to international law are not as explicit and exhaustive as in the Constitutions of other states. The development of modern international law impacts the state's social, economic and political condition. The Indian Constitution has failed in providing an adequate mechanism to regulate the influx of international law into its legal system.

This chapter in five segments examines the constitutional channels that give effect to international law in the Indian legal system, particularly to treaty obligations. The first section being an introductory part lays out the structure of the current chapter and highlights the different sections. There is no express provision either in the Constitution or any other law explaining the relationship between international law and municipal law. The only provision in the Indian Constitution that regulate its conduct towards international law is Article 51. The very positioning of Article 51 in the Part IV makes it non justiciable in nature. It merely obligates the state to foster respect to international law. The structural ambiguities in the Article 51 further adds to the disarray. The second section of the chapter analyses Article 51 and its inadequacy in establishing a clear relationship between international law and municipal law. It undertakes a comprehensive study of the terminology of this Article to elucidate all possible interpretations. The third section exclusively deals with the formation and implementation of treaties by the appropriate state organs. The Article 73 read with Article 246 and list I of the VII Schedule of the Constitution empowers the Union Executive to exercise the executive function with respect to those subjects on which the Parliament has legislative control. A collective reading of the above mentioned provisions vests the Union Executive with the treaty making capacity. In the absence of the legislation regulating the treaty making process, the Executive's

power to negotiate and conclude treaties is unfettered. This part proposes the mechanism of Parliamentary approval as a pre-requisite before the conclusion of international treaties. The Article 253 of the Constitution requires Parliament to give effect to international treaties and agreements by providing an enabling legislation. The fourth segment highlights the scope of Article 253 in giving effect to the treaties in the light of the Supreme Court decisions. The fifth section summarizes the findings and arguments of the current chapter.

2. CONSTITUTIONAL BASIS FOR INTERNATIONAL LAW IN INDIA

Article 51 is the only provision in the Indian Constitution which lays down the basis on which India should accord respect to the international obligation and conduct its foreign policy. Article 51 was formulated by our Constitution drafters after being inspired by the proclamation made in the Declaration of Havana at the Second Conference of American States members of the International Labour Organisation 1939. This proclamation served as aspiration in drafting Article 51. It reads as follows,

> The state shall promote international peace and security by the elimination of war as an instrument of national policy, by the prescription of open, just and honourable relations between the nations, by the firm establishment of the understandings of the international law as the actual rule of conduct among governments and by maintenance of justice and the scrupulous respect for treaty obligations in the dealings of organised people with one another.[1]

In the Constituent Assembly debate Ambedkar proposed this proclamation as the guiding text for the Article 51[2] and observed that "the propositions contained in this new Article are so simple that it seems to be super arrogation to try to explain

[1] Rao, Shiva (1968), *The Framing of India's Constitution: A Study,* New Delhi: Tripathi Pvt. Ltd. p. 323

[2] Before Article 51 took its form and position in the Constitution many drafts were prepared on the basis of proclamation. Two of which is as follows: "the state shall promote international peace and security by the elimination of war as an instrument of national policy, by the prescription of open, just and honorable relations between nations, by the firm establishment of the understanding of international law as the actual rule of conduct among governments and by the maintenance of justice and the scrupulous respect for treaty obligations in the dealings of organized people with one another". "The state shall promote international peace and security by the prescription of open, just and honorable relations between the nations, by the firm establishment of the understanding of international law as the actual rule of conduct among governments and by the maintenance of justice and the scrupulous respect for treaty obligations in the dealings of organized people with one another". Rao, P.C.. (1993), *The Indian Constitution and International Law,* New Delhi : Taxmann Publishers p. 4

them to the house by any lengthy speech".[3] The members of the Constituent Assembly during the course of debate considered that declaration of India's pledge to promote international peace and security was necessary, for, if there was no such peace and security, there could be no peace and economic and social progress within the country.[4]It is argued that the initial drafts to Article 51 were drafted with a definitive language than the present text of the Article.[5]

The proposal was adopted as the text of Article 51 of the Indian Constitution which reads:

The state shall endeavour to-

a. promote international peace and security;
b. maintain just and honourable relations between the nations;
c. foster respect for international law and treaty obligations in the dealings of organised peoples with one another and;
d. encourage settlement of international disputes by arbitration.

The Article 51 falls in the Part IV, which is the Directive Principles of State Policy. Part IV of the Constitution being ancillary in nature lays down the objectives and policies to be pursued by the state organs. They thereby are not justiciable in the court of law. However, Ambedkar in the Constituent assembly stated that the Legislative and the Executive should not merely pay lip service to the Directive Principles, but should make them as the basis for their action. The Supreme Court highlighted the importance of Directive Principles in the Constitution and the governance of a country in *State of Kerala vs. Thomas*.[6] Fazal Ali J. explained the scope of DPSP held that, "the Directive Principle in the view of the Supreme Court, forms the fundamental feature and the social conscience of the Constitution and the Constitution enjoins upon the State to implement these directive principles. The directives thus provide the policy, the guidelines and the end of socio-economic freedom."[7]

Though the Article 51 is placed in DSPS, Indian Judiciary has habitually cited Article 51 in the cases involving foreign element to evince that India has accorded

[3] *Ibid.,* p. 4
[4] *Ibid.,* p.5
[5] Hegde V.G (2010), "Indian Courts and International Law", *Leiden Journal of International Law,* 23(1): 53-77, p 58
[6] (1976) 1 SCR 906
[7] *Ibid*., para 199

respect to international law. An expansive meaning is given by Supreme Court to the scope of Article 51 through its verdicts. As Rajmani observes, the courts have refrained from analysing the textual building blocks of Article 51(c), instead prefer to approach the obligation to foster respect for international law and treaty obligation in an expansive and instrumental manner.[8] For instance, Supreme Court in *Keshavananda Bharati and others vs. State of Kerala*[9] J. Sikri has observed,

> it seems to be that, in the view of Article 51 of the Constitution, this Court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of United Nations Charter and the solemn declaration subscribed to by India.[10]

In *U.P.S.E. Board vs. Hari Sankar*[11] Supreme Court discussed the spirit of Directive Principles of State policy. It argued that though these principles are not justiciable in the court of law, they are nevertheless important in framing the laws of our country. This analogy can be drawn while discussing the scope of Article 51(c).[12] The Supreme court in this case held that,

> The mandate of Article 37 of the Constitution is that while the DPSP shall not be enforceable by any Court, the principles are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws. Addressed to Courts, what the injunction means is that while Courts are not free to direct the making of legislation, Courts are bound to evolve, affirm and adapt principles of interpretation which will further and not hinder the goals set out in the DPSP. This command of the Constitution must be ever present in the minds of Judges when interpreting statutes which concern themselves directly or indirectly with matters set out in the DPSP.[13]

The Article 37[14] of the Constitution directs the state organs to make laws in accordance to the Part IV as they are considered to be the policies of fundamental

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[8] Rajamani Lavanya, (2016), "International Law and the Constitutional Schema", in Sujit Choudary, Madhav Khosla and Pratap Bhanu Mehta (eds.) *Oxford Handbook of the Indian Constitution*, New York: Oxford University Press.

[9] AIR 1973 SC 1461

[10] *Ibid.*, p. 1510, para 155

[11] AIR 1979 SC 64

[12] *Commissioner of Customs, Bangalore vs. M/S G.M. Exports and Others,* (2016)1 SCC 91; *T. Commissioner of Customs, Bangalore vs. M/S G.M. Exports and Others,* (2016)1 SCC 91; are few among many other cases where Supreme Court has stressed on the state's obligation to respect to international law.

[13] AIR 1979 SC 64, p. 69, para 4A

[14] Article 37 deals with the application of the principles contained in this Part IV. It states that "the provision contained in this Part shall not be enforceable by any court, but the principles therein laid

governance in our country. The scope of Article 51(c) when read with Article 37 signifies that the state organs are vested with the duty to frame laws that are not in conflict with the international law. However, it is to note that such laws do not override the provisions relating to Fundamental Rights in Part III of the Constitution. The directive in this Article indicates the policy of our State in the international sphere and does not enable it to override constitutional guarantees contained in Part III of the Constitution. A law which is inconsistent with the Fundamental Rights conferred by Part III of the Constitution will be void, although it may give effect to a treaty with another country.[15]

Much of the Constituent Assembly debates regarding international law were focussed on the writings of international jurists like Austin, Gray, Westlake, Oppenhiem, and Hall. They reasoned the failure of League of Nations and weakness of the UN.[16] They debated over determining the conduct of India with other nations in the post- II World War period. The drafters approach Article 51 from diverse angles, but overlooked the domestic implication the Article may have owing to ambiguity in language. The chapter highlights the structural ambiguities in the Article 51.

The meaning to be given to the term 'state' in the Article 51 forms the first among the other ambiguities. There is uncertainty with respect to the scope of the expression 'state' in Article 51, whether it must have the same meaning as in Part III of the Constitution. The expression 'state' as per Articles 12[17] and 36[18] of the Constitution, comprises of 'Government and Parliament of India and the Government and Legislature of each of the states'. If the term 'state' in Article 51 is construed in accordance with the inclusive definition given in Article 12, then the federal state legislatures and executives will also be competent to engage with international law. This construction of Article 51 conflicts with Article 73, Article 246 (with entry in 7th Schedule) and Article 253 which empower only the Parliament and Union Executive

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down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws."

[15] Chitaley D.V. and Appu Rao, S. (1973), *The Constitution of India*, Bombay: AIR Commentaries, II: p. 723

[16] cadindia.clpr.org.in; Constituent Assembly of India Debates (Proceedings) Vol. VII.

[17] Article 12 provides that "the term 'state' includes (1) the Government and Parliament of India, i.e., Executive and Legislature of the Union. (2) the Government and the Legislature of each State i.e.. Executive and Legislature of States. (3) All local or other authorities within the territory of India. (4) All local and other authorities within the territory of India".

[18] Article 36 provides discusses the ambit of state that "definition in this Part, unless the context otherwise requires, the state has the same meaning as in Part III".

to engage with international law. The issues relating to international peace and security, international relations and international obligations fall within the exclusive domain of the Union.

The other debatable issue is if judiciary falls within the definition of state according to Article 12. It is to note that the Article 12 does not expressly mention judiciary as a state. The question arose before the Supreme Court for the first time in *Naresh vs. State of Maharashtra*[19] and again in *A. R. Antulay vs. R.S. Nayak*[20]if the judiciary is covered under the ambit of Article 12. The Supreme Court indirectly and subtly agreeing to bring judiciary under the ambit of state, held that "the courts (like any other organ, emphasis added) cannot pass any order or issue any direction which would violate the fundamental rights of the citizens".[21] It can be inferred that the conditions applicable to the other state organs under Article 12 apply to judiciary as well. Seervai is of the opinion that the judiciary should be included in the expression of 'state' as defined under Article 12 of the Constitution and acting judges are to be subjected to the writ jurisdiction".[22] If judiciary is to fall within the ambit of state, then the scope under which the judiciary has to discharge its obligations towards international law is not explicit in the Constitution.[23] Nonetheless, Indian judiciary honours international law and common law unless they are inconsistent with the Indian Constitution.

The positioning of Article 51 makes the provision non-enforceable in the court, which is to mean that the enforcement of international treaties and customary international law cannot be questioned in the court of law. Alexandrowicz argues that "it would seem that Indian law has not accepted Blackstone's doctrine that the law of nations is part of the law of the land, a doctrine which in English law is subject to qualifications".[24] This opinion of Alexandrowicz is however not true as the Indian Courts have adopted Lord Denning's principle that customary international law is the

[19] AIR 1967 SC 1
[20] AIR 1988 SC 1531
[21] *Ibid*., para 40
[22] Seervai H.M. (1991),*Constitutional Law of India* , New Delhi: Universal Law Publishing, p. 155
[23] Nanda argues that the mention of 'state' in Article 51 is open to include judiciary, but the Article 12 does not expressly mention judiciary to be considered as state. Nanda Ved P. (1966), *Application of customary International Law by Domestic Courts: Some Observations*, 12 N. Y. L. F. 187(N2), p.210. However, the Supreme Court is not restricted to the narrow scope of Article 12.
[24] Alexandrowicz, C. H. (1952), "International Law in India", *International and Comparative Law Quaterly*,1(3): 289-300, p. 291

law of the land from the *Trendex* case[25] in their decisions.[26] When customary international law is described as law of the land, then it is subject to jurisdiction of the court irrespective of non-justiciable nature of Article 51. In a dualist model, the content of an international treaty is subject to jurisdiction only after it has been transformed into a domestic legislation. However with the acceptability of un-ratified international human rights and environmental law by the Indian judiciary, there is a future possibility of questions being raised on the enforceability of international treaties.

The clause (c) of Article 51 requires the state to foster respect to international law and treaty obligations. The intention of the drafters for the separate mention of international law and the treaty obligations might be to mark divergent treatment to be accorded to international treaties and customary international law. For a dualist state like India, it is very early for the drafters to apprehend the incorporation approach being advanced towards customary principles, unless they were aware of Lord Denning's precedent. The expression international law might be connotation used for customary international law. Weil observes that the use of 'general international law' and 'customary international law' interchangeably is to establish the difference between a treaty law as applicable to state parties and rule of customary international law as generally applicable on the states. He further says that "the very generality of a rule of customary international law is held to make it binding on all states without distinction".[27] Similarly in Article 51, the use of term 'international law' instead of 'customary international law' gives the connotation of customary international law being general and binding. Unless, the Indian judiciary has opposed to any customary principle as persistent objector, the Indian judiciary observes the customary international law because of the general character of customary norms.

[25] *Trendex Trading Corpn. vs. Central Bank*, (1977) I All E.R. 881, Accessed 25 December 2016, URL: www.uniset.ca/other/css/19772WLR356.html.

[26] The position of customary international law in India and their reception by the Indian judiciary has been discussed in detail in Chapter 6. However, for the present purpose reference can be drawn to *Gramophone Co. of India Ltd vs. Birendra Bahadur Pandey*, AIR 1984 SC 667; *Vellore Citizens Welfare Forum vs. UOI* AIR 1996 SC 2715 among others

[27] Weil, Prosper (1983), " Towards Relative Normativity in International Law?", *American Journal of International Law*, 77(3): 413-442, p. 437

Fourthly, the phrases "maintain just relations" underscores the importance of justice to relation between the nations.[28] Likewise, phrase "foster respect for international law" is ambiguous as it raises the question if India requires fostering respect to international law in its own conduct or as between nations.[29]

Finally, encouragement of arbitration as a means for settlement of disputes is the outcome of influence of League of Nations. The inclusion of arbitration was a result of an inadequate understanding, as this phrase was inserted based on few statements made during the course of debate in the Constituent Assembly.[30] The arbitration referred to was third party arbitration which was popular during the reign of League. The use of the term 'organised peoples with one another' might be to mean the dealings of states and peoples with one another. Alexandrowicz added that this may also include apart from sovereign states "self-governing communities which have not secured recognition by the family of nations, yet may have the capacity to conclude certain treaties, mainly of non-political character."[31] This signifies that India acknowledges the position and role of the trust territories and dependent states in international community similar to its position prior to independence.

Though the Article 51 is filled with ambiguities, it is the only provision in the Indian Constitution that mentions about international law and frequently cited by Supreme Court in its decisions involving foreign elements. Due to the many ambiguities in the text, Lavanya Rajamani observes that "the constitutional schema, therefore, in practice has lent itself to a usurpation of power by the executive and the judiciary, leaving Parliament and 'people power' with a limited role in relation to international law".[32]

3. EFFECTUATING TREATIES IN THE INDIAN LEGAL SYSTEM

The Constitutional framework towards the treaty process in India can be studied under two divisions, treaty formation and treaty implementation. India follows the British

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[28] Mani, V.S. (1995), "Effectuation of International Law in the Municipal Legal Order: The Law and Practice in India", in Ko Swan Sik, M.C.W.Pinto and J.J.G. Syatauw (eds.) *Asian Yearbook of International Law*, Hague: Kluwer Law International, p. 157

[29] *Ibid.*, p. 157

[30] cadindia.clpr.org.in; Constituent Assembly of India Debates (Proceedings) Vol. VII.; Rao, *supra* note 348, p.6. The drafter viewed arbitration as an effective mode of settlement of disputes and opined that it will be prescribed by UN as an effective mode of dispute settlement.

[31] Rajamani, *supra* note 8

[32] *Ibid.*

practice in dealing with treaties. There are deep-seated affinities between India and the United Kingdom in ideas and institutions such as rule of law and the parliamentary system of government.[33] It appears to be appropriate to mention the decision of Privy Council in *Attorney General for Canada vs. Attorney General for Ontario,*[34]

> it will be essential to keep in mind the distinction between (1) the formation and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign states. Within the British Empire there is a well-established rule that the making of a treaty is as executive act, while performance of its obligation, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law.[35]

The decision of the Privy Council represented the practice adopted by British India which continued substantially even after the commencement of the Constitution. The Constitutional Debates in India indicate that the drafters wanted it to be a primary executive affair similar to British model where the British Crown has the prerogative power to conclude treaties.

3.1 Formation of Treaties

The term 'treaty' is defined in Article 2 of the VLCT 1969 as "an international agreement concluded between states in written form and governed by international law, whether embodied in single instrument or in two or one related instruments and whatever its particular designation". The Indian judiciary has given a positivist formal definition to the term treaty similar to that Article 2 of the VLCT 1969. The Indian Judiciary gave an expansive definition to the term treaty in *State Bank of India vs. Income Tax Officer, 'A' Ward*.[36] The court defined the term treaty as,

> the word treaty is a generic term and means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments (called either treaty, convention, protocol, convenient, character, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, modus vivendi or any other appellation)

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[33] Rau B.N. (1960), *India's Constitution in the Making*, Chennai: Orient Longman, p. 355.
[34] 1937 A.C 326 cited in Raghavan C.G. (1972), "Treaty Making Power under the Constitution of India" in S.K. Agrawala (ed.) *Essay on the Law of Treaties*, New Delhi: Orient Longman 71 at p. 220
[35] *Ibid.*, p. 220
[36] [1965] 57 ITR 235, (Cal); MANU/WB/0225/1965.

concluded between two or more states or other subjects of international law and governed by international law.[37]

The Court further explains the effect of signature, ratification, accession, acceptance or approval of treaty as "the act whereby a state establishes, on the international plane, its consent to be bound by a treaty. Signature, however, may also mean, according to the context, an act whereby a state authenticates the text of a treaty without establishing its consent to be bound."[38] The mainstream international law and the state organs render a very formal and positive definition to international law or its related aspects. Chimni observes that "the bourgeois international law offers a formal and technical definition to international law, holding international law in abstraction from international society. They proceed with an assumption that the state stands above particular groups, interests and classes within a nation state."[39] Mohammed Bedjaoui opines that "only the form of a legal concept is considered, while its content- the social reality it is supposed to express-is lost sight of."[40]

The appropriate meaning to the term treaty is offered by the Soviet scholars Koravin as "every international agreement in the expression of an established social order, with certain balance of the collective interest"; and Pashukanis as "a treaty obligation is nothing other that a special form of the concretization of economic and political relationships."[41] These definition draws attention towards establishing a fair socio-economic order by balancing the collective interests unlike the definition and explanations offered by VLCT 1969 or state organs.

Treaty making in India, like any other Commonwealth country falls within the Executive function of Union. Article 73 read with Article 246 and Item 14 of the Union List, Seventh Schedule of the Indian Constitution confers the power upon the Executive to conclude treaties.

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[37] *Ibid*.
[38] *Ibid*.
[39] Chimni, B. S. (1999), "Marxism and International Law: A Contemporary Analysis", *Economic and Political Weekly*, 34(6): 337-349, p. 337.
[40] *Ibid.*, p. 338
[41] Chimni, B.S. (2004), "An Outline of a Marxist Course in Public International Law", *Leiden Journal of International Law*, 17: 1- 30, p. 12.

Article 73 states the Extent of Executive power of the Union:

1. subject to the provisions of this Constitution, the Executive power of the Union shall extend,
   a) to the matters with respect to which respect to which Parliament has power to make laws; and
   b) to the exercise of such rights, authority and jurisdiction as are exercisable by the government of India by virtue of any treaty on agreement: Provided that the executive power referred to in sub clause (a) shall not, save as expressly provided in this constitution or in any law made by Parliament, extend in any State to matters with respect to which the legislature of the State has also power to make laws"

A proviso to this Article also makes clear that the general Executive power described in clause (a) was linked to Parliament legislative power and shall not extend to those areas which fall within the exclusive legislative domain of the state. The executive power of the Union extends under sub-clause (b) of clause (1) to exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.

The textual foundation to Article 73 can be traced back to the Government of India Act 1935. The Government of India Act 1935[42] provided for the establishment of a federation of India under the Crown. The federation composed of the British India Provinces and the Indian states which would accede to it. The Governor-General on behalf of the Crown exercised executive authority in the matters on which the federal legislature had power to make laws.[43] Section 3(1) (b) of the 1935 Act empowers the Governor- General to exercise "such other powers of His Majesty, not being powers connected with the exercise of the functions of the Crown in its relation with the Indian states, as His Majesty may be pleased to assign to him." One of those powers was conclusion of treaties which was the royal prerogative.

The phraseology of this provision resembles that of section 8(1) (c)[44] of the Government of India Act 1935, under which the executive authority of the Federation

[42] The Government of India Act 1935 was inspired by Canadian Constitution.
[43] Section 8(1)(a) of the Government of India Act 1935.
[44] Section 8 of the Government of India Act of 1935 mentions the extent of executive authority of the federation
(1) Subject to the provisions of this Act, the executive authority of this Act, the executive authority of the federation extend: (a) to the matters with respect to which the federal legislature has power to make laws;
(b) to the raising in British India on behalf of His Majesty of naval military and air forces and to the governance of His Majesty's forces borne on the Indian establishment.

extended to the exercise of such rights, authority and jurisdiction as are exercisable by His Majesty by treaty, grant, usage, sufferance or otherwise in and in relation to tribal areas.[45] The Indian Constitution borrows largely from the other constitutions and in particular from the Government of India Act 1935. But so long as the borrowings have been adapted to India's peculiar circumstances, they cannot in themselves be said to constitute a defect.[46] The Government of India has confirmed to this position by sending Memorandum in 1951 to the Secretary-General of the United Nations, the Government of India informed that 'the President's power to enter into treaties remains unfettered by any "internal restrictions'.[47]

Under Article 53[48] the President is the head of the Union Executive. The Court in *Union of India vs. Manmull Jain and Others*[49]observed that "making of a treaty is an executive act and not a legislative act" and further expanded the ambit of executive's power holding that "when the President, in whom Article 53 of the Constitution vests all the executive power of the Union, has entered into a treaty, the municipal courts cannot question the validity of the treaty".[50] However, the treaty making power of the executive is not absolute as there are some implied restrictions. If a treaty or any provisions of the treaty are in contravention to the provisions of the constitution, then such treaty or provisions are treated to be null and void. This principle is upheld by the Supreme Court in the advisory opinion of *re The Berubari Union and Exchange of Enclaves*[51]that "the treaty making power is of course subject to the limitations which the Constitution of the state may either expressly or by necessary implication impose in that behalf... stated broadly the treaty making power would have to be exercised in the manner contemplated by the Constitution and subject to the limitation by it".[52]

(c) to the exercise of such rights, authority and jurisdiction as are exercisable by His Majesty by treaty, grant, usage, sufferance, or otherwise in any relation to the tribal areas.

[45] Chitaley, D.V. and Rao, Appu S., *supra* note 15 at p.817.

[46] Rau, B.N. *supra* note 33 at p. 361

[47] United Nations: Law and Practices Concerning Conclusions of Treaties in Rao, Narayana K. (1960-1961), "Parliamentary Approval of Treaties in India", *Indian Yearbook of International Affairs*, 22- 39, p. 23.

[48] Article 53 states that" (1) the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with its Constitution".

[49] AIR 1954 Cal 615.

[50]*Ibid*., p. 616-617.

[51] AIR 1960 SC 845

[52]*Ibid*., p. 857, para 31

International law similar to municipal law imposes limitations on treaty formation. Article 53 of the VLCT 1969 states that "a treaty is void if at the time of its conclusion, it conflicts with a pre-emptory norm of general international law." A pre-emptory norm of general international law is a norm accepted and recognised by the international community of states as a whole norm. There shall not be any form of derogation from the pre-emptory norms and it can be modified only by a subsequent norm of general international law having the same character." India is bound by this principle though India is not a signatory to VCLT 1969. The Supreme Court in *Ram Jethmalani vs. Union of India*[53]considered the provisions of the VLCT 1969 applicable holding them as customary principles of international law. The court held that "while India is not a party to the Vienna Convention, it contains many principles of customary international law, and the principle of interpretation, of Article 31 of the Vienna Convention, provides a broad guideline as to what could be an appropriate manner of interpreting a treaty in the Indian context also".[54] Since pre-emptory norms have been crystallised as customary international law the states are bound by them.

The other limitation on the treaties is imposed by the UN Charter. Treaties attain validity and legitimacy if they are in consonance with the UN Charter. The Article 103 of the Charter provides that "in the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". The treaties which are not in accordance with the *jus cogens* or principles enshrined in the UN Charter are considered to be invalid.

The treaty making power in India is not a special self-standing *sui generis* Constitutional power subject to special restrictions enshrined in the Constitution itself.[55] There is no express provision in the Constitution that regulates treaty making mechanism or directs the Union Executive i.e. President to make treaties. In practice, the President does not negotiate and conclude a treaty or agreement. Plenipotentiaries are appointed for this purpose and they act under the full powers issue by the

[53] (2011) 8 SCC 1.
[54]*Ibid*, para 60
[55]Dhawan Rajiv (1997), "Treaties and People: Indian Reflections", *Journal of the Law Institute*,39,(1): 1-46, p. 12

President.[56] The treaty making power is a general part of the executive power but with the added facility that the legislative lists can be transgressed while making or implementing treaties.[57]

The treaty making power of the Executive is drawn from Article 73, which in turn refers to Article 246 that lists out the subjects on which Parliament has the power to legislate.[58] In the Union list so specified Schedule VII List I Entries (10-25, 29, 31, 37, 41, and 57) relates to matters on international importance of which entries 10-15 deals with those subject areas which are associated to treaty making.[59]

Pursuant to Article 246 read along with the entries, Parliament is competent to make laws on the subjects mentioned in the entries. Under Entry 14 Parliament has power to make laws regulating the procedure concerning the entry into treaties and agreements and their implementation. Parliament has the exclusive power to make laws with respect to any of the matters enumerated in List I and it is not to be construed as a term of limitation. Since the powers of both executive and the legislature are enumerated in the Constitution, the Parliament cannot pass any law that limits or confines the power constitution has vested in the executive. Narayan Rao articulates three interpretations in relation to the exclusive power of the Parliament to make laws with respect to entering into and implementing treaties, agreements and conventions.

1. Parliament alone that is competent to 'enter' into treaties. Article 246(1) and (2)[60] has made Parliament's power more explicit. Though this interpretation may appear logical and reasonable, it does not fit in well

[56] Article 53(3) states that Nothing in this article shall (a) be deemed to transfer to the President any functions conferred by any existing law on the Government of any States or other authority, or (b) Prevent Parliament from conferring by law functions on authorities other than the President."

[57] Dhawan, *supra* note 55 at p.12

[58] Article 246 (1) states "Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule"

[59] Entries 10 – Foreign affairs; all matters which bring the Union into relation with any foreign country; entry 11- Diplomatic, consular and trade representation; entry 12- United Nation Organization; entry 13-Participation in international conferences, associations and other bodies and implementing of the decision made there; entry 14 entering into treaties, agreements and conventions with foreign countries and implementing of treaties, agreements and conventions with foreign countries; entry 15- War and peace

[60] Article 246(2) Notwithstanding anything in clause (3), Parliament and subject to clause (1), the Legislature of any state also, have power to make laws with respect to any matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as Concurrent List')

with the reality. Parliament cannot, by its very nature, initiate and physically participate in the deliberations and negotiations of treaties.

2. Entering into treaties belongs to the Union as the executive power of the Union by virtue of article 73(1). Function of the Union Executive extends to all the matters in which the Parliament has power to legislate. Treaty making is an executive act and this executive act is exercisable by the President as per Article 53. Hence the treaty making power vests with the President.

3. Though the executive power includes treaty-making, the legislative power under the jurisprudence of modern constitutional law also includes treaty making functions.[61]

From the days of monarch the treaty making functions was regarded as an exclusively executive concern. But from the time of American and French revolutions, the legislative organs of the state began to assert themselves effectively in the external affairs in general and in treaty making in particular. About 60 states have procedures expressly providing for the legislative approval of all or certain categories of treaties. It cannot be maintained that treaty making is exclusively an executive act. It can be both an executive and a legislative act.[62]

However, the Parliament has not made any laws in this regard. In the absence of any piece of legislation it has conferred total power on the Executive to not only enter into the treaties and agreements but also to decide the manner in which they should be implemented, except requiring enabling legislation.[63]

As elucidated by T.O. Elias "a situation could arise in which a treaty entered into by the Federal Government in the exercise of its treaty making power might bind the country in its international relations with the other parties to it, yet not apply to any of its component units that might withhold its consent to the implementation of law having effect within its own territorial scope".[64] Nigeria to avoid such difficulty

[61] Rao, Narayana *supra* note 47 at p. 23-24
[62] *Ibid.,* p. 23
[63] National Commission to Review the Working of the Constitution,(2001),*Treaty Making Power Under Our Constitution*, New Delhi, para 5
[64] Elias, T.O. (1974), *The Modern Law of Treaties*, Sijthoff International Publishing Company: Netherland, p. 50.

has established policy of including in its negotiating team representatives of those states that are likely to be affected by the terms of the proposed treaty. This ensures the participation of all parts of Nigeria from the process of negotiation till the conclusion of the treaty[65]

Once the Executive government enters into a treaty, it would be quite embarrassing for the Parliament to reject it, more so in the view of the provisions of the Vienna Convention on the making of Treaties which although not ratified by India indicates certain consequences flowing from the conclusions of a treaty.[66] However, there has been an instance where the refusal to ratify a treaty was considered as an inherent right of a sovereign state. Article 7 of Havana Convention on Treaties 1928 a regional treaty operating among American states provides that "refusal to ratify or the formation of a reservation are the acts inherent in national sovereignty and as such constitute the exercise of a right which violates no internal stipulation or good form. In case of refusal it shall be communicated to the other contracting party." The Vienna Convention on Law of Treaties 1969 has provided for the reservation in the treaties but has not acknowledged the right of a state to reject the ratification of treaty. Even in the cases of unequal treaties a state cannot reject the ratification after being a party to it. Detter argues the continued existence unequal treaties as,

> we do not always have equality of states. There may sometimes arise less desirable situations: a state that has just gained its independence may, for various reasons, find difficulties in making itself heard in international relations; it may sometimes find itself compelled to enter into treaties with more dominating states, treaties which only favour the stronger of the parties, treaties which even sometimes are in conflict with the long-term national interest of the weaker state. Such treaties are referred as being unequal.[67]

However, according to the Soviet doctrine, all agreement under international law that have been forced upon a state, or agreement that are of an "enslaving' nature as well as those that disregard the principle of equality, are without any effect under international law. Lukachuk has furthermore added to this theory that agreements

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[65] Elias, T.O.,(1967), *Nigeria: Development of its Laws and Constitution*, London: Stevens, p. 270

[66] National Commission Report, *supra* note 63 at para 5

[67] Detter explains two types of inequality as "Legal equality, equality in law and before the law applicable to all states, great or small. This means legal equality as opposed to political equality. Legal equality, however, has two aspects. On the one hand, it means that states, whatever political influence they may have or whatever size they may be, are all alike before international law; this is what McNair calls 'forensic equality in international law'. Detter Ingrid,(1966), "The Problem of Unequal Treaties", *International and Comparative Law Quarterly*, 15:1069- 1089., p. 1070

which do not correspond to the "real will" of the parties lack legal effects.[68] When unequal treaties are formed in unequal circumstance then international law has to provide mechanism to cancel the treaty for its nature and consequence. Putney observes that,

> there do not seem to be any principles of international law that entitle a state to cancel a treaty because of its inequality. There are only two way open to such a state: either denounce the treaty, claiming that it had been concluded under force or rescind it on account of changed circumstances i.e. applying the principle *rebus sic stantibus*.[69]

Bhagwati in describing the multilateralism opined that "it is useful to remember that interdependence is a normative attractive soothing word, but when nations are unequal, it also leads to dependence and hence to possibility to perverse policy interventions and aggressively impose coordination policies with outcomes that harm the social good and the welfare of the dependent nations while advancing the interest of the powerful nations".[70]

Chimni observes that in treaty making process "bargaining frequently takes place in a world with uneven resources and opportunity costs".[71] It is argued that treaty making is not a democratic process for the weak states. Mohammed Bedjaoui describes treaty negotiations in reality as "the substantive inequality of parties almost always shapes the content of the agreement".[72] Since state is an abstract notion, the effect of treaties will be directly borne by the people. When treaties have direct effect on the people, there has to be some mechanism in the treaty process for making the process democratic. Participatory democracy in treaty making may be ensured at two levels, at international and national levels. The first step towards democratizing the international treaty negotiation process is by restructuring the concept of treaty in the backdrop of socio-economic concerns. Chimni argues for the adoption of certain elements for democratic treaty process, firstly codification of rules on deliberative democracy; secondly, introduction of people-based social impact assessment system;

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[68] *Ibid.*, p. 1082; He highlights that even today 103 of the world's 193 nations are either 'not free' or only 'partly free' according to Freedom House's annual survey of political freedom around the world.
[69] *Ibid.*, p. 1084. For instance, in the WTO Agreements, the option of revoking or cancelling is not available to state parties after accepting the obligations.
[70] Chimni, B.S. (2005), "Alternative Visions of Just World Order: Six Tales from India", *Harvard International Law Journal*, 46, p. 391
[71] Chimni, B. S. *supra* note 41 at p. 12
[72] Chimni, B. S., *supra* note 39 at p. 338

thirdly, prescribing to the legal tools that provide flexibility for the dependent state to implement norms according to its socio-economic needs; and finally, fair and just use of *rebus sic stantibus*.[73] A fair and just international treaty mechanism appears to be a cherished aspiration, but might not be in the immediate grasp. However, an alternative within the reach of a state to protect its interest from the dominance and effect of unequal treaties is to structure its own domestic treaty making process to suits its concerns. By structuring the domestic treaty making mechanism to suit its socio-economic conditions, a state can minimizes the effect of unequal international instruments.

3.1.1 Parliamentary Approval

In a democratic system, the consent of the people or the people's representative may be made a pre-requisite before entering into a treaty. Indian practice of vesting unfettered power of treaty making on the executive is derived from the Commonwealth practice. It is noteworthy that when this practice had originated the treaties were limited to the governments which were mostly of political and administrative in character. After the Second World War and establishment of United Nations the large numbers of treaties have expanded covering issues directly affecting the individuals. The treaties related to environment, human rights, intellectual properties, trade agreements and others have an impact on our society. These are the issues which directly and substantially affect the lives of the people. Krishna Iyer J. argues that "the legal methodology of treaties legitimises the process of economic exploitation". "Without consulting Parliament or people, signed on the dotted line, signing away the safeguard for crucial sectors such as agriculture on which nearly 70 per cent of the Indian population still depends for a living".[74]

The participation of the people may be ensured by seeking the Parliamentary participation in the treaty making process. Parliamentary approval provides for the democratic participation of the nation through its representatives in treaty making and also acts as a shield in protecting the legitimate interests of the people of the country. The Parliamentary approval and Parliament's implementation of treaties are not the

[73] Chimni, B. S. *supra* note 41 at p. 13-14
[74] Saxena, Rekha (2007), "Treaty- Making Powers": A Case for 'Federalisation' and 'Parliamentarisation', *Economic and Political Weekly*, Vol. 42, (1):24-28, p. 24.

same. In the words of Kelson "many constitutions provide that all, or certain, treaties must be approved by the legislative organ in order to be valid. Such approval is not transformation, it is the participation of the legislative organ in the conclusion of the treaty, which is nothing other than participation in the creation of international law".[75]

Further, any decision taken by the Executive in exercise of its broad treaty making power is binding both within and without the international legal system of India.[76] In the international legal system, the international commitment becomes binding and irrevocable from the moment it is made. At present there are no constraints to the Executive's treaty making power. Therefore, if the Executive enters in to binding commitment, India will be internationally liable for violating obligations incurred through such commitments. After the Executive concludes a treaty the Parliament has a very little chance of discussing the advantages and disadvantages of the treaty. When the Parliament approval is taken before conclusion of treaty entailing obligation, India can save itself from the blame for not having ratified the treaties and incurring liability for the same.

Another important reason to obtain Parliamentary approval is that India is a federation of states and the federal principles must be given full effect. Mani states that Indian federal principles have not been given as much importance as in United States, Australia or Canada. In the Draft on the Law of Treaties submitted in 1950 to the International Law Commission, Prof. Brierly anticipated the problem and suggested that "in the absences of provision in its constitution to the contrary, the capacity of a state to make treaties is deemed to reside in the Head of the State". This suggestion raised objections from several member countries after which this provision was deleted. [77] With participation of the Parliament in the treaty making process, the federal state representative will be able to voice in the interest of their region and people.

The Constitution has neither expressly designated the treaty making power to executive nor developed a sui-generis mechanism for the treaty making. It may be argued that the treaty making function falls within the purview of both the Executive

[75] Kelson, Hans (1952), "*Principles of International Law*", New York: Rinehart and Company, p. 493.
[76] Dhawan, *supra* note 55 at p. 14
[77] International Law Commission (1950), Yearbook of the International Law Commission, II United Nations, New York, p. 234

and Legislature. With no expression provision to indicate the contrary, treaty making can be considered as the joint concern of both the executive and legislature.[78] The argument that treaties in India need Parliamentary approval may be supported by following arguments. Firstly, the Article 73 limits the executive power to those areas where the constitution has provided for the legislative enactment. The executive can exercise its power only in execution of powers and responsibilities empowered by Parliament; and where the Constitution expressly or by necessary implications vested the executive with such power.[79] Parliament has inherent power to pass legislation under Entry 14. An argument can be furthered that if treaty making were exclusively an executive function then it would get an explicit mention under Article 73(1) (a). This indicates that Article 73(1) (a) does not contain the totality of treaty making power. The contention is that Article 73(1) (a) covers the entire field of treaty making power subject to the future legislation by Parliament under Entry 14 of the Union List is not true. Whenever the Constitution wants to retain the status quo until Parliament passes a law on the matter, it has invariably employed the familiar expression 'until Parliament otherwise provides by law'.[80] Nor can the doctrine of Residuary Powers of the Executive be invoked here for the reason that legislative participation in the conclusion of treaties is quite an admitted and established fact.[81] Therefore it can be submitted that treaty making is not completely an executive act. Secondly, Article 73(1) (b) provides that the Union shall extend 'to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement." If the issue like exercise of rights under a treaty requires an express provision to that effect in defining the extent of the executive power of the Union, then an important aspect like treaty-making capacity cannot be entirely left to the discretion of the executive.[82]Finally, the cabinet has to be accountable to the Parliament. There has to be some checks and balances otherwise the unscrupulous power of the Executive leads to tyranny. In the present system, the cabinet is accountable to Parliament only after the country has been committed to the treaty. Article 73 considers both the Executive and the Parliament on par with each other. As

[78] Rao, Narayan, *supra* note 47 at p. 26
[79] Varma Prem (1975), "Unequal Treaties in Modern International Law", *Eastern Journal of International Law,* VII: 56-79, p. 65.
[80]Rao, Narayan, *supra* note 47 at p. 28
[81]*Ibid*.,p. 28
[82]*Ibid*., p. 28

the jurisdiction of both the Union Executive and Union Legislature are co-extensive, the Commonwealth practice of granting unfettered power to the Executive is not in consonance with the Indian Constitution.

Rajiv Dhavan explains that "under the scheme of the constitution it is Parliament that needs to legislation on the manner and extent to which the union may participate in international conferences, associations and other bodies, enter into treaties and agreements and implement whatever decisions are made at these meetings through these instruments… there is nothing to prevent Parliament from passing legislation which will place treaty negotiations within a framework of democratic accountability of India".[83]

Many attempts were made to amend the treaty making power of the Executive by providing parliamentary scrutiny. In 1993, George Fernandes, Member of Parliament, Lok Sabha gave notice of intention to introduce the Constitution Amendment Bill, for amending Article 253 to provide that treaties and conventions be ratified by each House of Parliament by not less than one half of the membership of each House and by a majority of the legislatures of not less than half the States. [84] The second time, Satyaprakash Malviya, Member of Rajya Sabha enquired whether the Government proposes to introduce any legislation to amend the Constitution to provide for Parliamentary approval of international treaties.[85] In 1992, M.A. Baby, Member of Parliament, Rajya Sabha gave a notice of his intention to introduce the Constitution Amendment Bill, 1992 to amend Article 77 providing that

> every agreement, treaty, memorandum of understanding contract or deal entered into by the Government of India including borrowing under Article 292 of the Constitution with any foreign country or international organization of social, economic, political, financial or cultural nature and settlements relating to trade, tariff and patents shall be laid before each House of Parliament prior to the implementation of such agreement, treaty, memorandum of understanding, contract or deal and shall operate only after it has been approved by resolutions of both Houses of Parliament.[86]

There were no positive results regarding this issue. This issue was discussed at length in Rajya Sabha in 1997, Pranab Mukherjee, observed that Parliamentary

[83] Dhawan, *supra* note 55 at p. 50
[84] National Commission to Review the Working of the Constitution, *supra* note 63 at para 45
[85] *Ibid.*,para 45
[86] *Ibid.*, para 45

approval has led to certain complications. He gave the example of the United States Senate refusing to ratify the Treaty of Versailles the end of the World War in spite of the fact that President Wilson had played a crucial role in bringing about the said treaty. He then referred to the two river treaties signed between India and Nepal on harnessing water where it had become difficult to obtain the Parliamentary approval. He noted that "the Parliament is not so constituted as to discuss international treaties and agreements in an effective manner. Entrusting the Parliament with the power to oversee any and every treaty and agreement and convention being entered into or signed by the Executive would not be practicable and would also not lead to desirable consequences".[87]

Obtaining Parliamentary approval to all international treaties and agreements may not practically feasible. The study proposes that there has to be segregation in the international treaties. The segregation must be based on the nature and the gravity of the international obligation the instruments entail. For instance, the WTO Agreements have serious consequences on the socio-economic conditions of individuals thereby requiring the participation of the Parliament.

Another instance is 'Major Defence Partner' designation to India and the Logistics Exchange Memorandum of Agreement between the U.S. and India concluded last year. The U.S. placed the details of the Major Defence Partner designation for approval of the U.S. Senate as part of FY 2017 National Defence Authorization Act (NDAA) while India did not table it. Issues like this when placed before the Parliament for its approval triggers the debate and deliberation in house leading to an appropriate decision.[88]

The other alternative is that the Parliament may consider providing some over-sight mechanism to the treaty negotiations. This model is similar to the American treaty making process. This supervisory role requires a creation of structural unit capable of undertaking hearing, investigation, consultations and review reports. This

[87] *Ibid.*,para 46

[88] Yechury to PM: Place defence pacts with U.S. in Parliament, The Hindu, 14 December 2016, p.12. CPI(M) further claimed that there are significant concessions made by Indian government which will make Indian defence forces open to American scrutiny, and Indian defence production under the control of the U.S. Hence this had to be placed before Parliament before the treaty negotiations.

model can be appropriately modified and adopted in India so that there is sufficient debate on the advantages and consequences arising from international agreements.

3.1.2 Participation of the Federal States in Treaty Making

The Constitution provides that Parliament alone can make law with regard to the subject matter in List I. This rule thereby empowers the Union Executive to conclude treaties in the subject matter concerning the state list. This rule is analogous to the British rule when it exercised paramountacy extinguishing the power of the state to establish any relation with foreign states. The law was framed excluding the participation of the states in the List I, Section 100 (1) of the Government of India Act 1935 states that,

> Notwithstanding anything in the two next succeeding subsections, the Federal Legislature has, and a Provincial Legislature has no power to make laws with respect to any matters enumerated in List I in the Seventh Schedule to this Act.

A state or a province had no right to enter into agreements with any foreign country or share with the federal government in the conduct of external affairs.[89] However, in its application to the State of Jammu and Kashmir, to Article 253, the following proviso shall be added, "Provided that after the commencement of the Constitution (Application to Jammu and Kashmir) order, no decision affecting the disposition of the State of Jammu and Kashmir shall be made by the Government of India without the consent of the Government of the state".[90]

The study of its treaty power is important since India is the most recent world's main federations and has evolved through two constitutions.[91] During 1990's, India moved from a command economy[92] to a federal market economy. Under conditions of a federal market economy, the states command a larger share of

[89] The 1935 Act was not clear about the relationship between the Crown and the federated states. For instance the Governor-General could exercise his authority over a state only to the extent which the ruler accepts as a matter with respect to which federal legislature may make laws for his state. But the clause (2) of the same section provides that not only the Governor- General but also His Majesty could exercise in relation to a federal state such functions as may be vested in them by or under this Act. Looper, B. Robert (1955), "The Treaty Power in India", *British Yearbook of International Law*, 32: 300- 307, p. 301.

[90] Constitution (Application to Jammu and Kashmir) Order 14/5/1954 para 2(6)(e).

[91] Looper, *supra* note 89 at p. 300

[92] A command economy is a system where the government determines what goods should be produced, how much should be produced and the price and the price at which the goods are offered for sale.

economic sovereignty than they did under the conditions of a centrally planned economy.[93]

The globalization has given rise to state authorities participating in international arenas. John Kincaid has discussed the connection between subnational units (states, provinces and cantons) and globalization. Kincaid has introduced the term 'constituent diplomacy' to denote activities undertaken by state units. The term constituent diplomacy is preferred to subnational diplomacy because 'subnational implies that the states are below or inferior to national governments and thus also inferior in the field of international relation.[94] Environmental activist Vandana Shiva has argued that in 1998 state government were illegally bypassed when the central government's Review Committee on Genetic Manipulation approved genetic field trials in Karnataka and Andhra Pradesh.[95]

The state governments complained that the WTO Agreement on Agriculture negotiated by the Central Government violated the right of state governments to determine policy on an area of competence assigned to them under Indian Constitution. Without the active participation, the states find their autonomy constrained and trade vulnerability.[96] The perception in recent years is that states have experienced an erosion of their sovereignty.

But Indian state's engagement in foreign relations is described as subnational diplomacy.[97] If Indian states were to participate in true constituent diplomacy could have helped to co-formulate India's WTO and WTO-related position and policies. For reducing tension or friction between states and the union and for expeditious decision-making on important issues involving states, the desirability of prior consultation by the union government with the interstate council may be considered before signing any treaty vitally affecting the interest of the states regarding matters in the state

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[93] Rudolph Lloyd I. and Rudolph Susanne Hoeber, (2001), "Iconisation of Chandrababu Sharing Sovereignty in India's Federal Market Economy", *Economic and Political Weekly*, 36, (18): 1541-1552, p. 1541

[94] Jenkins, Rob (2003), "India's States and the Making of Foreign Economic Policy: The Limits of the Constituent Diplomacy Paradigm", in Francine R. Frankel and Douglas V. Verney (eds.) *Merging Federal Processes in India in Publius, Journal of Federalism,* 33 (4): 63-82, p. 64-65

[95] *Ibid.,* p. 70

[96] Raw- Silk producers in Karnataka had at various times been adversely affected by reduced barrier to import competition Jenkins p.75.

[97] Jenkins, *supra* note 94 at p. 80

list.[98]Not only have some of the state government protested against the Union Executive unilateralism in signing some international treaties and conventions but also approached the Supreme Court of India to adjudicate in such matters. The Indian Constitution does not clearly lay out direction with regard to the treaties unlike constitutions of other states.[99] The Indian Judiciary has interpreted the treaty making power of the executive in many cases.

The Supreme Court in *Maganbhai Ishwar Bhai vs. Union of India,*[100] held that "the effect of Article 253 is that if a treaty, agreement or convention with a foreign state deals with subject within the competence of the State Legislature, the Parliament alone has, notwithstanding Article 246(3) the power to make laws to implement the treaty, agreement or convention or any decision made at the conference."[101]

In *P. B. Samant vs. Union of India*[102], a writ of mandamus was filed to restrain the central government from entering into the Dunkel proposal without the prior consent of the Parliament and State Legislatures. It was held that the agreement would affect the subjects under the state list like agricultural products for instance raw cotton and irrigation facilities. The Court however upholding the precedent of *Maganbhai* case stated that "the executive power of the central government flows from the Central Government flows from the provisions of the Article 73 of the Constitution of India. It is equally true that the provisions set out that the executive power shall not, save as expressly provided in this Constitution or in any state, extend to matters with regard to which the legislature of the state has the power to make laws".[103]

In *Vandana Shiva vs. Union of India*[104], known as GATT/WTO ratification case, the petitioners filed a writ restraining the Central Government from agreeing to the terms of Article 27(3) and signing it. The Court however relied on the decision of

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[98] NCWRC in Saxena, *supra* note 74 at p. 24.

[99] Article II, section 2 (2) provides that the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. Article VI further declares that all treaties made or which shall be made under the authority of the United States shall be the Supreme Law of the Land; and the judges in every state shall be bound thereby, anything the Constitution or Laws of any state to the contrary notwithstanding." Article 26-28 and 31, treaties ratified by the state have the force of law notwithstanding any contrary municipal law without any further act of the legislature other than necessary for the ratification of treaty.

[100] AIR 1969 SC 783

[101] *Ibid.*, para 80

[102] AIR 1994 Bom 323

[103] AIR 1969 SC 783

[104] MANU/DE/0475/1994

Maganbhai case and held that the executive body possesses the authority to conclude a treaty. It further relied on the decisions of English and American Courts and concluded that it has been an established practice that the Union Government alone negotiates, concludes and ratifies treaties and Parliament legislates when the implementation of treaty is required. The Court held that they are empowered to enforce the law and not to make any. It repeated said that the matters of economic policies are to be left to the government.[105]

In *State of Rajasthan vs. Union of India,*[106] the Court reaffirmed the overriding power of the Parliament when legislating to give effect to the treaties. Such act of the Parliament cannot be questioned on the ground that the subjects matter belongs to the state list.[107]

These arguments results towards a strong centralization. External danger and internal planning are both forcing the transformation of genuinely federal constitution into quasi-federal ones.[108] There is an absence of an institutionalised consultation process between the centre and the states prior to making treaties. If some cooperative mechanism is put in place whereby the state governments become partners with the centre in concluding international treaties accords and agreements. The treaty- making power of the union may give rise to in the context of India's growing integration with global and regional economies. The economies of the states are affected by trade treaties made in pursuit of globalization and liberalisation. The Centre may possess an exclusive power in concluding treaties but neither the centre nor the states can fully honour treaty obligations unless there is a broad consensus between the two levels of government to do so.[109]

In Canada, the federal government has no power to conclude international agreements but the Canadian system has started to institutionalise the Premier's conferences to evolve consensus among the provinces prior to the government's agreement on critical international commitments. Mani argues that the Rajya Sabha should be allowed to participate like the Senate in American Constitution the process

[105] *Ibid*., para 17-19
[106] MANU/SC/0370/1977; AIR 1977 SC 1361
[107] *Ibid.*, para 146
[108] Looper, *supra* note 89 at p. 306.
[109] Saxena, *supra* note 74 at p. 27.

of treaty making.[110] International treaties and other agreement can be challenged in the court of law if these are in violation of fundamental rights of the people but more so if they are not in line with the basic structure of the Constitution.[111] The doctrine of basic construction is still in the making, but federalism has certainly been recognised as falling within the ambit of 'basic structure.'

3.2 Implementation of Treaties

It is a Commonwealth practice that the treaties to be implemented in the municipal law require legislative enactment. India has adopted this practice that for treaty to be domestically implemented requires an act of transformation. The signing and ratifying an international treaty falls within the competence of the Executive, whereas the implementation of such treaty falls under the domain of Parliament as explicitly provided under Article 253. The Article states that:

> Notwithstanding anything in the foregoing provision 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 countries or any decision made at any international conference, association or other body.

In British practice, local legislation by the colonies themselves was at first regarded as a pre-requisite to the entry into force of a treaty intended to apply, but later provision began to be made in commercial treaties excluding the automatic application to colonies that had reached an advanced stage of political development.[112] However, prior to the independence, treaty implementation was a federal subject under Entry 3, List I of the 7th Schedule under the Government of India Act 1935.[113] The Act further laid down in section 106[114] that the federal

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[110] Mani, *supra* note 28 at p. 163

[111] Saxena, *supra* note 74 at p. 27

[112] Elias, *supra* note 64 at p. 51

[113] List I of 7th Schedule of Government of India Act, of 1935 contains the subjects of the federal legislative list. Entry 3 refers to external affairs; implementing of treaties and agreements with other countries; extradition; including the surrender of criminals and accused persons to parts of His Majesty's dominion outside India

[114] Section 106 of the Government of India Act 1935 states that (1) the federal legislature shall not by reason only of the entry in the Federal Legislative List relating to the implementing of treaties and agreements with other countries have power to make any law for any Province except with the previous consent of the Governor, or for a Federated State except with the previous consent of the ruler thereof. (2)So much of any law as is valid only by virtue of any such entry as aforesaid may be repealed by the Federal Legislature and may , on the treaty or agreement in question ceasing to have effect, be repealed as respects any province or state by a law of that province or state.

legislature could not make any law to implement treaties for any province or state without the consent of the Governor.

Discussing the scope of Article 253 as the treaty implementing provision, Jawaharlal Nehru said in the House of People on 19 December 1960 that,

> The treaty making power under the Constitution rests with the Executive government. Of course, to give effect to the treaty, one has to come to Parliament. The government of India, if it does a wrong thing may be punished for it.[115]

Another instance, during the debate on the Geneva Convention Bill, 1960, the competence of the executive to implement treaties was highlighted was by the Defence Minister in Lok Sabha as "most of the obligations that this country undertakes under this Convention can be dealt with administratively… But since it involves certain inroads into or certain modifications of our jurisprudence, since it involves the provisions of penalties of a severe character and other provisions for the protection of emblems, it has been necessary to bring this Bill".[116]

Subject to valid laws made by the Legislature and to the provisions of the Constitution, the Government of India has power to pass orders of an executive character in relation to any subject which falls within the legislative jurisdiction of the Central legislature. Thus where a specific law of Parliament is required by the Constitution, it cannot be done by mere executive action.[117]

The effect of Article 253 is removal of limitations imposed by Article 245 and Article 246(3) by opening the entire field to legislation by Parliament which means that Article 253 is in the form of an exception to the rule contained in Article 246.[118] When a state concludes and ratifies a treaty according to its constitutional procedure, the treaty becomes binding on such state as per international law, but the internal restriction as to the applicability of the treaty to certain areas is the concern of the

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(3) Nothing in this section applies in relation to any law which the federal Legislature has power to make for a province or as the case may be a federated state by virtue of any other entry in the federal or the concurrent legislative list as well as by virtue of the said entry.

[115] Rao, P.C., *supra* note 2 at p. 131

[116] Lok Sabha Debates in Varma, Prem (1975), "Position Relating to Treaties Under the Constitution of India" *Journal of the Indian Law Institute*, 17(1): 113-130, p. 119.

[117] Chitaley D.V. and Appu Rao, *supra* note 15 at p.816.

[118] Varma, *supra* note 116 at p. 119.

municipal of such state.[119] When commission's draft articles were considered at the Vienna Conference in 1968, the delegation of the Ukrainian criticised the phrase "the application of a treaty extends to the entire territory of each party" is contrary to international law and some internal constitutional process for implementing the provisions of treaty vary from one state to another.[120] However, the Article 29 reads as "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its territory."[121] Many states considered this as a residual rule.[122]

The Article provides for the Parliament to make laws for the purpose of implementing treaties and agreements with foreign countries even when such treaties and agreements concern matters in the State List. Article 253 does not address the questions as to which treaties require the legislative incorporation. Not all the treaties may require legislative enactments. Rao after analysing case-laws culled out a few categories of treaties which require the Constitutional amendment or legislation by Parliament:

1. Treaties involving cession of territory
2. Treaties whose implementation requires additions, or alterations of the existing laws;
3. Human right conventions and other instruments.

C.H. Alexandrowicz opines that in the United Kingdom international treaties which affect private rights or which for their enforcement require an adjustment of common law or statute law, must be enacted by Parliament. Thus, an extradition treaty calls for an Act of Parliament and so do treaties connected with expenditure which must be approved by Parliament.[123] He further argues that "the Court expressly quotes the English Common Law principle that certain treaties such as treaties

[119] Elias, *supra* note 64 at p. 50
[120] *Ibid*., p. 53.
[121] Article 29 of VCLT 1969 states that "unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory".
[122] However Australian delegation opined that "Article 29 is only a residual rule of interpretation and cannot in any way be construed as a norm requiring a state to express its consent to be bound by treaties without first establishing whether the treaty is acceptable and applicable to all the component parts of the state. That will continue to be a matter for internal law and practice." in T.O. Elias, *supra* note 64 at p. 53
[123] Alexandrowicz, *supra* note 24 at p. 295.

affecting private rights, must be enacted by Parliament to become enforceable. This principle does not apply to all treaties. Thus it can be assumed that no deviation from English Common Law rules relating to international law was intended and that subsequent judgements of Indian Courts will follow the same line".[124] The democracy deficit is a central flaw in a variety of defences of the beneficence of international law. Treaty ratification by the Senate, Parliament in case of India or incorporation of international law by statute cures the democracy deficit that is found in raw international law.[125]

However, the trend of Supreme Court decisions shows that human right conventions need not require legislature to be enforceable. They become automatically operative when municipal law has lacunae. Many multilateral human rights treaties were in fact negotiated at a time when certain states were powerful force in the international community and had veto power over the treaties content.[126] The Supreme Court decision with respect to human right will be discussed in detail in the next part of the chapter.

Rao on the basis of the treaties incorporated by India identifies three different legislative methods adopted by the Parliament

i. Making provisions in compliance with the relevant provisions of the treaties without enacting the treaty provision;
ii. Annexing to the statute in a schedule to it, those provisions of the treaty which required enforcement under Indian law;
iii. Reproducing the whole of the treaty in the schedule to the statute.[127]

The first two legislative methods are the most preferable as they provide the autonomy to select the provisions which is to be implemented. The legislature may select or make some modification to such provisions of treaties which is to be implemented in the best interest of the country.

The Parliament also has the legislative competence to give effect to any decision made at any international conference, association or other body pursuant to

[124] *Ibid.*,, p. 296
[125] McGinnis, John O. and Somin, Ilya (2007), "Should International Law be Part of our Law?", *Stanford Law Review*, 59:1175-1247.p. 1180
[126] *Ibid.*, p. 1205.
[127] Mani, *supra* note 28 at p. 167

Article 253 and Entry 13 of the VII Schedule. The international associations in the provision may include the inter-governmental organisations. For instance, the Environmental Protection Act 1986 was inspired by the Stockholm Conference 1972.[128] Hence, the Parliament of India may enact laws to give effect to international treaties or decision as it may deem fit.[129]

In *Sudhangsu Mazumdar and others vs. C.S. Jha*[130]"the only provision in Article 253 merely gives the Union Parliament to override the federal distribution of powers to implement treaties and international agreement… This is the position in USA as well. But Art 253 does not silence Article 31(2) or any of the other guarantees in Part III of our Constitution".[131] Right to be compensated for depriving of a citizen's right to property is inherent in the right of the State to acquire such property. This right doesn't require any express mention. Article 253 and 51 do not override such an existing right. In American legal system, a treaty becomes the law of the land without any Act of Congress implementing such treaty. The Federal Constitution has supremacy over a treaty or executive agreement. An Act of Congress is on a full parity with a treaty and when a statute which is subsequently in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.[132]

4. INDIAN JUDICIARY ON TREATY MECHANISM

Article 131 of the Constitution deals with the original jurisdiction of the Supreme Court over the union, state and inter-state disputes. Article 131 provides that,

> jurisdiction of the Supreme Court shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, sanad or other similar instruments which having been entered into or executed before the commencement of this Constitution, continue in operation after such commencement or which provide that the said jurisdiction shall not extend to such a dispute.

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[128] Rao P.C., *supra* note 2 at p. 19

[129] Without a provision like Article 253, Canada faced a conflict between treaty entered by the executive and legislations passed by the Parliament. The labour legislations were struck down by the Privy Council as *ultra vires* and the draft Convention adopted by International Labour Organization was given effect. *A.G. Canada vs. A. G. Ontario* 1937 A.C 326

[130] AIR 1967 Cal 216; MANU/WB/0062/1967

[131] Ibid., para 57-67

[132] Breard vs. Greene, 523 U.S. 371 (1998) quoted in Childress, Ramsey and Whytock (2015) , *Transnational Law and Practice,* New York: Wolters Kluwer.

Though the courts cannot validate a treaty directly, they can while deciding the validity of any law passed by the Parliament for the purpose of implementing such treaty, would be indirectly deciding the validity of the treaty itself.[133]

The treaty making power of the Executive has been contested before Supreme Court in many cases. The judiciary in all the case held that legislative backing is not precondition for any treaty entered by the Executive. The supremacy of the Executive to conclude the treaties and to give effect to them without the Parliament consenting to it has been considered as legitimate by the judiciary. In *Ram Jawaya vs. State of Punjab*[134], the Allahabad High Court while ascertaining the limits of Article 73 of the Indian Constitution held that,

> The executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The sub-clause does not say that the executive power is to extend to the matters with respect to which Parliament has made laws.[135]

In *Re Berubari*[136], the issue was involving division and exchange to enclaves between India and Pakistan. The court held that,

> the treaty making power is of course subject to the limitation which the Constitution of the state may either expressly or by necessary implication impose in that behalf…stated broadly the treaty making power would have to be exercised in the manner contemplated by the Constitution and subject to the limitation imposed by it.[137]

The argument was that the implementation of a treaty was an executive act and that it could be given effect without any legislation under Article 253. However, Supreme Court noted that the agreement involved the cession of territory and not merely the determination of a boundary. A legislation is required if it involves the alienation or cession of any part of the territory of India, but under Indian Constitution for cession of the territory requires an amendment of the Constitution and not a mere legislation.

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[133] Varma, *supra* note 116 at p. 118.
[134] MANU/SC/0011/1955
[135] *Ibid*., para 8
[136] AIR 1960 SC 845
[137] *Ibid*., p. 857, para 31

In *Maganbhai Ishwar Bhai Patel vs. Union of India*[138], the court held that the Article 253 does not seek to circumscribe the extent of the power conferred by Article 73. J. Shah in his concurrent opinion held that,

> A treaty really concerns the political rather than the judicial wing of the state. In some jurisdictions, the treaty or the compromise read with the Award acquired full effect automatically in municipal law, the other body of municipal law, notwithstanding such treaties and awards are self-executing. The Constitution of India makes no provision making legislation a condition of the entry into an international treaty in times of war or peace. The Executive is qua the State competent to represent the State in all matters international and may incur obligations which in International Law are binding upon the State. The power to legislate in respect of treaties lies with the Parliament and making of law is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the laws of the State. If the rights of the citizens and others which are justiciable are not affected, no legislative measure is needed to, give effect to the agreement or treaty.[139]

In *S.R. Bommai vs. Union of India*[140]considered the executive power towards foreign relations is not covered under the judicial review.[141] The Court held that the courts must refrain from entering into the political thicket and the political decisions call for 'judicial hands off.'[142] Dhavan opines "judge may not be easily persuaded to consider whether a treaty agreement is desirable but it is certainly judicially manageable for the judiciary to consider whether or not a particular treaty mal-effects the basic structure of the Constitution, which infringes fundamental rights or parts with the sovereignty of the nations".[143]

In *Sudhangsu Mazumdar and others vs. C.S. Jha, Commonwealth Secretary,*[144] the question arose if the executive must obtain the parliamentary approval before signing the treaty. The Court relying on the English precedents held that the right to enter into international treaties and agreements is an essential attribute

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[138] AIR 1969 SC 783
[139] *Ibid.,* p. 807, para 81
[140] MANU/SC/0444/1994
[141] Reddy J. is of the view that executive power towards foreign relations is political thereby not subjected to judicial review.
[142] Verma J. In *S.R. Bommai vs. Union of India,* Accessed 11 June 2016, URL: www.supremecourtcases.com/index2.php?option=,com_content&itemid
[143] Dhawan, *supra* note 55 at p. 26
[144] AIR 1967, Cal 216; MANU/WB/0062/1967

of sovereignty. The court further read that international law leaves it to the national law and the state organ to conclude treaties on behalf of its states. [145]

In, *Civil Rights Vigilance Committee, SLSRC College of Law, Bangalore vs. Union of India,*[146]the Court on the treaty implementing power of the legislature held that "if Parliament does not enact any law for implementing the obligations under a treaty entered into by the government of India with foreign countries, Courts cannot compel Parliament to make such law. In the absence of such law, Court cannot also, in our view enforce obedience of the Government of India to its treaty obligations with foreign countries".[147]

Legislation required if a treaty requires alteration or an addition to existing law or affects the rights of the subjects or raises such obligation as are enforceable in municipal courts otherwise the executive is competent to give effect to the treaty without enabling legislation. It was held that the exercise of executive power to make treaty or to implement a treaty, agreement or convention does not require an authority of law as that power co-extensive with power of Parliament to legislate in respect of treaties under Entry 10 and 14 in List I of the 7th Schedule of the Constitution. It was however pointed out in that case that if in consequence of the exercise of executive power, rights of the citizens or others are restricted or infringed, or laws are modified, the exercise of power must be supported by legislation. Where there is no restriction, infringement of the right or modification of the laws, the executive is competent to exercise the power.[148]

The Indian judiciary directly dealt with the treaty making power of the Executive is *P. B. Samant v. Union of India*[149]. A writ petition of mandamus was filed before High Court of Bombay restraining the Union Executive from entering into final treaty of Dunkel proposal that eventually led to the creation of WTO. Dunkel proposal included subjects like agriculture, irrigation and other which are in the state list. It was contended that the Union Executive should take the consent of the states before entering into such treaties. Pendse J. after relying on *Maganbhai* case held that,

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[145] *Ibid*., para 34-35.
[146] MANU/KA/0119/1983; AIR 1983 Kar. 85
[147] *Ibid*., para 10
[148] Chitaley D. V and Rao,Appu S., *supra* note 15 at p. 816.
[149] AIR 1994 Bom 323

> The observations made by the learned Judge establish that the Executive power conferred under Article 73 is to be read along with the power conferred under Article 253 of the Constitution of India. In case the Government enters into treaty or agreement, then in respect of implementation thereof, it is open for the Parliament to pass a law which deals with the matters which are in the State list. In case the Parliament is entitled to pass laws in respect of matter the State list in pursuance of the treaty or the agreement, then it is difficult to appreciate how it can be held that the Central Government is not entitled to enter into treaty or agreement which affects the matters included in the State list.[150]

There were many Public Interest Litigations before the Supreme Court restraining and questioning the treaty making power of the Executive and restraining the Executive from entering into multilateral treaties to fulfil the obligations under WTO. It argued that treaty-making power of the Executive was not subject to the Constitutional framework.[151] The Court held that none on the provisions of the WTO agreement were violated of the provisions of Constitution. The Supreme Court also did not entertain four PILs filed during over the India-US nuclear agreement. The Court held that there was nothing in the Constitution which prevents the government from signing a treaty (without approval of Parliament). The Court asked to be shown a provision of law which said that Parliament's approval was mandatory for such agreement. Dismissing another PIL the Supreme Court held that, "It is the prerogative of Parliament to consider the matter. Let Parliament decide. India signs a host of bilateral and multilateral treaties. Some like TRIPS agreement affected the prices of medicines. But the court cannot look into these. If something affects the country, Parliament is the body to look into it."[152] The trends of Supreme Court decision show a kind of reservation on the part of Indian Judiciary towards the treaty regulation.

The argument is that the national legislations go through the tedious process of bicameralism and other democratic procedures, but international law suffers severe democratic deficit.[153] The other aspect of the democracy deficit faced by international law is that citizens are rationally ignorant about international law and the institutions responsible for its creation to an even greater degree than domestic politics and domestic institutions. McGinnis and Somin argue that the "public ignorance

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[150] *Ibid.*, p. 326, para 4

[151] Sridhar, N. (2003), "Parliament has a Role to Play Now*", Frontline*, New Delhi, 20 August 2003

[152] Parliament Approval not required for Indo- US Deal: Supreme Court, (2008). Accessed on 7 June 2013 URL:articles:TimesofIndia.indiatimes.com/20081125/27744648/nucleartreaty.parliamentaprroval

[153] McGinnis and Somin, *supra* note 125 at p. 1225.

exacerbates the democracy deficit because citizen cannot monitor or control the individuals and institutions responsible for international law fabrication if they are unaware of their existence or operation. Most voters are "rationally ignorant" about politics".[154] The solution to mitigate this democratic deficit is to reiterate the argument of introducing the mechanism of Parliamentary participation in the treaty negotiations.

5. CONCLUSION

The only provision in the Indian Constitution that prescribes the India's conduct towards international law is Article 51. This Article being a part of DPSP has only a directive force and is non- justiciable in the court of law. The Article is unable to make any effective contribution towards the implementation of international treaties or customary law due to its structural ambiguities. This chapter has discussed elaborately the manner in which the scope of the term 'state' is interpreted in the light of other provisions. The position of the article is not clear on the treaties and customary international law either, as it placed in Part IV making it non-justiciable in the courts. In other words, there cannot be any claim in the Court of law concerning the implementation of international treaties or customary principles. The treaty mechanism in the Indian Constitution, similar to the British model is studied under two phases, treaty formation and treaty implementation. There is neither a direct exclusive provision in the Indian Constitution nor a *sui generis* model that regulates the treaty making power. A collective study of various provisions namely, Article 73, Article 246 read with Schedule VII, List I and Entry 14 directs the treaty making function to the Union Executive. The Article 246 read with Entry 14, vests the power in the Parliament to regulate the treaty making function by enacting suitable laws. However, the Parliament has so far not enacted any law with this regard, leaving the Executive's power to form treaty unfettered and unregulated.

Since, the Parliament is empowered to make law concerning treaty formation, it can be argued that the treaty formation need not be an exclusive function of the Union Executive but a collective function of both Parliament and the Executive. The participation of the Parliament may be materialised by subjecting the treaty in question for Parliamentary approval prior to the commencement of negotiations.

[154] *Ibid*., p. 1210-1212.

This mechanism not only ensures the participation of Parliament but also eliminates the democratic deficit to a reasonable extent. The Parliamentary approval also ensures the participation of the federal state governments in the treaty process. With the treaties impacting the economic, social and political aspects of individuals, the Parliamentary approval ensures accountability. The Supreme Court has perhaps given a very formalist meaning to the treaty making process by holding it as an exclusive function of the Union Executive.

The Constitution requires the Parliament to provide an enabling legislation to a treaty to gain entry into the Indian legal system. This rule of transformation is provided in Article 253 of the Indian Constitution. This process of transformation acted as a shield to the international treaties that had direct effect into the legal system. However, over the period this requirement of transformation has been relaxed by the Indian judiciary in two ways. The Courts have in many instances like the territorial disputes (for instance in *Maganbhai* case) or extradition claims (*Rosaline* case) held that not all treaties require enabling legislation. The mere executive act is considered to be sufficient to give effect to the international treaty domestically. The other scenario in which the requirement of transformation is relaxed is when the Indian Courts have given direct effect to the multilateral international instruments concerning human rights and environment.

The direct effect to the human right and environment treaties and instruments in the absence of domestic legislation has resulted in landmark decisions. At the same time it has encouraged the unfathomed use of un-ratified international instruments by the Indian judiciary.

CHAPTER-5

DOMESTIC COURTS AS AGENTS OF INTERNATIONAL LAW: CHALLENGES AND SOLUTIONS

1. INTRODUCTION

The process of globalization has resulted in the increased interaction between the domestic courts and international law. With the multiplicity of international norms on the state subjects the domestic courts engage with international law on a routine basis. The deliberation on international law elements by the domestic courts in their decisions often stirs the relationship domestic legal system has with international law. O'Connell observes that "almost every case in a municipal court in which a rule of international law is asserted to govern the decision raises the problem of the relationship of international law and municipal law."[1] Despite, the jurisprudential basis for the application of international law in municipal law, the undeniable fact is that international law is today applied in municipal courts with more frequency than in the past. The courts rarely question the theoretical explanation for their recourse to international law.[2] The domestic courts are regarded as the trusted mouthpieces and agents of international law as local divisions of the great High Court of Nations.[3]

This chapter studies the role of domestic courts in implementing international law in six segments. The current segment being the first and introductory part lays out the scheme of this chapter and the different sections in it. The second segment discusses the position assigned to the domestic courts as agents of international law. The role as agents requires the domestic courts to act independently in observing international law. This function is premised on the principles of independence of judiciary and separation of power.The third segment enquires into the nature of international rule of law, as it is international rule of law that encourages judiciary to independently act in the service of international law. This section problematizes the concept of international rule of law and argues that it is very narrowly interpreted.

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[1]Owada Hisashi, (2015), "Problems of Interaction between the International and Domestic Legal Orders", *Asian Journal of International Law,* 5: 246-278, p. 249.

[2] John Dugard on the incorporation of public international law into municipal law and regional law against the background of the dichotomy between Monism and dualism, Ferreria G. and Ferreira-Snyman A (2014)., *PER/PELJ* (17)4, p. 1471

[3] Tzanakopoulos, Antonios and Tams, Christian J. (2013), "Introduction: Domestic Courts as Agents of Development of International Law", *Leiden Journal of International Law*, 26:531-540, p. 533-534

The fourth section examines the judicial techniques and methods in adopting international law under three divisions namely; customary international law, international treaties and informal international instruments. The fifth section draws the attention towards the emergence of a new comparative law regime developed with inter-judicial co-operation. It lists out some of the prominent colloquia the domestic courts have participated outside their constitutional framework. The dialogue among the domestic judges results in building a network where the judges are influence by each other's judgements. The final part sums up the role played by the domestic courts while engaging with international law.

2.DOMESTIC COURTS AS INDEPENDENT AGENTS OF INTERNATIONAL LAW

Lauterpacht often described the role of Permanent Court of International Justice as an agency. However, the concept of agency can be applied to all participants contributing to the process of legal development, including domestic courts. The term 'agent' is used in a broad sense denoting a capacity to influence processes of legal development. Agents can be powerful or weak and their strength may vary across areas as in indeed the case with respect to domestic courts.[4]

The international legal order requires the domestic courts like any other organ of the state, to apply and give force to international law. Although silent about the modes of implementation, international legal order holds the primacy of international laws over domestic laws. It stipulates that state's domestic legal arrangements cannot be taken as a defence to a violation of their obligations under international law, thus creating some pressure to incorporate those obligations into domestic law when appropriate.[5] In such circumstances, to prevent a violation of international law, the domestic courts are expected give effect to international law either by applying it directly or by reading domestic law in accordance with international law, when the executive fails to abide by its international commitments or the legislature

[4] *Ibid.*, p. 538

[5] Megret Frederic, (2012), "International Law as Law", in James Crawford and Martti Koskenniemi (eds.) *Cambridge Companion to International Law*, London :Cambridge University Press, 64- 92, p. 70

remainsambiguous as to whether it wishes to comply with the State's international obligations.[6]

The globalization has impacted upon the traditional relationship between the international and domestic legal systems. Owada J. explains the effect of globalization as,

> The emergence of globalization within the international community, which has had the effect of producing a global society, is bringing forth an increasing challenge to the validity of the existing institutional framework of international law as the system of governance of this community. As the globalised world requires a regulatory framework for this globalised society as a single legal community, a novel conception of global public order is a central theme of this globalised community would seem to be in order.[7]

The idea of globalised community to materialise has to cross the impediment of the reluctant state structures and their diverse legal systems. Chimni observes that there is now a global network of legislators, judges, bank official and police officials trying to collectively address common global problems. Such networks are the first step in aggregating the functional processes necessary for the formation of a global state.[8] Teeple argue that the national barriers have made way to the TNCs for their accumulation of capital. In his words "the barriers to the expansion of capital had to overcome to make the modern nation-state, so today the systems of governance in the nation-state have to be dismantled in order to remove the barriers to accumulation for global corporations".[9] A project of separating the judiciary from the rest of the state organs on the novel and extended versions of the principles like independency of judiciary, separation of power and international rule of law is in progress.

Falk argues that the courts have to develop an ability to withstand internal political influence when confronted with an issue of international law. The inference is that when the domestic courts construe the rules of international law in consonance with the national values, the courts become politicized by their own independent action. This attitude of the courts to give more value to the domestic values creates a

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[6] Fikfak, Veronika (2013),"International Law before English and Asian Courts: Finding the judicial Role in the Separation of Powers", *Asian Journal of International Law*, 3: 271-304, p. 271.

[7] Owada, supra note 1 p. 246

[8]Chimni, B.S. (2004), "An Outline of a Marxist Course in Public International Law", *Leiden Journal of International Law*, 17: 1- 30, p. 20

[9]Chimni, B. S. (1999), " Marxism and International Law: A Contemporary Analysis", *Economic and Political Weekly*, 34(6): 337-349, p.340

sense of scepticism in the foreign parties to expect and receive unfair treatment in a domestic court. The judicial outcome thereby represents the national values than the uniform rules of international law on the issue. From the perspective of the international system, a court is expected to apply rules of international law as independently and consistently as it does to the rules arising from any other source of law. Domestic courts are in a position to develop international law, to manifest respect for international law, and to demonstrate that normal standards of judicial independence are just as operative in an international law case as in a domestic case.[10] He further fragments the judiciary into two types; the autonomy of the judicial institutions within the framework of the domestic political system and the autonomy of the rules of international law within the law applying context.[11] Falk lists out some of the qualities domestic courts may imbibe for the effective implementation of international law:

1. Purely international tribunals are not conveniently available for the litigation of disputes about international law.
2. Respect for the claims of international law as a legal system is lost if adjudication is made subservient to diplomacy
3. Domestic courts have an excellent opportunity to develop international law if they will be allowed to operate as independent tribunals.
4. The domestic location of the forum should normally not be treated as an essential aspect of the controversy.
5. The independence of the judiciary in international law cases is one way to shatter the illusion that sovereignty allows a state to reconcile its obligation to uphold international law with the promotion of its national interest.
6. An awareness by the general community of states of the independence of the judiciary will by itself mitigate many of the burdens that such independence imposes on the executive. Part of the need for executive control arises from the illusion abroad.

[10] Falk, Richard A. (1964), "The Role of Domestic Courts in the International Legal Order", *Indiana Law Journal*, 39(3): 429- 445, p. 436. The author arrives at this argument after the case *Banco Nacional de Cuba vs. Sabbatino Receiver, et al.* (376 U S 398) which was filed before the Court of New York. The Court categorically dismissed the case on the ground that the expropriation by the sovereign state is not subject to the jurisdiction of the US Courts under the doctrine of 'Act of State' even if it violates the customary principles of international law.

[11] *Ibid.,* p. 431

7. An independent judiciary preserves a private sector of international transaction that is not vulnerable to government control and thereby resists the trend towards totalization of the exercise of control over human activity by the modern state.
8. Domestic courts are in a better position in part because of their visibility and discipline mode of operation, to resist domestic pressures to apply international law in a partisan manner.
9. Domestic courts can educate the public about the character and importance of international law by writing opinions in this area, particularly if these opinions manifest a non-political approach to the interpretation and application of rules of international law.
10. The dangers of the nuclear age make it desirable to take risks, even to make sacrifices in order to promote the growth of world legal order.[12]

The expectation of the domestic courts to operate in compliance with international law is again derived from the Euro-centrism, where such principle of independence of judiciary and separation of power are well founded. The international legal order fails to capture the scenario of the judiciary worldwide, it is noted that about one-third of the countries in the world lack an independent judiciary.[13] Since the independence of judiciary is contested reality, the call for the domestic courts to act independently from the other state organs is meaningless. Yet the international rule of law requires the domestic courts to function as independent agents of international law.

3. INTERNATIONAL RULE OF LAW

The international rule has been construed in a very narrow manner over the time to merely include, compliance of law and avoidance of arbitrary and discriminatory rule. It is also interpreted to further and protect interest of the powerful states. As Kanetake opines "the rule of law at the international level ought not to be construed as protecting sovereign states and their freedom in the same manner as does the domestic

[12] *Ibid.*, p. 440- 442

[13] Sloss, David (2009), "Treaty Enforcement in Domestic Courts": A Contemporary Analysis in David Sloss (eds.) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, Cambridge: Cambridge University Press, p. 2

rule of law for individuals and their autonomy."[14] The general idea is that the international rule of law means that the actors of international system should abide by existing rule of international law.[15]

The international rule of law has flawed in its conceptualization and the procedure of concretization. It can be argued on two grounds, firstly, as Chesterman observes "if the rule of law is understood in the core, formal sense used here, it might be questioned whether the process of international rule making can itself be said to be governed by laws."[16] This is to say that international rule of law which is held as a beacon for its guidelines in the international legal order is itself being subjected and governed by international law. TWAIL in numerous instances, in the previous chapters has argued the nature of international law to be an imperialist agenda. Nyerere holds that in international rule making, we are recipients not participants.[17] Hence, the questions may be raised on the legitimacy of the international rule of law. The second argument is that the procedure of forming international rule of law is not democratic. Chimni argues that,

> the procedure of making international law is diffuse since international law is not made by elected world legislature but by the principle subjects of law, the states themselves. The validity of international law rules is determined and limited to the sources of international law. Rules that are not validated through specified sources of international law possess only persuasive value.[18]

The international rule of law has flawed in its very formation thereby there can be reasonable doubt on the principle it projects. One of such principles is the function of judiciary to apply international law independently of its state and state organs.

The principles of international rule of law are manifested in many multilateral international instruments. The adoption of the international rule of law was discussed in the United Nations World Summit in 2005, where member states unanimously

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[14]Kanetake, Machiko (2016), "The Interfaces between the National and International Rule of Law: A Framework", Paper in MachikoKanetake and Andre Nollkaemper(eds.)*The Rule of Law at the National and International Levels: Contestations and Deference,* Oxford: Hart Publishing Ltd. 11-41, p. 17

[15] Chimni, B.S. (2012), "Legitimating the International Rule of Law" in James Crawford and Martti Koskenniemi(eds.), *The Cambridge Companion to International Law*, Cambridge: Cambridge University Press p. 292

[16] Chesterman Simon (2008), "An International Rule of Law", *American Journal of Comparative Law*, 56(2): 331-361, p. 357

[17] Matua, Makau and Anghie, Antony (2000), "What is TWAIL?", *Proceedings of the Annual Meeting*, 94 (April 5-8): 31-40, p.35

[18] Chimni, *supra* note 15 at p. 293

recognised the need for 'universal adherence to and implementation of the rule of law at both the national and international levels' and reaffirmed their commitment to 'an international order based on the rule of law and international law'[19].The other multilateral instrument that highlights the principle of independence of judiciary is the United Nation Basic Principles on the Independence of the Judiciary (Basic Principles) adopted by the General Assembly in 1985 and 1990 establish a series of model institutional arrangement.[20] These are the leading international instrument establishing guideline for judicial independence. Under the Basic Principles, judicial independence includes both individual and institution components. Governments are encouraged to incorporate these institution arrangements directly into their domestic law and UN proposes that "offers models for lawmakers everywhere who are encouraged to write them into their national constitutions and enact them into law."[21] The Human Development Report 1992 issued by the UN Development Program, suggested five possible indicators of which independent and impartial judiciary forms an integral part.[22]

The new versions and additions to the international rule of law have extended its application to include the internal affairs of the states. It has influence even on the relationship between the international and municipal laws by providing the primacy to international law over municipal law. It also has attempted to dissolve the link between the individuals with the state by encouraging the direct access to the international forums by the individuals. Chesterman observes that,

> The international rule of law may be understood as the application of rule of law principles to relations between the states and other subjects of international law. Secondly, the rule of international law could privilege

[19] The 2005 World Summit focused on the areas of development, security, human rights and reforms in UN. This Summit was called as "In Large Freedom", Accessed on 12 November 2016, URL: www.un.org/en/events/pastevents/worldsummit_2005.shtml.

[20] Basic Principles, Accessed on 13 November 2016, URL: www.un.org/ruleoflaw/blog/document/basicprinciples-on-the-independence-of-the-judiciary/

[21] Ibid.

[22] The other principles are: fair and public hearings in criminal cases; the availability of legal counsel; provision for review of convictions in criminal cases; and whether government officials or pro-government forces are prosecuted when they violated the rights and freedoms of other persons, Accessed on 13 November 2016, URL: hrd.undp.org/sites/default/files/reports/221/hdr_hdr_1992_en_complete_nostats,pfd.; the UDHR 1948 goes on to enumerated specific rights such as prohibiting arbitrary deprivation of liberty requiring fair trials by independent and impartial tribunal and protecting equality before the law. These protections broadly correspond to the three aspect of the core definition adopted here with the qualification that independence of the judiciary is only part of what is implied by supremacy of the law.

> international law over national law, establishing the primacy of international law. Thirdly, a global rule of law might denote the emergence of a normative regime that touches individuals directly without formal mediation through existing national institutions.[23]

The argument is that the international rule of law is facilitating the creation of global state by encroaching upon the national sovereignty. With dissolution of state sovereignty, the national legal systems succumb to the international legal order. By making the individuals direct subjects of the international normative order, the international rule of law is attempting to underplay the relevance of the state organs and institutions. International law has made the international obligations inward looking[24] making states to undertake certain conduct their own domestic legal order like adopting a specific legal framework stipulated by international legal order, to accord specific rights, to abstain from taking specific actions among others. In fields as diverse as human rights, environment protection, investment and trade or the secondary law of international organization are becoming increasingly 'inward looking' in that they demand a state to take, or refrain from, certain conduct within the domestic jurisdiction, often within specific parameters.[25] Neil Walker draws up a list of very general and disparate concepts to describe the relationship between international law and domestic law: institutional incorporation, system recognition, normative coordination, environmental overlap and sympathetic consideration.[26] The domestic courts are responding by providing for the internationalization by means deserting their affiliations to the traditional school and adopting methods of incorporating specific treaties, providing for treaty superiority over domestic legislation, and making customary law directly applicable by increasing its scope.

If the international rule of law is to possess legitimacy, then it has to devoid itself from the hegemonic modes of thinking and practices.[27] The character of international rule of law is to be restructured on the new foundations of accommodating the democratic, pluralist, socialist and individualist symmetries.

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[23] Chesterman, *supra* note 16 at p. 355

[24] International Law Association, (2012), *Preliminary Report, Study Group: Principles on the Engagement of Domestic Courts with International Law,* p. 4

[25] Boudouhi, Saida El (2015), "National Judge as an Ordinary Judge of International Law? Invocability of Treaty Law in National Courts", *Leiden Journal of International Law*, 28:283-301, p. 301

[26] Knop Karen, Michaels Ralf and Riles, Annelise (2009), "International Law in Domestic Courts: A Conflict of Laws Approach", *Proceedings of the Annual Meeting(AJIL*), 103: 269-274, p. 269

[27] Chimni, (2012), *supra* note 15 at p. 293

4. JUDICIAL TECHNIQUES AND METHODS

The international legal system requires a court to apply rules of international law as independently and as consistently as it does concerning rules arising from any other source of law. Courts have complied by considering themselves as international actors by actively engaging with international law. They exhibit an eagerness to respond to the cases involving elements of international law. The courts try to engage more frequently with international law deviating from the strict dualist stance due to the pressures of globalization. For instance, the Indian Supreme Court in *Steel Authority of India Ltd vs. National Union of Waterfront Workers*,[28] refused to give an expansive interpretation of provision of the Contract Labour (Regulation and Abolition) Act of 1970. This decision was criticised by Upendra Baxi as "an example of the Indian courts inclination to generate to tender solicitude for the rights guaranteed by multilateral trade agreement of which the WTO is an exemplar of the multinational corporations and of the 'community' of direct foreign investors even at the cost of the not so benign neglect of the fundamental rights of Indian citizens."[29] As Aust explains that the national courts bolster their institutional position, especially with regard to executive in a time when the advance of globalization threatens to divest them of many fields of activity which formerly were dealt at national level.[30] With the development of international law, there has been increased condition of overlapping of norms in the subjects with were essentially considered as national concern.

As national courts have been burden with the duty to act agents of international law, they exercise dual roles, one at national level as domestic courts and the other at international level. Goldonis calls the domestic court servant of two masters since it attempts to appeal to both domestic and international audience.[31] According to Scelle, national courts have the potential to fulfil dual roles, as either national actors operating within the national actors operating within the national order or international actors enforcing international law on behalf of the world

[28] MANU/SC/0515/2001

[29]Benvenisti, Eyal (2008), "Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts", *American Journal of International Law*, 102: 241- 274, p. 258

[30]Aust Philipp Helmut, Rodiles Alejandro and Staubach Peter, (2014), "Unity or Uniformity? Domestic Courts and Treaty Interpretation", *Leiden Journal of International Law*, 27: 75-112, p. 76

[31] *Ibid.*, p. 76

community.[32] Cassese opines that some of the issues are considered to be of primary importance like the maintaining peace and security, protection of human rights, meeting the individualist concerns among others which have to be persevered and enforced by the domestic courts. He argues that the domestic courts do and should 'play a weighty role as instruments for safeguarding the international legal order,' which requires them to take into account 'meta-national considerations[33] (protection of human rights, need to repress terrorism, need to implement international standard etc.) rather than being motivated by national short-term interest'.[34] For instance, in *People's Union for Civil Liberties vs. Union of India*,[35] the Indian Supreme Court has acknowledged, "anti-terrorism activities in the global level are mainly carried out through bilateral and multilateral co-operation among nations. It has thus become our international obligation also to pass necessary laws to fight terrorism. In the light of global terrorist threats, collective global action is necessary".[36] The Indian Court supported this statement with a reference to Lord Woolf's assertion in *A vs. Secretary of State for the Home Department*, that "where international terrorist are operating globally, a collective approach to terrorism is important."[37]

The decisions from the domestic courts generally form the evidence of state practice. They are relevant to the interpretation of treaties and the existence of custom under article 38(1)(a) and (b) of the ICJ statute.[38] When a court decision is consistent or does not contradict the views of the legislature and executive, it will represent strong evidence of state practice. As evidence of state practice, relevant to the interpretation of treaties and formation of custom (where domestic judgements play a role in law creation) and as a subsidiary means of determining the existence and content of international law (where domestic judgement can be characterized as law enforcement).[39] It is argued that only the domestic judgments of the western block are involved in the creation of law. There is hardly any instance where a decision of a

[32] Roberts, Anthea (2011), "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law", *International and Comparative Law Quarterly*, 60(1): 57-92, p. 68
[33] Cassese considers the meta- national interest of a state to be of primary concern which have to be met by the domestic judiciary though the national interest proves otherwise.
[34] Roberts, *supra* note 32 at p. 68
[35] (2004) 1 LRI 1
[36] *Ibid*., para 10
[37] *Ibid*, para12
[38] Roberts, *supra* note 32 at p. 62.
[39] *Ibid.*, p. 62.

domestic court of a third world state has qualified as a custom. The role of domestic courts relates to the increasing participation in world affairs of nations with diverse normative traditions. It is generally acknowledged that international law as a dynamic system suffers from its historical attachment to Europeans culture. Falk argues that "if law is to bring increasing stability to international relations, then it must progressively liberate itself from its somewhat provincial past. This requires a respect for diversity more than an agreement upon universal standards."[40]

The domestic courts generally chose either to comply with international law or adopt techniques to avoid compliance. One of the predominant methods of compliance is method of direct effect. By the method of direct effect, the courts apply international law like they apply any other domestic law. However, to avoid implementation, the courts look for many excuses. Aust describes that "avoidance method is referred either to a bundle of judicial techniques designed to prevent a court's engagement in the pitfalls of international relation or to general concepts applied to this effect."[41] There is no guarantee that incorporation leads to direct applicability of international law by the domestic courts, as domestic courts have devised a variety of avoidance techniques. Some of them are non justiciability where one might include the political question doctrine, the act of state doctrine, denial of standing and the doctrine of non self-executive of treaties, sovereign immunity among others.[42]. Kanetake explains that specific techniques and grounds under which domestic courts avoid and contest the decisions of international institutions vary depending on whether those decisions are rendered by political or judicial institutions, whether states have monist or dualist traditions, the kind of treaties involved and the wider political and judicial climate surrounding the judges. Some of the avoidance methods are:[43]

1. Domestic courts may deny the domestic applicability of particular decision in the first place. In a monist state in which international agreement automatically acquire domestic validity, domestic courts encounter the question of whether or not particular international treaties are directly

[40] Falk, (1964), *The Role of Domestic Courts in the International Legal Order*, Syracuse: Syracuse University Press, p. 66
[41] Aust, Rodiles and Staubach *supra* note 30 at p. 75-76
[42] ILA, Preliminiary Report, *supra* note 24 at p. 7
[43] Kanetake, *supra* note 14 at p. 24-26

applicable. A well-known case in this regard is *Medellin vs. Texas*[44] in which the US Supreme Court observed that ICJ decision were not automatically enforceable as domestic law.

2. Judges can also interpret international law as more favourable to domestic law and political interest. The US Supreme Court in *Sanchez-Llamas vs. Oregon*[45] interpreted Article 36(2) of the Vienna Convention on Consular Relations as requiring the conformity of the treaty provision with domestic law and regulation.

3. The third method is the principle of separation of power at the domestic level. Domestic courts may avoid or contest the specific decision of international institution by leaving the political branches to decide whether or low the rules can be given effect to in the domestic legal order.

This choice of the domestic courts between two traditional options has changed over years with the development of sectorial regimes. The courts now adopt a host of other incorporative and interpretative techniques during their engagement with international law.

One of the very popular methods of interpretation is by the method of consistent interpretation. This method is also known as 'Charming Betsy' doctrine. This interpretation directs the court in situations of two possible interpretations to adopt the ones that give effect to international law. It is however argued that the 'transplant effect' in harmonization treaties where single texts are interpreted in diverse ways that often undermine the very point of harmonization.[46] It then appears that a large number of domestic courts from formally dualist legal systems resort to the theory of consistent interpretation in a way that is much more favourable to international law than many of the judges belonging to monist systems.[47]The assessment of the technique of consistent interpretation shows that most

[44]552 U.S. 491 (2008), Accessed on 12 May 2016, URL: https://supreme.justia.com/cases/federal/us/554/759/

[45] 548 U.S. 331 (2006), Accessed on 11 June 2016, URL: https://www.law.conell.edu/supct/html/4-10566.ZS.html.

[46] Arvind, T.T. (2010), "The Transplant Effect in Harmonization", *International Comparative Law Quarterly*, 59(1):65-88, p. 65

[47] Boudouhi, *supra* note 25 at p. 293

'internationalist' judges do not always come from monist systems.[48] For instance, the Indian Supreme Court highlighted the harmonious interpretation in in *Additional District Magistrate, Jabalpur vs. S. Shivakant Shukla,*[49]

> Equally well established is the rule of construction that if there be a conflict between the municipal law on one side and the international law or the provisions of any treaty obligations on the other, the courts would give effect to municipal law. If however, two constructions of the municipal law are possible. The court should lean in favour of adopting such construction as would make the provisions of the municipal law to the in harmony with the international law or treaty obligations.[50]

The other method of incorporation is reflected through citing of consubstantial norms. This may be the unconscious interpretation and application of the substance of international law by the domestic court. The consubstantial norms are norms which happen to exist both at the international and at domestic level, and provide for the same substantive norm. For instance, in *T. N. Godavarman Thirumulpad vs.Union of India and others,*[51]the Court declared that the national legislations like Bio-Diversity Act 2002, Environment Protection Act 1986 were to be interpreted in the light of international environmental instruments. The Court held that,

> When we examine all those legislations in the lights of the constitutional provisions and various international conventions like Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES), the Convention of Biological Diversity 1992 (CBD) evidently there is a shift from environmental rights to ecological rights, though gradual but substantial.[52]

The Indian Courts have interpreted the Constitutional provisions in the light of international instruments when there is a void in the legal system. They have derived the source and interpretation from the international instruments in expanding the ambit of the constitutional provisions. The landmark case of Indian jurisprudence is *Vishaka and others vs. State of Rajasthan and others*,[53] where the Supreme Court interpreted the right to life of Article 21 to include right against sexual harassment in the light of CEDAW. It held that,

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[48]*Ibid.,* p. 301
[49] AIR 1976 SC 1207
[50] *Ibid.*, p. 1259, para 169
[51]*T. N. Godavarman Thirumulpad vs.Union of India and Others,* Accessed on 1November 2016, URL: http://judis.nic.in/supremecourt/imgs1.aspx?filename=39078
[52] *Ibid*., para 18
[53] AIR 1997 SC 3011

> International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the Constitutional guarantee….The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the fields when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms from construing domestic law when there is no inconsistency between them and there is a void in the domestic law.[54]

The Indian Courts have developed new principles of jurisprudence on the basis of international instruments. Some of them are even based on the informal international instruments. The decision in *Vellore Citizens Welfare Forum vs. Union of India & Others*,[55] the Court has introduced the principles of polluter pays, precautionary, sustainable development, inter-generational equity from the Bruntland Report.

> We have no hesitation in holding that 'sustainable development' as a balancing concept between ecology and development which has been accepted as a part of the customary international law. Some of the salient principles of sustainable development, as culled-out from Brundtland Report and other international documents are inter-generational equity, use and conservation of nature resources, environmental protection, the precautionary principle, polluter pays principle, obligation to assist and cooperate, eradication of poverty and financial assistance to the developing countries.

The unusual method of incorporation by the domestic courts is by referring the un-ratified international instruments as customary international norms. The customary international norms entail direct application. For instance, the Indian Courts reliance on the Convention against Torture 1984 and the Convention on Status of Refugee 1951 as customary international law. Another convention the court held applicable as the customary international law is Vienna Convention on Law of Treaties 1969. In *AWAS Ireland v Directorate General of Civil Aviation*[56] drew reference to Article 26, 27 and 31 of the VLCT holding them applicable in the Indian legal system. The next chapter deals in detail the interpretative and incorporative techniques the Court has adopted during its engagements with international law.

[54] *Ibid.*, p. 3014, para 8
[55] AIR 1996 SC 2715
[56] MANU/DE/0832/2015

4.1. Domestic Courts and Customary International Law

The relationship between the domestic courts and the customary international law is highly debated as the state practice of a concerned state depends widely on the decisions of its judiciary. The domestic court decisions forms the elements of the state practice or ways through which states may express their *opinio juris* or views on the proper interpretation of their international obligations.[57]It is only when the decisions of the domestic courts are not rejected by the State's executive that they constitute the state practice or that they can be taken to express the state's *opinio juris* so that they are capable of contributing toward the formation or development of customary law.[58] The state practice is determined by the collective action of the state organs. The decision of the judiciary if is against the executive creates a different issue altogether. It will be very embarrassing for a state if such situation occurs. For a hypothetical instance, India has not been a party to Non Proliferation Treaty (NPT) or Comprehensive Test Ban Treaty (CTBT) but recently it has signed 123 nuclear deal with the US. Few authors contend that the CTBT principles have gained the status of customary international law. India till recently was a persistent objector to these principles but having signed 123 agreement she might have lost the status of persistent objector. With the Supreme Court's stance that customary international law is the law of the land as long as in compliance with the municipal law, India shall be bound by CTBT. It is purely a hypothetical situation, however, if the question arises the Indian Judiciary has made it very clear in the *S.R. Bommai vs. Union of India*[59]that its jurisdiction does not encroach upon the executive functions such as the foreign policy.

The customary international law in domestic courts operate in two different ways. The first way is that decisions of few courts are held in such high value that they concretize as customary international law. Benvenisti explains as "a purely doctrinal matter, national courts are directly and indirectly engaged in the evolution of customary international law: their decisions that are based on international law are viewed as reflecting customary international law, and their government's acts in

[57] ILA, Preliminiary Report, *supra* note 24 at p. 2
[58]*Ibid.,*, p. 3
[59] MANU/SC/0444/1994

compliance with their decisions constitute state practice coupled with *opinion juris*."[60] And there are other set of courts from the developing countries which have declared that the customary international law (that has been formed by the western block) as law of the land.

The decisions of these courts are never regarded as the evidence for the evolution of customary international law. Tzouvala rightly argues that the formation of customary principles of international is dependent on the states advocating such principle. She argues that "the methodological choices about the threshold for customary international law are by no means either new or politically neutral".[61] She gives an example of humanitarian intervention as an exception to the use of force which is debated at length though advanced by two western states; Belgium and United Kingdom. If such legal argument was to be advance by a third world country (Thailand or Tunisia with same population) it is very unlikely that it would qualify to be a sound exception. Hence "even though the state is on the periphery to retain their normal status as subjects of international law, their actual ability to influence its content is curtailed. And hence, the conviction of TWAIL scholars that international law and its practitioners were never fully decolonised is accurate, not only with regard to the substance of international law arguments, but also their methodology and construction". [62]

Since the formation, the corpus of customary international law, it has been defined by specific terms like "general", "consistent", "settled", "constant and uniform", "both extensive and virtually uniform" but never as "unanimous" or "universal".[63] The very use of such terms creates an apprehension of its nature as general and the need to follow. It can never be defined as universal or unanimous for the reason that they don't represent the state practice of all the states. The Article 51 of the Indian Constitution uses the term 'international law' to mean customary

[60] Benevensti, *supra* note 29 at p. 248
[61] Tzouvala, Ntina, TWAIL and the "Unwilling or Unable" Doctrine: Continuities and Raptures, American Journal of International Law, Symposium on TWAIL Perspectives on ICL, IHL and Intervention, Accessed 3 August 2016, URL: https://www.asil.org/blogs/symposium-twail-perspectives-icl-ihl-and-intervention-twail-and-"unwilling-or-unable"-doctrine.
[62] *Ibid*,
[63] Weil, Prosper (1983), " Towards Relative Normativity in International Law?", *American Journal of International Law*, 77(3): 413-442, p. 434

international law. It signifies the drafter's erroneous understanding of customary international law as a wide-spread, popular and settled branch of law.

A treaty norm depending on its language, moral force and global level of acceptance may become legally binding as customary international norm, and govern the conduct even of states that have not formally accepted it.[64] For instance, the application of the provisions of the Convention of the Convention against Torture 1984 or the principle of '*non refoulement'* in the Convention on the Status of the Refugee 1951. Though these conventions have not been ratified by India they are applied as the principles of customary international law.

The general perception regarding the customary international law was the antiquity which is to say that there has to be sufficient time that has been elapsed since the evolution of a principle and such principle has to be in practice during the time. This traditional notion has been replaced by the new instant customary international law[65]. The ICJ judgement in North Sea Continental Shelf case[66] encapsulates the formation of the instant customary law if it is already a treaty norm. The Court held that,

> it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of states whose interest were specially affected…the passage of only a short period of time is not necessary, or itself, a bar of what was originally a purely conventional rule.[67]

The ICJ emphasis on the customary international law over conventional law is two-fold; firstly, that if conventional law is not to be applicable to state party, then general character of customary international law can hold a state accountable in the international community and secondly that conventional norm is so infused into customary international law that it becomes operative on the state parties which not parties to the treaty.[68]

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[64] Charlesworth, Hilary (2012), "Law-making and Sources" in James Crawford and Martti Koskenniemi (eds.), *Cambridge Companion to International Law*, Cambridge: Cambridge University Press, p. 191

[65] Cheng Ben, (1997) *Studies in International Space Law*, New York: Clarendon Press.

[66] 1969 ICJ Reports, Accessed on 15January 2017, URL: www.icj-cij.org/docket/files/52/5561.pdf.

[67] *Ibid*, at 42-43

[68] Weil, *supra* note 63 at p. 437

A domestic court in a western jurisdiction may insist on evidence of actual conduct by a considerable number of states for a substantial period of time as a prerequisite for the identification of a customary rule, unlike the courts of the southern hemisphere which blindly follow. Koretsky observes the nature of customary international law as "customary international law was too vague to be important and might moreover be fashioned into a tool to serve certain deplorable tendencies. Customary law is bound by tradition backward and always lagged behind social development".[69] The TWAIL scholars, Chimni and Anghie argue that "though customary international law is a body of practices of colonial times, it has attained validation as a source of international law, while the legal status of resolutions adopted by international institutions where the developing states hold a large majority (UNGA) is still being contested."[70]

The method of inquiry used by a national court in examining the existence of a custom is likely to reflect its national affiliation. However, it can be argued that since most of the courts have already declared that customary international law forms the part of law of the land, they have be cautious in choosing such norms. Benvenisti advances a mechanism where the courts when adopting method of incorporating customary international law have to invoke multilateral instruments as well a UN instruments as evidence of customary law.[71]

The practices of various countries are evident that status of customary international law is elevated to the law of land. The precedents of various countries have reasserted that the customary international law norms are a part of the national local systems. One of the dualist countries, United Kingdom which in theory requires an act of transformation for an international norm to get recognition in to domestic law accepts that customary international law need not undergo transformation to be implemented in the British legal order.

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[69] Grzybowski, Kazimierz (1987), *Soviet International Law and the World Economic Order*, Duke Press Policy Studies, Durham and London, p. 201.

[70] Charlesworth, *supra* note 64 at p. 188.

[71] Benvenisti, Eyal (1993), "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts", *European Journal of International Law*, 4:159-183, p. 165

The landmark judgement was delivered by Lord Denning in *Trendtex Trading Corp. Ltd. vs. The Central Bank of Nigeria*[72] on the incorporation of customary international law into the national law, which was later on followed by most of commonwealth and other countries. Lord Denning held that:

> seeing that the rules of international law have changed and do change and that the courts without any Act of Parliament, it follows to my mind inexorably that rules of international law, as existing from time to time, do form a part of our English law. International law knows no rule of *stare decisis*. If the court is satisfied that the rule of international law on a subject has changed from what is was 50 or 60 years ago, it can give effect to the change and apply the change in our English law, without waiting for the House of Lords to do it.[73]

The British position was that the rule of customary international law had to be given direct applicability within municipal law or its operativeness becomes impossible. The customary international norm to be recognised in the municipal law has to be in conformity with the statutes or rules of the state in which it is to be implemented i.e., there shall be a judicial scrutiny of the customary norm before its implementation. Starke points out three stages in the judicial reasoning in assessing the customary international norm:

> Firstly, when a judge is faced with the problem of an international character which can be solved by municipal law, he will ascertain the existence of the relevant rule of the international customary law and inquire into its general acceptance by member state including the country of the forum. Secondly, he will examine if there is any inconsistency between the customary norm and the domestic statutes and other relevant instruments of the country, if found inconsistent he will not allow it to operate in the municipal sphere and; lastly if not he will treat the relevant customary norm as the part of domestic legal order.[74]

Though international customary law becomes directly applicable it has to pass the test laid down by the judicial organs of states before its application. So, the norm which conflicts with a domestic legal instrument and the customary norm which has not gained attention as a matter of practice shall not be recognised by the state. Some amount of autonomy and discretion may be exercised by the state in implementing the

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[72] Beaulac, Stephan (2006), "Customary International Law in Stare Decisis", in Chistopher P.M. (eds.) *British and Canadian Perspectives on International Law*, Leiden: Martinus Nijhoff, p.389

[73] *Ibid.*

[74] This form of judicial enquiry was held by Starke J. in *Chung Chi Chung vs. King*, (1939), AC. 160 pc.; Alexandrowicz, Charles (1964), "International Law in the Municipal Sphere according to Australian Decisions", *International and Comparative Law Quarterly*, 13(1): 78-95, p. 82

customary norm, but this again depends on the attitude of the judiciary towards the international law, that is, whether they are pro-active or hesitant in such application.

4.2 Domestic Courts and International Treaties

The acceptance of the international treaties in a domestic system primarily dependent on the monist or dualist model a state adopts. The operation of international treaties in the monist models is through direct effect. However, in dualist common law states, Higgins highlights two key factors;

1. In English Law a treaty cannot be given internal effect without incorporation.
2. In discharging their judicial functions, the judiciary has been extremely sensitive not to usurp the rights of the legislature.[75]

The state practice of the common law states cannot be strictly described as dualist because of following reasons; firstly treaties and customary principles of international law are not treated in the similar patterns; and secondly, the failure to incorporate a treaty into domestic law occurs not because it is desired to ensure priority to domestic law, but exactly because the treaty is already regarded as consistent to English law, and requiring no alteration to the latter. The English jurist like Blackstone and Lord Hoffmann insist that international law is binding on the domestic courts only when it forms a 'part' of domestic law.[76] Traditionally, international law becoming a "part' of domestic law depends on whether a state follows a monist or dualist model. Fikfak argues that these "theories are unhelpful because they present the question of bindingness as an issue decided extra-judicially, most often by other branches of government which make international law "part" of domestic law- by a Parliament which brings international law into domestic law, or by the Executive that assents to it at a domestic level."[77] Crawford suggests disaggregation from the notion of "part" than fiddling with terms such as "adoption" and "transformation". He lists out four elements of Lord Mansfield's rule, later adopted by Lord Denning, which a court must possess while adjudicating the cases involving foreign element. They are as follows,

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[75] Higgins, Rosalyn (1997), "The Role Of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom," in Benedetto Conforti and Francesco Francioni (eds.) *Enforcing International Human Rights in Domestic Courts*, Martinus Nijhoff Publishers, p. 37

[76] Fikfak, *supra* note 6 at p.272

[77] *Ibid.,* p.272

a. Judicial knowledge- the courts acknowledge the existence of a body of international law, whose content is not a matter of evidence but of argument.

b. Judicial authority- in any matter where the courts acknowledge international law to be relevant or to govern, they may apply international law as the rule of decision.

c. Judicial integration- international law is not same in every domestic legal systems but the latter should be assumed to be consistent with it.

d. Judicial precedent- a rule of international law applied in this way remains a rule of international law; it is not indigenized or domesticated. If international law changes, then so does the decision based on it.[78]

When the element of international law is approached, the courts first look whether it belongs to the monist or the dualist model and assert the same in the initial part of the judgement, though deviation are sought at the later stages. In a case before Indian court, *I. P. Geetha vs. Kerala Livestock Development Board Ltd.,*[79]the Kerala High Court held that "Jurisprudentially India is Dualistic, but Article 51 (c) exhorts the nation to respect the international covenants. On the hand, Article 253 speaks of Parliament's power to give effect to international conventions"[80].

A dualist state adopts international law in three different methods, firstly by enacting a separate legislature to give effect to the international treaty; secondly, by including the text of a treaty in the already existing legislature; and finally, by scheduling, which means, the legislature gives a treaty the force of domestic law by appending its text to an implementing statute. The dualist state generally requires a transformation of the international treaty for its operation with exception to some international instruments.

Some hybrid monist states require advance legislative approval for all treaties before the executive may express consent under international law; other require such approval only for certain treaty types.[81]The debate over whether particular treaty

[78] Crawford, James. (2009), "International Law in the House of Lords and the High Court of Australia 1996-2008: A Comparison", *Australian Book of International Law*, 28: 1-27, p.6.
[79] 2015 (1) KHC 165
[80]*Ibid*. para 51
[81] Sloss, *supra* note 13 at p. 10

provisions are 'self-executing' or have 'direct effect' simply has not featured prominently in transnational disputes. Most domestic courts do not grant deference to the executive branch in treaty interpretation.[82]

4.3 Domestic Courts and Informal Instruments

The domestic courts have adopted informal international instruments in their decisions. It seems irregular that despite of the non-binding character of such informal instruments they still find reference in the decisions of the domestic courts. It can be argued that the informal international instruments are persuasive in nature. The MOUs and other soft law arrangements may not have the force of treaties but will produce legal effects. A soft law created in an informal international space will have some amount of normative value in the national legal system for acceptance. Charlesworth observes that, "soft law can be read as a sign of the democratization of international law making processes in the sense that its development is more inclusive than hard law: it typically emerges not just from the interests of states but in multilateral for a with the engagements of IOs, NGOs and individuals." [83] It is argued that the informal international instruments are much democratic and transparent than the customary international law. For instance, soft law like General Assembly resolutions have higher credibility as during its formation, the participation of all member states are involved, on the other hand, the formation of customary international law is not democratic and its concretization in deep rooted in western block.

Some instruments that appear to be informal could reflect, in substance established customary law or the accepted interpretation of treaties. For instance, domestic courts have invoked UNGA resolutions to provide evidence of a custom's existence. A typical example is the evidentiary use of the UDHR the large part of which reflects the rules of customary international law.[84]

The normative basis for implementation of informal instruments may be traced from the Article 32 of VCLT 1969, which provides that states and their courts may

[82] *Ibid.*, p. 23

[83] Charlesworth, *supra* note 64 at p. 192.

[84] Kanetake Machiko and Nollkaemper Andre, (2014), "The Application of Informal International Instruments before Domestic Courts", *George Washington International Law Review*, 46(4), p. 779. Domestic courts utilize the UNGA resolutions to disprove the existence of customary rules. For instance, the UK House of Lords in European Roma Rights Centre resorted to the 1948 UDHR to deny the existence of a customary obligation to grant asylum. Ibid., p. 790

take into account the findings of the treaty monitoring bodies or other informal instruments as part of a supplementary means of interpretation.[85] In monist traditions where Vienna Convention has domestic validity, Article 32 can serve as a formal legal basis that authorizes the reference to non-binding instruments for the purpose of treaty interpretation. In dualist states, though VCLT is not domestically operative, Article 32 may be still referred for the purpose of interpreting treaties. India, however has interpreted the principles of VLCT as customary principle of international law. For instance, Supreme Court in *Ram Jethmalani v. Union of India*[86] held that

> while India is not a party to the Vienna Convention, it contains principles of customary international law, and the principle of interpretation…provides a broad guidelines as to what could be appropriate manner of interpreting a treaty in the Indian context also.[87]

Rules of interpretation from Article 31-33 in VCLT are considered as customary rules of international law. Article 31 gives preference for objectivity than subjective interpretation. They regard treaty text as main source of interpretation. Textualism is labelled by the critics as the 'grossest exercise of arbitrary formalism'.[88] However, the reference of Indian Courts to the informal international instruments might for different reasons from using them as aids of construction and interpretation of a domestic norm, or it might be due to the misunderstanding of non-binding international instruments as binding treaties. However, some of decisions by Indian Judiciary incorporating informal international instruments are as follows.

In *Civil Rights Vigilance Committee, SLSRC College of Law, Bangalore vs. Union of India,*[89] a writ petition was filled in the Karnataka High Court restraining two players of the English Cricket team to visit India and play matches as they were allegedly having links with the South Africa which was practicing the policy of apartheid. The appellants contended that terms of the Gleneagles Accord were not met. The Karnataka High Court considered the Gleneagles Agreement adopted by the

[85] *Ibid*., p. 785
[86] MANU/SC/0711/2011
[87] *Ibid*., para 60
[88] Aust, *supra* note 57, p. 80
[89] MANU/KA/0119/1983; AIR 1983 Kar. 85

Commonwealth Heads of Government Meeting in 1977 as an international treaty[90] and held that it cannot be given effect absent legislative action.

In *Laxmi Mandal vs. Deen Dayal Harinagar Hospital & Jaitun vs. Maternity Home MCD and others*,[91] the petitioners below poverty line, were denied the welfare schemes like Antyodaya Anna Yojna and National Maternity Benefit Scheme. The Court held that there was violation of right to health and right to right nutrition and medical health of newly born. The Court to define 'right to health' referred to the Committee on Economic Social and Cultural Rights and its General Comment No. 14 of 2000 under ICESCR. It defined the right to health as:

> The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child (Article 12.2 (a)) may be understood as requiring measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information.[92]

In *People's Union for Civil Liberties vs. Union of India*,[93] the case before Supreme Court was if the Retired Director of CBI could be appointed as a member to the National Human Rights Commission. The article 3(2) (d) of the Human Rights Protection Act 1993 requires two members to be appointed from amongst persons having knowledge of, or practical experience in matters relating to human rights." The Court highlighted that NHRC was to investigate and prosecute offences that have caused human rights violation, of which many are related to the atrocities by the police personnel. The court arrived at the decision that retired Director of CBI is not eligible for the post. To arrive at this judgement the court refereed to the Principles Relating to the Status of National Institution (Paris Principles) endorsed by a UN General Assembly Resolution 1993, especially the part which specifies the composition of a human right commission. The Court held that,

> The exclusion of the police category under consideration seem evident when seen as to who are included in the light of Paris principles namely, representatives of non-governmental organisation responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and

[90] *Ibid*., para 16
[91] MANU/DE/1268/2010
[92] *Ibid*., para 23
[93] MANU/SC/0039/2005

> professional organizations for example, association of lawyers, doctors, journalists and eminent scientists; trends in philosophical or religious thought; Universities and qualified experts; and Parliament.[94]

The Court therefore held the appointment of a former police officer as a member of the National Human Rights Commission violated international covenants. However, the Court's decision of holding the treated the Paris Principles and the UNGA resolution as legally binding by Sabharwal J. was criticized.

In the above mentioned cases, the Indian Judiciary cited informal instruments considering them as necessary aid in giving meaning or interpreting the domestic law. There has not been any instance of discussion the non-binding nature of the informal instruments. They are referred as a general practice of judiciary to note the list of applicable international treaties. The Indian Judiciary if it deems fit perhaps has to re-consider the nature of international law and the distinction between hard and soft laws concerning their obligatory effect. However, there are other cases for the kind consideration of the Supreme Court. The Indian Courts out of enthusiasm to protect human rights internationalism have misconstrued some elements of international law.

In *Bijay Cotton Mills Ltd. vs. State of Ajmer*,[95] the constitutional validity of the Minimum Wages Act was challenged by the appellant as the workers were willing to work for half the wages government had fixed. The Court held that "it is well known that in 1928, there was a Minimum Wages Fixing Machinery Convention held at Geneva and the resolutions passed in that convention were embodied in the International Labour Code. The Minimum Wages Act is said to have been passed with a view to give effect to these resolutions."[96]

In *C.E.S.C. Ltd. and others vs. Subhash Chandra Bose and others*,[97] the issue before Supreme Court was whether employees whose wages being paid through contractor would come under the definition of employee of the corporation. The Court held that the right to health is the fundamental right by referring to UDHR and ICESCR. It important to note the irrelevance of quoting these instruments when 'right to health' directly flows from right to life of Article 21. It is also noteworthy that the

[94] *Ibid*., para 18
[95] MANU/SC/0107/1954
[96] *Ibid*., para 3
[97] MANU/SC/0466/1992

Court refers to ICESCR as 'International Convention' instead of 'International Covenant'.[98]

In *Madhu Kishwar vs. State of Bihar,*[99] the appellant claimed to retain possession of tenancy of her deceased husband. Ramaswamy J. culled out the provisions of CEDAW that abolishes the gender discrimination in the realization of civil, social, economic and culture aspects of life. He observed that,

> The General Assembly of the United Nations adopted a Declaration in 1986 on the 'the Right to Development' in which India played a crusading role for its adpotion and ratification of the same.[100]…Vienna Convention on the Elimination of all forms of Discrimination against Women was ratified by the UNO in 1979. The Government of India who was an active participant to CEDAW ratified it on 19.6.1993 and acceded on 8.8.1993.[101]

Many flaws may be marked in this opinion of Ramaswamy J. They are spotted by Verma as firstly, the declaration of General Assembly is not a treaty creating binding obligation, hence the question of its adoption and ratification by India does not arise; secondly, the CEDAW is not associated with Vienna; thirdly, the CEDAW was adopted by the General Assembly and not ratified by it; and finally, the uncertainly concerning the meaning of accession and ratification.[102] The same position was taken by Ramaswamy J. in *Valsamma Paul vs. Cochin University* that UNO ratified CEDAW on 18.12.1979 and the Government of India has ratified as an active participant and on 19.06.1993 acceded to CEDAW.[103]

These were some of the decisions of the Supreme Court involving international law and some informal instruments. As Higgins rightly observes that in some jurisdiction international law is routinely adopted making it a familiar topic, whereas in some jurisdictions it becomes practically difficult to understand and apply international law, both for the counsel and the judge.[104] It is however necessary to note that post globalization period that engaged the domestic judges inevitably with international law and the domestic courts too are proactively responding to the call.

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[98] *Ibid*., para 30
[99] MANU/SC/0468/1996
[100] *Ibid*., para 7
[101] *Ibid*., para 9
[102] Verma S.K., (2000), "International Law, in Fifty Years of the Supreme Court of India: Its Grasp and Reach", S.K. Verma and Kusum (eds.), New Delhi: Oxford University Press, pp. 621- 649, p. 642.
[103] *Ibid*., p. 642.
[104] Higgins, Rosalyn (1995), "*Problem and Process: International Law and How we Use It",* New York: Oxford University Press, p. 206

5. DEVELOPMENT OF A NEW JURISPRUDENCE ON COMPARATIVE LAW

The domestic courts frequently identify and interpret international law by engaging in a comparative analysis of the method by which the other domestic court has approached the issue. National courts frequently look sideways to other foreign decisions when identifying custom and interpreting treaties. [105] There is a disadvantage of referring to the foreign judgements as Justice Scalia of the US Supreme Court opines. His position is against US courts citing foreign decisions in constitutional interpretation on the ground of irrelevance. He observes that "the foreign decisions will have no bearing on the original constitutional interpretation. There is also an element of illegitimacy when references to foreign decisions are likely to be selective, self- serving and ripe for manipulation."[106] He cautions that judges may not be given comprehensive evidence of foreign law, leaving them likely to rely haphazardly on readily available sources. Sitaraman argues that references to international law may to less problematic than comparative constitutional citation on the basis that, inter alia, international law poses 'fewer concerns in terms of accuracy' and 'contextual complexities.'[107] On the other hand, Roberts while arguing for comparative law observed that,

> the duality of national court decisions affects the growing practice of comparative international law. On one level, the idea of comparative international law may help to identify diversity and hybridity by focusing the attention on the way that international law is domesticated differently by various national courts. Instead of simply mechanically enforcing international law, domestic courts frequently produce hybrid international /national norms through the process of nationalization, which provides fertile ground for comparative study.[108]

The domestic courts of the powerful states like their executive branch have the independence and ability to utilize the fragmentation of international law and international organization to suit their choice. The national courts now pick and choose selectively from conflicting international laws to determine which will be

[105] Roberts, *supra* note 32 at p. 58.
[106] *Ibid.*, p. 86
[107] *Ibid.*, p. 88
[108] *Ibid.*, p. 91

applied within their domestic jurisdiction. [109] Benvensti now reports that national courts are increasingly using international and comparative law as a sword to challenge legislative and executive actions rather than as a shield to protect them.[110]

5.1 Inter-Judicial Co-operation

Benvenisti proposes the idea of the inter-judicial co-operation as a suitable strategy for both protecting the authority of the domestic courts and safeguarding the domestic democratic processes.[111] Courts that wish to cooperate use the language of comparative law and international law so that other courts understand. The use of comparative analysis indicates that courts are willing to learn from one another, or are seeking support from other jurisdictions for their judgements or both.[112] The appropriate way for courts to initiate and maintain cooperation is through the mutual exchange of information. Their judicial reasoning and outcomes provide proof of their commitment to cooperation.

The judicial reasoning and outcomes of a decision may guide the other courts facing similar situation. If a court has confirmed to certain commitment then the co-operative courts will cite such decision with approval and if the courts which step out of line by either refusing to give force to a new standard or setting a different standard will be criticised.[113] Even the domestic avoidance and contestation will contribute to the development of the international rule of law. Kanetake observes that "if domestic courts refer to each other's decisions the inter-judicial communication may even create norms which are yet to become part of formal international law but which affect the way international organizations and international judicial institutions render their decisions."[114]

When the domestic courts face the situation of adjudicating the cases involving environment or human rights in the absence of their domestic legislations they base their authority to expand and enforce environment or human rights on international law by following the other courts. The courts feel a particular common

[109] Benvenisti, Eyal and Downs, George W. (2009), "National Courts, Domestic Democracy, and the Evolution of International Law", *European Journal of International Law*, 20(1): 59-72, p. 66
[110] Roberts, *supra* note 32 at p. 59
[111] Benvenisti and Downs, *supra* note 109 at p. 65
[112] Benvensti, *supra* note 29 at p.251
[113] Benvenisti and Downs, supra note 109 at p. 66
[114] Kanetake, *supra* note 14 at p. 28

bond with one another in adjudicating human rights cases because they form basic judicial function.[115] The courts communicate with the courts of other nations by citing of one another's judgements. Such inter-judicial communications have proved to be very beneficial. A key element in the explanation is the role that networks of courts play in influencing decisions. Goodman and Jinks observe that,

> A decision by a state to ratify a human rights treaty appears to be significantly affected by whether that state is a member of networks of other states which have ratified this treaty, even when the network of which these states is a member has little to do with human rights. They stress on the idea of socialisation as method by which states internalise these norms to the extent they ratify these covenants.[116]

The courts and judges at the national level are increasingly engaging in conversation with each other particularly in the context of rights claims and that this judicial conversation takes place in part in formal and informal networks and in part by engaging with each other's opinion and decisions in the course of their judgements.

This type of transnational judicial dialogue is taking place in the interpretation of international law by national judges, where national judges refer to each other's interpretation of the international standards. Linos observes that "international and domestic courts are typically faced with ambiguous treaty terms. To interpret them, they often turn to the jurisprudence of diverse foreign states."[117] Benvenisti opines that "national courts often realise that they need to consider approaches adopted by other courts, foreign national courts or international courts."[118] Comparing national practices may also be relevant when seeking to interpret treaties in light of other state practice as usually is in the case of human rights law and environmental law. The insights from comparative law, comparative politics and sociology may be useful in explaining different national approaches to international law.[119]

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[115] For instance, Bangalore Principles.

[116] Goodman, Ryan and Jinks, Derek (2004), "How to Influence States: Socialisation and International Human Rights Law", *Duke Law Journal,* 54(3): 621-703, p. 621

[117] Mc'Crudden, Christopher (2015), "Why Do National Court Judges refer to Human rights Treaties? A Comparative International Law Analysis of CEDAW", *American Journal of International Law*,109: 534- 550, p. 546

[118] *Ibid*., p. 546

[119] Roberts Anthea, Stephan Paul B., VerdierPierre-Hugues and Versteeg Mila, "International Comparative Law: Framing the Field", *American Journal of International Law,* 109(3): 467-474, p. 471

A court in one jurisdiction can serve as the beacon for the other courts, as has the Indian Supreme Court for some of the Asian states and vice versa in the developing world concerning the human rights and environment jurisprudence.[120] The Indian Supreme Court referred to judgements of the courts of the Philippines, Colombia, and South Africa and of the European Court of Human Rights, as well as to decision of the Inter-American Commission on Human Rights. The Indian judiciary has referred to decisions of the other courts while filling up the void in Indian legislations especially in the cases concerning human rights and environment.

For instance in *A.P. Pollution Control Board (II) vs. Prof. M.V. Nayudu (Retd.) and Others,*[121] the Supreme Court inferred the linkage between balanced and healthy environment and individual's right of well-being and private life by referring to domestic judgements of other courts. The reference was drawn from *Lopez Ostravs. Spain* (the European Court at Strasbourg); *Powell A Rayner vs. U.K.* (European Court of Human Rights); *Yanomani Indians vs. Brazil* (Inter-American Court of Human Rights); *Furtdepublico vs. Mayor of Bugatagrande and others* (Constitutional Court of Columbia); *Wildlife Society of Southern Africa and others vs. Minister of Environment Affairs and Tourism of the Republic of South Africa and others* (Court of South Africa).[122]The Indian Supreme Court in the landmark *National Legal Service Authority vs. Union of India*[123](Transgender case) dedicated a section to the foreign judgements on Sex Reassignment surgery (SRS). It referred to the decisions in *Corbett vs*. Corbett (England), *A.G vs. Otahahu Family Court* (New Zealand), *R vs. Kevin* (Australia)(regarding validity of marriage of Transsexual), *Christine Goodwinvs. U.K*, *Van Kuck vs. Germany* (European Court of Human Rights) for the merits.

5.2. Judicial Colloquia

Many international judicial and quasi-judicial institutions exercise a supervisory authority over implementation of international treaty obligations in state. They examine domestic legislation for consistency with the treaty provisions. This has deepened the need for better domestic enforcement of international treaty obligations.

[120] Benvenisti and Downs, supra note 109 at p. 66
[121] MANU/SC/2953/2000
[122] *Ibid*., para 9
[123] MANU/SC/0309/2014.

Mohammed Bedjaoui describing the role of international institutions states that "the task of international institutions set up to ensure observance of rules is not the defence of the interest of individual powerful states but rather to safeguard the interest of a coalition of dominant global social forces and states". [124]

On one hand, human rights advocates urge common law judges to join the internationalist trend by looking up to the vast international human rights jurisprudence. Many common law judges agree that the international human rights jurisprudence can be a useful resource in interpreting domestic law provisions. Some are even more ambitious, arguing that common law courts should engage in "an interactive dialogue' regarding the development of the normative content of human rights provisions- a dialogue that over time will "help to merge aspects of national and international law".[125] When the national legislatures in the common law countries have not enacted implementing legislation to the major human rights treaties, the common courts share a dilemma of how to make use of international human rights treaties and jurisprudence in their work, thus joining the rich transnational judicial dialogue on human rights law, while remaining true to their historical dualist roots.[126]

The judicial response to the tension between dualism and human rights internationalism was by moving slowly towards monism. Many common law judges have eroded strict dualism for a monist-oriented approach to human rights treaty incorporation. The development of these judicial techniques has not happened in isolation. The judges have engaged themselves in transnational judicial dialogues. They have periodically participated in the gatherings and colloquia with their case law, citing and discussing one another's opinions in developing monist-oriented techniques for utilizing human rights treaties in their work

5.2.1 The Bangalore Principles

A face to face dialogues in eight judicial colloquia from 1988 to 1998 (the concluding statements being referred as Bangalore Principles) addressed the issue of common law court's engagement with international human rights law.

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[124] Chimni, *supra* note 9 at p. 338.
[125] Waters, Melissa (2007), "Creeping Monism: The Judicial Trend Towards Interpretive Incorporation of Human Rights Treaties", *Columbia Law Review*, 107(3):628-705, p. 642.
[126] *Ibid.*, p. 643

The theme is described as the growing and encouraging rapprochement in using international human rights law to shape domestic legal rules. [127] The major focus however was the status of unincorporated treaties in dualist-oriented common law legal systems. The reasons for a re-examination of the role of domestic courts in implementing international human rights law as follows. Although the international protection of human rights has reached an scope regarding both the rights covered and number of countries bound, the implementation of the relative obligations remain unsatisfactory. The resentment between the international recognition of rights and their actual implementation by domestic courts and by public organs is a disturbing aspect of international efforts to ensure human dignity. While most human rights treaties provide for independent supervisory and implementing procedures and organs, few states have optional protocol concerning the rights of the individuals to have recourse to such organs. However, even where the contracting parties have allowed such individual right, the role of domestic courts remains critical since, the route to international remedies remains blocked until full exhaustion of domestic remedies has occurred.[128] Since international community is dominated by states than by peoples, establishment of truly universal and reliable international system of human rights enforcement will remain unpredictable. Hence efforts are to be made at a political and judicial level, to improve compliance with international human rights, particularly judicial organs. The independence of judiciary has considered the domestic court as the only public organ that is impartial implementer of human rights. But the domestic implementation of human rights has obstacles like the over reach of executive, un-ratified human rights instruments, limits of jurisdiction, sovereign and functional immunity etc. It has become an interpretative enterprise of the human rights.[129]

The Judicial Colloquia on Domestic Application of International Human Rights Norms was the effort of Justice P. N. Bhagwati. The First Judicial Colloquium

[127] *Ibid.*, p. 644

[128] Francioni, Francesco (1997), "The Jurisprudence of International Human Rights Enforcement: Reflections on the Italian Experience" in Benedetto Conforti and Francesco Francioni (eds.) *Enforcing International Human Rights in Domestic Courts*, Hague :Martinus Nijhoff Publishers p. 15

[129] *Ibid.*, p. 31.

was held in Bangalore jointly organised by the INTERRIGHTs, a Human rights NGO and the Commonwealth Secretariat[130] with the participation of about 37 countries.[131]

The Judicial Colloquium was based on the principles as follows:

> While it is desirable for the norms contained in the international human rights instruments to be still more recognised and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs.
>
> It is within the proper nature of the judicial process and well- established judicial functions for national courts to have regard to international obligations which a country undertakes whether or not they have been incorporated into domestic law for the purpose of removing ambiguity or uncertainty form, national constitutions, legislation or common law.

However, where national law is clear and inconsistent with the international obligations of the state concerned in common countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international obligation.

The Bangalore Principles did not challenge the dualist doctrine which is, in any case somewhat different in the United States than in Commonwealth countries. They simply recognised a 'growing tendency' for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law whether, constitutional, statutory or common law- was uncertain or incomplete.[132]

The Bangalore Principles did not undermine dualism. Nor did they purport to authorize judicial incorporation of treaty or customary international law by the backdoor. They simply noted that occasionally, municipal courts might find assistance of their own intellectual tasks by having regard to the growing body of international

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[130] Secretariat of the British Commonwealth Association , an intergovernmental organization representing 53 Commonwealth member states.

[131] The Countries that participated in the Judicial Colloquia are Antigua and Barbuda, Australia, Bangladesh, Barbados, Belize, Brazil, British Virgin Islands, Canada, Dominica, Gambia, Ghana, Grenada, Guyana, India, Jamaica, Kenya, Lesotho, Malawi, Malaysia, Mauritius, New Zealand, Nigeria, Pakistan, Papua New Guinea, Seychelles, Sierra Leone, South Africa, Sri Lanka, St. Lucia, Tanzania, Trinidad and Tobago, Uganda, The United Kingdom, the United States, Zambia and Zimbabwe.

[132] Bhat Ishwara and Bajaji, Shubangi (2105), "Judiciary and Protection of Human Rights: A Focus on the Bangalore Principle's Impact", *Journal of West Bengal Human Rights Commission*, 1:139- 157, p. 148

law, particular as that law expresses universal principles of human rights. In brief they shall not ignore international human rights.

The second judicial colloquium was held in Harare in 1989 in Zimbabwe. A manual of human rights was prepared from the resource papers of the judges. In third Colloquium held in Banjul at Gambia in 1990, where the principles like rule of law, democracy and independence of judiciary were upheld. The fourth judicial colloquium held in Abuja at Nigeria in 1991 focussed on strengthening democracy. The fifth colloquium of 1992 held in UK emphasized on the human rights in the common law system. The Sixth colloquium in 1993 happened in Bloemfontein in South Africa focussing on the role of lawyers in protecting human rights especially against apartheid. The final colloquium in Georgetown in 1996 focussed on freedom of expression and fair trail.

The Bangalore Principles are based on the following presumptions:

1. International law (whether human rights norms or otherwise) is not, as such, part of domestic law in most common law countries

2. Such law does not become part of domestic law until Parliament so enacts or the judges (as another source of law-making) declare now the norms thereby established are part of domestic law

3. The judges will not do so automatically, simply because the norm is part of international law or is mentioned in a treaty even on ratified by their own country.

4. If an issue of uncertainty arises (as by a lacuna in the common law, obscurity in its meaning or ambiguity in a relevant statute), a judge may seek guidance in the general principles of international law, as accepted by the community of nations; and

5. From this source material, the judge may ascertain and declare what the relevant rule of domestic law is. It is the action of the judge, incorporating the rule into domestic law, which then makes it part of domestic law.

6. J. Kirby termed the colloquium as "the growing rapproachement" between the domestic and international human rights law signifying the future usage of international human rights to shape the domestic law.[133]

Though in the first colloquium they adopted a conservative approach strongly acknowledging the traditional limitations on the common law courts following the dualist tradition, they eventually accepted that unincorporated international human rights instruments can play a gap filling role. [134]

The Bangalore Principle declare that "there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law whether constitutional, statute or common law is uncertain or incomplete. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes whether or not they have been incorporated into domestic law for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law." However, where national law is clear and inconsistent with the international obligations of the state concerned, in common law countries the national court is obliged to give effect to national law."[135]

By 1998 the concluding colloquium (Bangalore), the judges had become mediators between international human rights and domestic legal system and reached to an understanding that the international treaties are no longer used to address ambiguities or uncertainties in domestic law. They asserted that it is the vital duty of the judiciary to interpret and apply national constitutions and legislations in harmony with international human rights codes and customary international law and to develop the common law in the light of the value and principles enshrined in international human rights law. [136] They further noted that "even when human rights have not been ratified or incorporated into domestic law, they provide important guidance to law-makers, public officials and the courts."

[133] Waters, *supra* note 125 at p. 645
[134] *Ibid*., p. 645
[135] Bangalore Principles, Accessed 12 February 2017, URL: http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_bang11.htm
[136] Waters, *supra* note 645, p. 646

5.2.2 Beijing Statement of Principles on the Independence of Judiciary

The Beijing Statement of Principles of the Independence of the Judiciary was adopted by the Asia-Pacific Region. These principles originated from a statement of principles formulated by the LAWASIA[137] Human Rights Committee and judges of Asia-Pacific region. The Beijing Principles reflect an agreement between the Chief Justices from a range of countries throughout the Asia-Pacific Region on the minimum standard necessary to secure judicial independence in their respective countries. About 38 states in this region have subscribed to the Beijing Principles.

The Beijing Principles can be divided into judicial function, the concept of judicial independence, judicial appointments, security of tenure, jurisdictional issues and resources and finances.

The Beijing Principles lays out the objectives and functions of judiciary[138] to include:

1. to ensures that all persons are able to live securely under the Rule of law;
2. to promote, within the proper limits of the judicial function, the observance and the attainment of human rights within its own society; and
3. to administer the law impartially between citizen and citizen and between citizen and state

The development of the concept of judicial independence at the international level started in during 1980's. Several attempts were made to highlight the key principles to be adopted for the unbiased and independent working of judiciary. Some of them are International Bar Association's Minimum Standards of Judicial Independence 1982 also known as New Delhi Standards, the United Nation's Draft Principles on the Independence of the Judiciary 1982 (Siracusa Principles), the United Nations Basic Principles on the Independence of the Judiciary 1985 (Basic Principles), Draft Universal Declaration on the Independence of Justice (1989) (Singhvi Declaration), Judicial Colloquium 1989-1999.

[137] LAWASIA is the acronym of the Law Association of Asia and Pacific. It was founded in 1966 and is an association of lawyers, law teachers and judges. Its objective is to protect human rights and maintain the rule of law by an independent judiciary. David K. Malcolm, (2003) The Independence of the Judiciary in the Asia-Pacific Region, 10th Conference of Chief Justices of Asia and the Pacific Accessed 14 February 2017, URL: http:/reserachonline.nd.edu.au/law_conference/5.

[138] Article 10

The United Nation Basic Principles on the Independence of the Judiciary (Basic Principles) adopted by the General Assembly in 1985 and 1990 establish a series of model institutional arrangement.[139] These are the leading international instrument establishing guideline for judicial independence. Under the Basic Principles, judicial independence includes both individual and institution components.[140] Governments are encouraged to incorporate these institution arrangements directly into their domestic law and UN proposes that "offers models for lawmakers everywhere who are encouraged to write them into their national constitutions and enact them into law."[141] The Basic Principles reiterate the importance of the UN Declaration of Human Rights particularly the principle of equality before the law, explicitly state the freedom of expression extends to judges like all other citizens and providing guidance for conditions of service, tenure, remuneration and disciplining of judges. The Basic Principles describes independent judges in Article 2, as those who are capable of deciding matters before them impartially, on the basis of facts and in accordance with the law, without any restriction, improper influences, inducements, pressures, threat or interferences, direct or indirect from any quarter or for any reason.

The international instruments, regional standard also establish judicial independence rules for group of countries either within a particular geographic region or that share a common legal heritage.

5.2.3 Declaration of Delhi- The Rule of Law in Free Society

The International Congress of Jurists consists of 185 judges, practicing lawyers and teachers of law from 53 countries, assembled in New Delhi in 1959. This was held under the aegis of the International Commission of Jurist. The declaration highlighted the independence of judiciary and legal profession as essential to maintain rule of law and proper administration of justice. It observed the primary responsibility of the jurists is not only to safe guard and advance civil and political rights of the individual

[139] Trebilcock, Michael J. and Daniels, Ronald J. (2008), *Rule of Law Reform and Development: Charting the Fragile Path of Progress*, Glos: Edward Elgar Publishing House, p. 61
[140] Neudorf, Lorne, *The Dynamics of Judicial Independence: A Comparative Study of Courts in Malaysia and Pakistan*, Canada: Springer, p. 28
[141] *Ibid*., 29

in a free society, but also to establish social, economic, educational and cultural conditions.[142]

It further calls the jurists of all countries to give effect to give effect in their own communities to the principles expressed in the conclusions of the Congress.

5.2.4 Paris Principles- Principles Relating to the Status of National Human Rights Institution

The United Nations meeting in Paris in 1991 put together a set of regulations targeting the national institutions for the promotion and protection of human rights The United Nations General Assembly Resolution 48/134 in 1993 and the Resolution 1992/54 adopted by UN Human Rights Commission in 1992 endorsed these principles. These principles prescribe minimum standards for the national human rights institutions.

The key elements of the national institutions are its independence and pluralism. The Paris Principles have limited provision to instil independence of the national institutions which is appointment of commissioners and personnel's. These Paris Principles identify six broad requirements that human rights institution should meet to be effective; they are a clearly defined and broad-based mandate based on universal human rights standards, autonomy from government, independence guaranteed by legislation or the constitution, pluralism including membership that broadly reflects their society, adequate resources and adequate powers of investigation.[143]

5.2.5 The Global Judges Symposium on Sustainable Development and the Role of Law

The Global Judges Symposium on Sustainable Development and the Role of Law[144] was held in Johannesburg, South Africa from 18-20 August 2002 under auspice of United Nations Environment Programme. It was hosted by the Chief Justice of South Africa, Chaskalson J. It was a gathering of Chief Justices and Senior Judges from 60

[142] Delhi Declaration, Accessed 15 February 2017, URL: icj.wpengine.netdna-cdn.com/wp-content/uploads/1959/01/Rule-of-law-in-a-free-society-conference-report-1959-eng.pdf.
[143] Paris Principles, Accessed 15 February 2017, URL: www.asiapacificforum.net/support/what-are-nhris/paris-principles/.
[144]Global Judge Sympsium on Sustainable Development and Role of Law, Accessed 15 February 2017URL: staging.unep.org/delc/judgesprogramme/GlobalJudgesSymposium/tabid/106158/Default.aspx

countries and judges from the International Courts and Tribunals. It affirmed that "an independent judiciary and judicial process is vital for the implementation, development and enforcement of environmental law and that members of the judiciary as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law."[145] The primary purpose of this Global Symposium was to provide a global perspective to the importance of the role that the judiciary plays in promoting sustainable development through the rule of law at the national level.

Kripal J. participated from India in the symposium. His research paper titled 'Developments in India Relating to Environmental Justice' summarised the development of environmental jurisprudence in India. He highlighted the development of judicial activism in India and public interest litigation. The expansive ambit of right to life so as to include right to healthy environment was stressed by the judge. He further highlighted the development of various doctrines like precautionary principle, polluter pays, public trust, sustainable development and intergenerational equity in the Indian jurisprudence.

It is common among international lawyers to refer to national courts as a reliable if diffuse system for ensuring compliance with international norms, and therefore to urge judges to apply these norms rigorously. Lacking central enforcement agencies, international law relies heavily on the action of national agencies. Many view national judges as the best candidates within the national systems to grapples with this important task, because of their independent status and their apolitical role.[146]

These principles are framed by the judges outside the purview and working of their respective constitutions. They are completely driven by judicial activism and their role as the enforcers of human rights. These principles establish that judiciary is an independent state organ and is vested with the primary responsibility of protecting human rights.

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[145] Greiber, Thomas (2006), "Judges and the Rule of Law, Creating the Links: Environment, Human Rights and Poverty", *IUCN Environmental Policy and Law Paper*, 60, Gland: IUCN, p. 70.
[146] Benvenisti, *supra* note 71 at p. 160.

6. CONCLUSION

The chapter tries to map out the role of the domestic courts in implementation of international law. The reference to the domestic court as the agent of international law began from the writings of Prof. Lauterpatch and continues till today in the mandates of international organizations and writing of various scholars. The international rule of law also calls the domestic courts to impartially implement international law. The basis of assigning this role to judiciary is that compared to the state organs, it only the domestic court that enjoys certain amount of independence in a state. Therefore, if a domestic court independently implements international law, international law can flow into the state, without the hurdle of Executive or Parliament's requirement of transformation. However, the legitimacy of the international rule of law is only questioned for its conservative approach and inability to address the concerns of the third world. The international rule of law is biased towards the interest of the first world nations.

The judicial technique is examined throughout the difference types of international law like international customary law, international treaties and informal instruments. It can be submitted that the international customary law is accepted in the domestic systems through the incorporation method. The courts of the third world are encouraged to look for a UN General Assembly Resolution or other multilateral instrument on the same aspect involving customary international law.

There is no much debate in a monist state concerning the interpretation of international treaties. But in a dualist common law system, it is observed that the dualist stance is being faded away by the adoption of various interpretative and incorporative methods. The important feature is the treatment given to the informal institutions on par with the international treaties. A new judicial mechanism introduced by Waters is assessment of 'domestic value' of a treaty.[147] This checks the degree of acceptance of an international instrument by the state organs. For instance, the negotiations, accession, ratification or reservation of a state towards an international agreement forms the domestic value of that agreement. Based on this the Courts can relatively accord their treatment to international instrument.

[147]Waters, supra note 125 at p. 702

The interaction and the inter-judicial co-operation between the courts has led to the emergence of the development of comparative jurisprudence. The domestic courts are found referring to the decisions of the other courts when an international norm is question. The domestic courts of the third world states heavy rely on Anglo-American jurisprudence. It may create a form of resistance, if a network of the Asian-African states is established and they relied and supported each other's decisions in taking any position that deviates from mainstream international law. The domestic courts are spotted organizing and attending the judicial colloquia, where the judges are operating out of the constitutional limits. They are found citing each other's judgements in arriving at their own decisions, for instance in the field of human rights and environment. However, these colloquia are focus on the domestic implementation of the existing international law and do not offer any scepticism or resistance to the imperialist nature of the existing international law.

CHAPTER-6

INTERNATIONAL LAW BEFORE INDIAN COURTS: TRENDS, IMPACT AND LESSONS

1. INTRODUCTION

India is primarily a dualist state. Pursuant to Article 253 of the Indian Constitution, the Parliament is required to enact an enabling legislation for an international norm to become operative in the Indian legal system. The jurisdiction of the court to enforce Article 51 in the domestic legal system is limited by Article 37. Article 51 due its ambiguous construction has caused much uncertainty than regulation. As discussed previous chapters, the term 'state' used in the Article 51 is subject to debate whether it includes the judiciary. However, without any explicit provision in the Constitution or any statute providing or barring the same, it is subject to various interpretations. There is no mandate in the Indian Constitution prescribing the role of Indian Judiciary towards international law. However, the state practice over years reveals that that the Indian Courts have adopted a very pro-active role in deciding the cases involving the elements of international law.

India as a dualist state has to reflect transformation patterns while engaging with international law, but the state practice shows the presence of both transformation and incorporation methods. The Indian Courts follow incorporation method during the application of customary international law and transformation while adopting international treaties obligations. The position of the Indian Courts concerning customary international law is predominantly influenced by the decisions of the British Courts. The customary international law is declared as the law of the land. The position of the international treaties is entirely different from that of the customary international law. The Supreme Court with few exceptions continues to maintain the requirement of transformation of treaties into domestic legislation by the Parliament. The decisions of the Indian Courts are not consistent through different sectorial regimes. They show flexibility in regimes like human rights, environment, extradition and others by allow direct application of treaty norms. This trend of direct incorporation of treaty obligations by the Indian Courts shows a shift from their traditional strict dualism towards monism.

This chapter is divided into five sections; the first part being the current introductory part introduces the theme and structure of this chapter. The second section examines the decisions of the Indian Supreme Court and High Courts involving customary international law in an attempt to locate its position in the Indian legal system. The third segment studies the Supreme Court's stance on the treaty procedures. Only the decisions concerning treaty formation and the requirement of treaty implementation are highlighted in this segment. It identifies a tendency of the court towards relaxing the requirement of transformation over a period of time. The fourth segment is a compendium of decisions of the Indian Courts on various sectorial regimes involving international law elements. The objective of this part is not necessarily to draw a generalised conclusion on the role of Indian Judiciary in incorporating international law, but to draw a pattern in those judgements. It advances an argument that such pattern may reflect the inclination towards integration of the two legal systems. The final section summarizes the arguments and findings of the present chapter.

2. INDIAN COURTS AND CUSTOMARY INTERNATIONAL LAW

The relationship between customary international law and domestic law is much complicated as most of the countries do not have provisions prescribing the same. In India there are no specific provisions either in the Constitution or in any other statutes directing the adoption of customary international law into Indian domestic law. The Article 51(c) merely requires the state to foster respect to customary international law, which means that the customary norms were not regarded as a part of law of the land. Examining the position of Article 51 in the Indian Constitution, Alexanderowicz argues that "it would seem that Indian Constitution drafters have not accepted the Blackstone's doctrine that the customary international law is a part of law of the land, a doctrine which in English law is subject to qualifications."[1] It has been made clear in English courts that for a customary norm to be incorporated into English municipal law the norm must be universally recognised. There must be evidence that the family of nations universally observe a certain rule of customary law to make it applicable without legislative enactment.[2] However, the separate mention of customary

[1]Alexandrowicz, C. H. (1952), "International Law in India", *International and Comparative Law Quaterly*,1(3): 289-300, p. 291.
[2]*Ibid.*,p. 292.

international law as 'international law' creates an apprehension that the drafters were aware of the nature of customary international law as general and binding.

However, pursuant to Article 372 India continues to observe some of the laws which were in force before the commencement of the Constitution. The term all the law also includes the international customary laws that were prevalent before the commencement of the Constitution. Therefore, India continues to observe the rules of diplomatic immunity though there is no legislative enactment in this respect. The same rule applies to other rules of international customary law relating to the high seas, to the maritime belt to innocent passage and so on.[3]

The Courts have also not evolved any doctrine regarding the adoption of international law but have relied on the decisions rendered by the courts of United States and Britain in delivering the judgement pertaining to applicability of international law. India's position towards the customary international law is largely influenced by the British practice. British practice reveals that customary international law forms part of the law of the land, hence it could be directly incorporated. Rama Rao observes that "When Indian courts have been confronted with the problems of international law, they seldom analyse whether the particular rule relied upon has received the consent of all nations or of India. They merely examine whether it is part of English common law or sometimes American law and then they usually apply the rule, unless they find it opposed to justice, equity and good conscience".[4] In *Indian and General Investment Trust Ltd. vs. Sri Ramachandra*[5] Sinha J. observed that,

> we have invariably followed the English rules. In fact the Judicial Committee of the Privy Council in England being the ultimate authority in these matters, nothing else could be expected. Many of the decisions, as will be found are based on the fact that India at some time formed a dependent colony under the British Crown. Circumstances, however, have now altered, and in my opinion it is no longer incumbent upon us to follow the English rules, or for the matter of that, any rule excepting our own.[6]

Baxi terms this continuous reliance on western legal system (particularly the common law culture of England and America) by judges, legislatures, administrators

[3] *Ibid.,* p. 292
[4] Rao, Rama T.S (1972), "Treaty Making Power under the Constitution of India" in S.K Agrawala (eds.), *Essay on the Law of Treaties,* New Delhi :Orient Longman, p. 256.
[5] AIR 1952 Cal 508; MANU/WB/0056/1952
[6] Ibid., para 21

and jurists as 'juridical dependencia'.[7] He observes that "juristic dependencia manifests strikingly in planning or initiating through legislative/ juridical process evident in copycat drafting of laws or reliance on obsolescent Anglo-American decision law which have undergone drastic changes even in the countries of their origin".[8]

The pre-dominant dependency of the Indian Courts on Anglo-American decisions is concerning the customary international law. The Supreme Court has relied on the British case *Trendex Trading vs. Bank of Nigeria,*[9] where Lord Denning held that:

> seeing that the rules of international law have changed and do change and that the courts have given effect to the changes without any act of Parliament, it follows to my mind inexorably that the rules of international law as existing from time, do form part of our English law. It follows too that a decision of this court as to what was the ruling of international law 50 or 60 years ago is not binding on this court today. International law knows no rule of *stare decisis*. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change and apply the change in our English law without wasting for the house of Lords to do it.[10]

The Indian judiciary was influenced by the decision and the reasoning of Lord Denning in the above case and applied to the cases which involved a question of inclusion of customary international law.

The Supreme Court examined the relationship between customary international law and Indian municipal law in *Gramophone Co of India Ltd vs. Birendra Bahadur Pandey*.[11] The appellant was a manufacturer of music records and cassettes. He received information that the consignment which was in the Calcutta port awaiting dispatch to Nepal had substantial number of cassettes of pirated works.

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[7] Baxi derives this term from the Latin American Theorist of Development and Under-development. They designate the term 'dependencia' to an economic condition where economies of certain subordinate states depend on economy certain powerful state or states.

[8]Baxi, Upendra (2005), "Colonial Nature of the Indian Legal System", in Indra Deva (ed.), *Sociology of Law*, New Delhi: Oxford, p. 46; In 90% of the cases, the legislative draftsmen follow the model and language of English laws; juridical interpretation continues to rely heavily on Anglo American decisional materials.

[9] (1977) QB, p. 529 cited in Beaulac, Stephan (2006), "Customary International Law in Stare Decisis", in Chistopher P.M. (eds.) *British and Canadian Perspectives on International Law*, Leiden: Martinus Nijhoff p. 389.

[10] *Ibid.*, p. 389

[11] AIR 1984 SC 667

The appellant sought the intervention of the Registrar to make an enquiry and seize the pirated goods. The Supreme Court was in a fix if the Copyright Convention or the bilateral Transit Treaty between India and Nepal is to be given priority. However, the Court considered that "so great is the concern of the international community for industrial, literary or artistic property that the Convention on Transit Trade of Land Locked States 1965. It views traffic in this kind of property with the same gravity as it views traffic in narcotics, dangerous drugs and arms." The divisional bench of the High Court and the Supreme Court gave a broader interpretation to the term "import" in the Copyright Act in the light of Copyright Conventions, Transit Convention and Bilateral treaties. The important questions before the Supreme Court were (i) whether international law is, of its own force, drawn into the law of the land without the aid of a municipal statute; and (ii) whether so drawn it overrides municipal law in case of conflict.[12] The Court held that there can be no question that nations must march with the international community and the municipal law must respect rules of international law even as nations respect international opinion. Chinnappa Reddy J. held that,

> The comity of nations requires that the rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with the Acts of Parliament. The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be a part of the national law, unless they are in conflict with the an Act of Parliament. Comity of nations or no, municipal law must prevail in the case of conflict. National courts cannot say 'yes' if Parliament has said no to a principle of international law. National courts will endorse international law but not if it conflicts with national laws. National courts being organs of the national state and not organs of international law must perforce apply national law if international law conflicts with it. But the courts are under an obligation within legitimate limits, to so interpret the municipal statute as to avoid confrontation with the comity of nations or the well-established principles of international law. But if conflict is inevitable, the latter must yield.[13]

This was the first instance where the Supreme Court had dealt with the relationship between international customary law and the municipal law. The Supreme Court relied on the doctrine of incorporation basing it on Lord Dennings decision in *Trendex* case. The ratio of this case served as the principle in other cases.

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[12] Hegde, V.G. (2013), "International Law in the Courts of India", *Asian Yearbook of International Law*, 19: 65- 89, p. 74

[13] *Ibid.*,p.671 para 5; The court arrived at this interpretation after referring to *Trendex Trading Corporation vs. Central Bank*, (1977) I All E.R. 881; *West Rand Central Gold Mining Co. vs. The King*, (1905) 2KB 391; Lauterpacht in International Law (General Works)

In another case, *M.V. Elisabeth and others vs. Harwan Investment And Trading Pvt. Ltd.,*[14] The appellant's vessel carried the goods out of the port without bills of lading or other documents. They also delivered the goods to the buyer despite of several communications made by the respondents that buyer had not made the payment. Since the appellants acted in breach of duty, the respondent instituted a suit against the appellants invoking the admiralty jurisdiction of the Andhra Pradesh High Court. The question before the Supreme Court was whether any courts in Andhra Pradesh or in any other state in India had the admiralty jurisdiction to proceed against the arrested ship on a cause of action concerning carriage of goods from an Indian port to a foreign port. Until then the admiralty jurisdiction was determined by the British Admiralty Act 1861, which did grant the jurisdiction to provide the remedy. Thommen J. considering that international maritime laws to be a part of general legal system held that,

> It is true that the Colonial statutes continue to remain in force by reason of Article 372 of the Constitution of India, but that does not stultify the growth of law or blinker its vision or fetter its arms. Legislation has always marched behind time, but it is the duty of the Court to expound and fashion the law for the present and the future to meet the ends of justice.[15]

The Supreme Court describing the inadequacy of the Indian legislation on maritime laws, held that "it is true that Indian statutes lag behind development of international law in comparison to contemporaneous statutes in England and other maritime countries."[16] The Supreme Court further noting that India not a party to Brussels Conventions[17] held that,

> Although India has not adopted the various Brussels Conventions, the provisions of these Conventions are the result of international unification and development of the maritime laws of the world, and can, therefore, be regarded as the international common law or transnational law rooted in and evolved out of the general principles of national laws, which, in the absence of specific statutory provisions, can be adopted and adapted by courts to supplement and complement national statutes on the subject. In the absence of a general maritime code, these principles aid the courts in filling up the lacunae in the Merchant Shipping Act and other enactments concerning

[14] AIR 1993 SC 1014
[15] *Ibid.,* p.1021, para 17
[16] *Ibid.,* p. 1036, para 77
[17] International Convention for the Unification of Certain rules relating to the Arrest of Seagoing Ships, Brussels, 1952.

> shipping. Procedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities.[18]

The Supreme Court held that the principles of Brussels Convention is a result of state practice, hence they also form customary international law. Since India lacked the maritime laws and is not a party to the Brussels Convention, she does not have laws to deal with the cases that arise with this regard. The Court referred to the international maritime law to fill this lacuna. The ratio of this case is that the courts must consider international law as the source complimentary to municipal law and must apply international law to fill the gaps in domestic law.

In cases pertaining to environment where, municipal law was not adequate the Supreme Court incorporated international customary law to fill the gaps. In *Vellore Citizens Welfare Forum vs. Union of India and others*,[19] the tanneries situated in Arcot district of Tamil Nadu released harmful effluents in to the river thereby changing the chemical composition of the water. The water was neither fit for consumption nor for agriculture. Kuldeep Sigh J. referring to precautionary principle, polluter pay principle and onus of proof in environmental matters and held that,

> we have no hesitation in holding that the precautionary principle and the polluter pays principle are part of the environmental law of the country. Even otherwise once these principles are accepted as part of the Customary International Law there would be no difficultly in accepting them as part of the domestic law. It is almost accepted proposition of law that the rules of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law.[20]

The Supreme Court in People's Union for Civil liberties (PUCL) vs. The Union of India and Another[21] and *A.P. Pollution Control Board vs. Prof. M.V. Nayudu (Retd.) and others*[22] reiterated the same principle that it is almost accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law. India has neither signed nor ratified Vienna Convention on Law of Treaties 1969 till date.

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[18] AIR 1993 SC 1014 p. 1040, para 85
[19] AIR 1996 SC 2715
[20] *Ibid.*, p. 2721, para 13
[21] AIR 1997 SC 569
[22] AIR 1999 SC 813

However, the India judiciary has adopted many principles in VLCT 1969 by stating that they form customary international law. And the status of customary international law in India is that of law of the land. For instance, Supreme Court in *Ram Jethmalani vs. Union of India*[23] held that

> while India is not a party to the Vienna Convention, it contains principles of customary international law, and the principle of interpretation, of Article 31 of the Vienna Convention, provides a broad guidelines as to what could be appropriate manner of interpreting a treaty in the Indian context also.[24]

Recently, the Delhi High Court in *AWAS Ireland v Directorate General of Civil Aviation*[25] drew reference to Article 26, 27 and 31 of the VLCT holding them applicable in the Indian legal system. Likewise, in *Jeeja Ghosh and others vs. Union of India*[26], the Supreme Court reiterated Article 27 of VLCT that state party cannot invoke the provisions of its internal law as justification for its failure to perform a treaty."[27]

The analysis of the above cases shows that Supreme Court took recourse to the British and American decisions making international customary law a part of Indian domestic law. The Supreme Court did not examine in any case if the same will hold good in Indian legal system. It holds that as long as international customary law does not come in conflict with Indian municipal law it can be considered as law of the land but has not elaborated as to why it should give effect to automatic incorporation.

The post-Gramophone decisions merely adopted the obiter without making any further investigation into it. In *Gramophone* case the Supreme Court failed to make distinction between the 'comity of nations' and 'international customary law.' The International Court of Justice in *North Sea Continental Shelf* Case[28] has held that a norm to become customary international law has to satisfy two requirements: state practice and *opinio juris*. Without testing these elements, the Supreme Court gave automatic incorporation to international customary law. It further held customary international law on par with comity of nations. The customary international law as

[23] MANU/SC/0711/2011
[24] *Ibid*., para 60
[25] MANU/DE/0832/2015
[26] MANU/SC/0574/2016
[27] *Ibid*., para 13
[28] 1969 ICJ Reports, Accessed on 15January 2017, URL: www.icj-cij.org/docket/files/52/5561.pdf

viewed by Soviet scholars like Tunkin and Koretsky is bound by tradition and is lagging behind the social development. The customary international law was heritage of colonial system and still continues to be a tool of domination in the hands of western block. If the precautionary principle and the polluter pay principle of Rio Declaration with the signature of 153 states acquired the status of customary international law then, it may be questioned as why the principles of NIEO failed to achieve such status.

In *Elisabeth* case, the Supreme Court has automatically incorporated the un-ratified Brussels treaty on the grounds that the norms in the Brussels treaty form the customary norms. Similar approach is adopted with regard to the VCLT 1969 and Rio Principles. This appears to be a channel for the operation of the un-ratified international treaty instruments. The Supreme Court perhaps must reconsider the status accorded to customary international law as a part of the law of the land. The Indian Constitution and the subsequent laws in India do not stipulate that international customary law is to be part of municipal law. Hence, in the absence of a constitution or statutory mechanism there is no reason why the Courts to adopted this approach.

3. INDIAN COURTS AND INTERNATIONAL TREATY OBLIGATIONS

The treaty making power of the Executive has been contested before Supreme Court in many cases. The Supreme Court has perhaps given formalist interpretation to the provisions of the Constitution holding that it is an exclusive function of the Union Executive to make treaties. There has been no attempt to democratize the treaty making process. The Indian Court must in their wisdom consider a possible interpretation to the provisions of Constitution in favour of Parliamentary participation. The Courts have also moderated the Constitutional mechanism of transformation by holding that the Parliamentary transformation of an international treaty is not mandatory for its operation. The first case that questioned the validity of the treaties which are not backed by the domestic legislation arose in *Union of India vs. Manmull Jain.*[29] This case involved the cession of the Chandernagore to India as per the Indo-French Treaty of 1951. The contention was that the Parliament had not legislated to give effect to the treaty, hence the cession was invalid. The Calcutta High Court held that,

[29] AIR 1954 Cal. 615; MANU/WB/0207/1954

> Making a treaty is an executive act and not a legislative act…the treaty is complete without legislation. The power of legislation on the matter of entering into treaties leaves untouched the executive power of entering into treaties. The President makes treaty in exercise of his executive power and no court of law in India can question its validity.[30]

The judiciary in all the case held that legislative backing is not precondition for any treaty entered by the Executive. The supremacy of the Executive to conclude the treaties and to give effect to them without the Parliament consenting to it has been considered as legitimate by the judiciary. In *Maganbhai Ishwar Bhai Patel vs. Union of India*[31], Court stated that "if there is any deficiency in the Constitutional system it has to be removed and the state must equip itself with the necessary power." [32] Shah J. in his concurrent opinion held that,

> The Constitution of India makes no provision making legislation a condition of the entry into an international treaty in times of war or peace. The Executive is qua the State competent to represent the State in all matters international and may incur obligations which in International Law are binding upon the State. The power to legislate in respect of treaties lies with the Parliament and making of law is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the laws of the State. If the rights of the citizens and others which are justiciable are not affected, no legislative measure is needed to, give effect to the agreement or treaty.[33]

The case in which Indian judiciary directly dealt with the treaty making power of the Executive is *P. B. Samant vs. Union of India*[34]. A writ petition of mandamus was filed before High Court of Bombay restraining the Union Executive from entering into final treaty of Dunkel proposal that eventually led to the creation of WTO. Dunkel proposal included subjects like agriculture, irrigation and other which are in the state list. It was contended that the Union Executive should take the consent of the states before entering into such treaties. Pendse J. after relying on *Maganbhai* case held that,

> The observations made by the learned Judge establish that the Executive power conferred under Article 73 is to be read along with the power conferred under Article 253 of the Constitution of India. In case the Government enters into treaty or agreement, then in respect of implementation thereof, it is open

[30] *Ibid*., para 9.
[31] *Ibid*., p. 783
[32] *Ibid*., p. 792 at para 25
[33] *Ibid*., p. 807, para 81
[34] AIR 1994 Bom 323

> for the Parliament to pass a law which deals with the matters which are in the State list. In case the Parliament is entitled to pass laws in respect of matter the State list in pursuance of the treaty or the agreement, then it is difficult to appreciate how it can be held that the Central Government is not entitled to enter into treaty or agreement which affects the matters included in the State list.[35]

There were many Public Interest Litigations before the Supreme Court restraining and questioning the treaty making power of the Executive. Shiva Kant Jha filed a Writ Petition restraining the Executive from entering into multilateral treaties like WTO and nuclear deals without the Parliamentary approval. The Supreme Court however, held that the power of the Executive to conclude treaties is constitutionally valid and the courts are precluded from examining the same. The trends of Supreme Court decision show that it is reluctant to agree that the Executive power to conclude treaty has to be regulated. The Court has been upholding its precedent that all the treaties do not need legislative sanction. In *S.R. Bommai vs. Union of India*,[36] the Supreme Court held that the executive power towards foreign relations is not covered under the judicial review.

The rules of construction and interpretation of municipal law and international law was laid down by Bhagwati J. in *Additional District Magistrate, Jabalpur vs. S. Shivakant Shukla.*[37] The question that arose before the Supreme Court in this case was whether civil rights and liberties during the pendency of national emergency could be suspended. The Court answered in the affirmative. This decision was considered as a black mark in the Court's jurisprudence. The Court in this case though upheld the suspension of human rights, laid down the rules of construction in case of conflict between international law and municipal law. The conflict was between the presidential order to suspending human rights during emergency and the Articles on non-derogable rights in ICCPR. The Court laid down the rules of construction as follows:

> Equally well established is the rule of construction that if there be a conflict between the municipal law on one side and the international law or the provisions of any treaty obligations on the other, the courts would give effect to municipal law. If however, two constructions of the municipal law are

[35] *Ibid.*, p. 326, para 4
[36] MANU/SC/0444/1994
[37] AIR 1976 SC 1207

> possible. The court should lean in favour of adopting such construction as would make the provisions of the municipal law to be in harmony with the international law or treaty obligations.[38]

Until this case the principle of harmonious construction was an interpretative rule between the two provisions of the same statute or the two different statutes in the domestic legal order. The Supreme Court in this case applied harmonious construction as a principle of interpretation between the two legal systems. If two interpretations are available to the municipal law, the court must adopt the one which is in harmony with international treaty obligation. In this case, the Supreme Court referred to ICCPR and the question arose whether the court should interpret municipal law in accordance with those treaties which have not gained the parliamentary enforcement. In *State of West Bengal vs. Kesoram Industries Ltd*.,[39] the Court held that, "it is true that the doctrine of "monism" as prevailing in the European countries does not prevail in India. The doctrine of 'dualism' is applicable. But, where the municipal law does not limit the extent of the statute even if India is not a signatory to the relevant international treaty or covenant, the Supreme Court in a large number of cases interpreted the statutes keeping in view the same."[40]

It may be argued that ensuring the Parliamentary approval or strengthening the requirement of transformation for the international instruments will instil the principles of democratic participation. When treaty process is outcome of the joint effort of Parliament and Executive, the Courts may apply un-ratified international treaties (without domestic transformation) as such instruments will have obtained the approval from the Parliament during negotiations.

4. SECTORIAL REGIMES INVOLVING INTERNATIONAL LAW IN INDIAN JUDICIARY

4.1 Territorial Dispute

Territorial disputes arose before the courts in India within two decades of India gaining independence. During partition of British-India, negotiations were undertaken concerning the apportionment of the international instruments. Some of the

[38] *Ibid.*, p. 1259, para 169
[39] MANU/SC/0038/2004
[40] *Ibid*., para 494

instruments also concerned the demarcation of the territory between the two Dominions. Eventually disputes arose concerning the divided territories. These issues sprung immediately after independence, the preservation of sovereign identity and relations with its neighbours became important.[41] The implementation of the treaties or the agreements requires enabling legislation, the division of territories were questioned before the Indian judiciary many number of times. The first case was *Midnapore Zamindary Co. Ltd vs. Province of Bengal and others*, the court held that disputes as to boundaries between two independent states cannot be subject of inquiry of municipal courts exercising jurisdiction in either state[42]

In *Re The Berubari Union and Exchange of Enclaves*[43]which is also called as Berubari I, an agreement was concluded between India and Pakistan in 1958 involving the division of Berubari 12 and exchange of old Cooch Bihar enclaves. The problem arouse for the implementation of the agreement. President of India requested the advisory opinion of the Supreme Court under Article 143(1) as to whether the implementation of the agreement involving the transfer of territories requires a legislative approval. On behalf of Union of India, the Attorney General contended that the agreement was merely the ascertainment of the boundaries; hence it does not require any action under Article 368[44]. A law passed by the Parliament under Article 3[45] of the Indian Constitution would be sufficient with this regard.

The Supreme Court noted that the agreement involved the cession of territory and not merely the determination of a boundary. The Supreme Court made a detail enquiry into the Article 3 of the Indian Constitution and observed that "the power to acquire a new territory or to cede the existing territory is outside the scope of Article 3

[41] Hegde V.G (2010), "Indian courts and International Law", *Leiden Journal of International Law*, 23(1): 53-77, p. 62

[42] 1949 Federal Court Reports (FCR) 309 cited in *Ibid*., p. 63

[43] AIR 1960 SC 845

[44] Article 368 of Indian constitution states that "Power of Parliament to amend the Constitution and procedure therefor (1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article".

[45] Article 3 of the Indian Constitution sates that "Formation of new States and alteration of areas, boundaries or names of existing States: Parliament may by law (a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State; (b) increase the area of any State; (c) diminish the area of any State; (d) alter the boundaries of any State; (e) alter the name of any State…"

of the Indian Constitution."[46] The Supreme Court further explained that "ceding an existing territory and acquisition of new territory is the essential attribute of sovereignty vested to India."[47] The Supreme Court held that "an agreement which involves the cession of a part of the territory on India in favour of a foreign state cannot be implemented by a Parliament by passing by passing a law under Article 3 of the Constitution"[48] Holding an action under Article 368 as a requirement to give effect to the agreement involving cession, the Supreme Court observed that:

> implementation of agreement involve the alterations of the content of and the consequent amendment of Article 1 and of the relevant part of the First Schedule to the Constitution, because such implementation would necessarily lead to the diminution of the territory of the Union of India. Such an amendment can be made under Article 368. Parliament may make a law to give effect to, and implement, the agreement in question covering the cession of a part of Berubari 12 and Cooch Bihar enclaves. Parliament may, however, if it so chooses, can pass a law amending Article 3 of the Constitution so as to cover cases of cession of the territory of India in favour of a foreign State. If such a law is passed then Parliament may be competent to make a law under the amended Article 3 to implement the Agreement in question. On the other hand, if the necessary law is passed under Article 368 itself that alone would be sufficient to implement the Agreement.[49]

This case led to the inclusion of 9th Schedule to the Indian Constitution. The Supreme Court viewed the cession of territory as an attribute of sovereignty of a state. To part with a territory or to acquire a new one, there has to be an amendment to the Constitution. In other words, a parliamentary approval through an amendment was required, not a mere executive order to give effect to the Agreement.

In *Ram Kishore Sen and others vs. Union of India and others*,[50] also called Berubari II, the 'Indo-Pakistan Agreements' were entered into in 1956 between the Prime Ministers of India and Pakistan. Half of the area known as Berubari Union No. 12, and a portion of Chilahati village admeasuring 512 acres were agreed to be transferred by India to Pakistan. In this case the appellants belonging to the villages meant to be partitioned filed a writ petition restraining the partition of the village Chilahati. They contended that the area in question, Chilahati village was neither

[46] AIR 1960 SC 845, p.860, para 41
[47] *Ibid.*, p.856, para 31
[48] *Ibid.*, p.860, para 42
[49] *Ibid.*, p.861, para 46
[50] AIR 1966 SC 645

covered under Indo-Pak Agreement nor under 9th Schedule. The appellant further argued that though Chilahati belonged to Pakistan according to Radcliffe Award, it had become a part of West Bengal and cession of such territory required a proper procedure. The Supreme Court observed that Chilahati had been in possession of West Bengal even after the Radcliffe Award was given and was not exchanged with Pakistan for many years. Hence it shall continue in its possession and this did not require any constitutional amendment.

> It would indeed be surprising that even though the Union of India and the State of West Bengal expressly say that this area belongs to Pakistan under the Radcliffe Award and has to be delivered over to Pakistan, the petitioners should intervene and contend that Pakistan's title to this property has been lost because West Bengal had been adversely in possession of it.[51]

In *Maganbhai IshwarBhai Patel vs. Union of India*[52], India and Pakistan concluded an agreement setting up a tribunal for determination and demarcation of the border between Gujarat and West Pakistan. A clause in the agreement stated that the tribunal was to operate as a self-executing arrangement, which would not only declare the boundary but also provide for fixing its location on site. About five writ petitions of mandamus were filed before the Supreme Court under Article 32 of the Indian Constitution restraining the Government of India from ceding the territory (areas in the Rann of Kutch) without the approval of the Parliament. This was the award of the Indo-Pakistan Western Boundary Case 1968. The tribunal's award entailed ceding to Pakistan parts of what was considered as Indian Territory. The petitioners contended that the territory in dispute belonged to India and giving it up to Pakistan would amount to cession. According to Berubari I case, the cession to be effective requires amendment of the first schedule. The Court observed that the tribunal was established to delimit and demarcate the boundary and there was no cession of territory. It thereby held that constitutional amendment was not a pre-condition to give effect to the award. The Court observed that,

> A settlement of a boundary dispute cannot, therefore, be held to be a cession of territory. It contemplates a line of demarcation on the surface of the earth. The argument that if power to settle boundaries be conceded to the Executive, it might cede some vital part of India is to take an extreme view of things. The same may even be said of Parliament itself but it is hardly to be imagined that

[51] *Ibid.*, p. 653, para 25
[52] AIR 1969 SC 783

> such gross abuse of power is ever likely. Ordinarily an adjustment of a boundary which international law regards as valid between two nations, should be recognised by the Courts and the implementation thereof can always be with the Executive unless a clear case of cession is involved when Parliamentary intercession can be expected and should be had.[53]

The Court further considering that the implementation of an award is the function of the Executive held that "The decision to implement the Award by exchange of letters, treating the Award as an operative treaty after the boundary has been marked in this area, is within the competence of the Executive wing of Government and no constitutional amendment is necessary"[54]

The decision in *Maganbhai* case overruled the *BerubariI* holding that executive order is sufficient to give effect to treaties relating to boundary issues. The Parliamentary approval is not a condition precedent in such disputes.

4.2 Human Rights

Human Rights is an area where the Indian judiciary has actively taken recourse to the international human rights instruments in the absence of domestic legislation. The human rights instruments are often argued not just as commitments but as the legal and moral standards that the states are expected follow.[55] There are many human right instruments which are not supported by the legislative enactments. The international treaties and conventions unless transformed into domestic law are not recognised under a dualist model. But the Supreme Court has in many instances concerning human rights has expanded the ambit of Article 21 of the Indian Constitution by invoking provisions of international instruments. The Supreme Court with the intention of protecting the rights of the individuals has overlooked the status and nature of such international instruments whether they are un-ratified or soft norms.

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[53] *Ibid.*, p. 798, para 44
[54] *Ibid.*, p. 803, para 59
[55] Subramanya T R. (2008), "Application of International Law in Municipal System: As Assessment of the Impact of UDHR on National and International Courts", *Indian Journal of International Law*, 48(3): 385-406, p. 391

Kuldip Singh J. explaining the reach of international law in People's *Union for Liberties vs. Union of India*,[56] held that,

> International law today is not confined to regulating the relations between the states. Its scope continues to extend. Today matter of social concern, such as health, education, and economics apart from human rights fall within the ambit of international regulations. International law is more than ever aimed at individuals.

D. K. Basu vs. State of West Bengal,[57] is one of those unique cases where a letter was considered as writ petition by the Supreme Court. The Executive Chairman of the Legal Aid Services of West Bengal submitted a letter that requested the examination of the issue of compensation in cases of atrocities and death in police custody. The Supreme Court referred to Article 9(5)[58] of the International Covenant on Civil and Political Rights (ICCPR) 1966 that provides for compensation in case of unlawful arrest or detention. The contention was raised that Government of India when ratifying the Covenant had made reservation to the right of compensation. The Court held that the reservation had lost its relevance over the period of time and in many cases compensation was awarded when there were instances of police atrocities.[59]

In *Additional District Magistrate, Jabalpore vs. Shivakanth Shukla and others*,[60] the contention was whether the suspension of the civil and political rights was valid during the national emergency. Since India is a signatory to the ICCPR 1966 and few of the rights are non-derogable, the Supreme Court answered in affirmation that the fundamental rights will continue to be suspended till the pendency of the national emergency. The conflict was between the Presidential Order suspending the right under Article 359[61] and Articles 8 and 9 of UDHR[62]. However

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[56] (1999) 2 LRC, 12

[57] MANU/SC/0157/1997

[58] Article 9(5) of ICCPR states that "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

[59] MANU/SC/0157/1997, para 42

[60] 1976 SCR 172

[61] Article 359 deals with Suspension of the enforcement of the rights conferred by Part III during emergencies. It states "(1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III (except Article 20 and 21) as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order."

Khanna J. dissented from the majority opinion and laid down the rule of construction and interpretation when the case involves both the municipal law and international law. He held that,

> Equally well established is the rule of construction that if there be a conflict between the municipal law on one side and the international law or the provisions of any treaty obligations on the other, the courts would give effect to municipal law. If however, two constructions of the municipal law are possible the court should lean in favour of adopting such construction as would make the provisions of the municipal law to the in harmony with the international law or treaty obligations.[63]

Though this case did not uphold the protection of human rights, the dissenting opinion served as a source to other decisions. This decision does not restrict the application of this rule of construction to human rights cases. Hence, the chances of this rule acting as a precedent for harmonious construction cannot be ignored.

In *Jolly George Verghese and Another vs. The Bank of Cochin*,[64] the issue before the court was whether a judgement debtor could be imprisoned for not having paid the debts. Section 51 of Civil Procedure Code provides for the imprisonment of the judgement debtor if he has acted in bad faith in not paying the debts incurred by him whereas Article 11 of ICCPR prohibits the same. The validity of the section 51 of the Civil Procedure Code was questioned as it ordered the imprisonment of the judgement debtor if he has failed to pay the amount of the decree. It was considered inconsistent with Article 11 of the ICCPR which provided that "no one shall be imprisoned merely on the ground of inability to fulfil contractual obligation." Krishna Iyer J. observed that it is inhuman as per Article 21 of the Indian Constitution and article 11 of the Covenant that a judgement-debtor is imprisoned for the failure to pay decreed amount when he found penniless. The Court held that,

> India is now a signatory to this Covenant and Art. 51 (c) of the Constitution obligates the State to foster respect for international law and treaty obligations. Until the municipal law is changed to accommodate the Covenant what binds the court is the former not the latter. A. H. Robertson rightly points out that international conventional law must go through the process of transformation into the municipal law before the international treaty can become an internal law. From the national point of view the national rules alone count. With

[62] Article 8 provides that everyone has the right to an effective remedy for the acts of violation of human rights and Article 9 provides that no one shall be subjected to arbitrary arrest or detention.
[63] 1976 SCR 172, 53, p.207
[64] AIR 1980 SC 471

> regard to interpretation it is a principle generally recognised in national legal system that, in the event of doubt the national rule is to be interpreted in accordance with the State's international obligations.[65]

For the question if a person can approach the courts for the violation of the rights that were vested upon him by the international instrument, the Kerala High Court (with assent of the Supreme Court) held that,

> The remedy for breaches for international law in general is not to be found in the law courts of the state because international law *per se* or *proprio vigour* has not the force or authority of civil law, till under its inspirational impact actual legislation is undertaken. I agree that the Declaration of Human Rights merely sets out a common standard of achievement for all peoples and all nations but cannot create a binding set of rules. Member states may seek, through appropriate agencies, to initiate action when these basic rights are violated; but individual citizens cannot complain about their breach in the municipal courts even if the country concerned had adopted the Covenant and ratified the Optional Protocol. The individual cannot come to court but may complain to the Human Rights Committee which, in turn, will set in motion other procedures. In short, the basic human rights enshrined in the international Covenants referred to may at best inform judicial institutions and inspire legislative action within member states; but apart from such deep reverence, remedies action at the instance of an aggrieved individual is beyond the area of judicial authority.

This case exhibits an initial conservative stance of India Judiciary towards the international human rights instruments. But over the years, this position of the Indian Courts has been replaced with a greater receptivity of international human rights law. Some of the cases discussed below show the shifting stance of the Indian Courts.

In *People's Union for Civil Liberties (PUCL) vs. Union of India*,[66] the constitutional validity of section 5(2)(b) of the Indian Telegraph Act 1885 was challenged before the Supreme Court contending that it violated right to privacy. The CBI had published a report on "tapping of politician's phones" in exercise of power conferred by sec. 5(2)(b). The question before the Supreme Court was whether the Section 5 (2)(b) of the Indian Telegraph Act which provided for telephone tapping legally valid as it is inconsistent with right to privacy under Article 21[67] of the Indian

[65] *Ibid.*, p.473, para 6
[66] (1997) 1 SCC 301
[67] Article 21 states that "no person shall be deprived of his life or personal liberty except according to procedure established by law"

Constitution.[68] The court interpreted the provisions of the Act in the light of Article 12[69] of UDHR and Article 17(1)[70] of ICCPR.[71] The court stipulated some guidelines according to which the provisions of the Act are to be construed.

In *Nilabati Behra vs. State of Orissa*,[72] compensation was claimed for the custodial death under Article 32 of Constitution. There is no specific provision in the Indian Constitution that provides compensation for the custodial death. The Supreme Court relied upon the Article 9(5)[73] of ICCPR and provided compensation. Though there is not express provision in the Constitution or any other law to provide compensation for custodial death, Supreme Court referred to the international covenant to fill the gap.

In *People's Union for Civil Liberties vs. Union of India*,[74]the Supreme Court had to deliberate on the issue if the Retired Director of CBI could be appointed as a member to the National Human Rights Commission. The Article 3(2) (d) of the Human Rights Protection Act 1993 requires two members to be appointed from amongst persons having knowledge of, or practical experience in matters relating to human rights." The Court highlighted that NHRC was to investigate and prosecute offences that have caused human rights violation, of which many are related to the atrocities by the police personnel. The court arrived at the decision that retired Director of CBI is not eligible for the post. To arrive at this judgement the court refereed to the Paris Principles relating to the Status of the National Institutions 1993 especially the part which specifies the composition of a Human Right Commission[75] and read Article 3(2) (d) in the light of these principles.

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[68] Ganguli A.K., (2008), "Interface between International law and Municipal Law: Role of Indian Courts" in Bimal .N. Patel (ed.) *India and International Law*, Boston: Martinus Nijhoff Publishers, p.30.

[69] Article 12 of UDHR states that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

[70] Article 17 protects the right of the individual against any arbitrary or unlawful interference with his privacy family, home or correspondence, or unlawful attacks on his honor or reputation.

[71] Both the provisions contain a right against arbitrary or unlawful interference with one's privacy.

[72] AIR 1993 SC 1967

[73] Article 9(5) states that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation

[74] MANU/SC/0039/2005

[75] Composition and guarantees of independence and pluralism: the representation of the social forces (of civilian society) to ensure the pluralist representation. Representatives of (a) non-governmental organisation responsible for human rights and efforts to combat racial discrimination, trade unions,

> Assuming two constructions of section 3(2)(d) are reasonably possible, the construction which promotes public confidence, advances the cause of human rights, and seeks to fulfil the purpose of international instrument has to be preferred than the one which nullifies it.[76]

The Court has relied upon the international instruments for the statutory interpretations where the terms of any legislation are not clear or are reasonably capable of more than one meaning. It is also well accepted that in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of more than one meaning, the meaning which confirms most closely to the provisions of any international instrument is to be preferred, in the absence of any domestic law to the contrary.

In *Salil Bali vs. Union of India,*[77]*a* writ petition was filed before the Supreme Court to declare Juvenile Justice Act 2000 as *ultra vires* to provisions of the Constitution and to take steps to bring change in the Act in accordance with the United National Standard Minimum Rules for administration of juvenile justice due to rising graphs of criminal activity below age of 18. The Court held that,

> The Juvenile Justice (Care and Protection of Children) Act, 2000, is in tune with the provisions of the Constitution and the various Declarations and Conventions adopted by the world community represented by the United Nations. The basis of fixing of the age till when a person could be treated as a child at eighteen years in the Juvenile Justice (Care and Protection of Children) Act 2000 was Article 1 of the Convention of the Rights of the Child.[78]

The case *Selvi vs. State of Karnataka,*[79] questioned the validity of the use of narco-analysis, brain mapping, poly-graphic test and FMRI (Functional Magnetic Resonance Imaging) on the accused, suspects and witness against their consent. The Court held them to be unconstitutional and void, as they are in violation of right to privacy in Article 21 and right against self-incrimination under Article 20(3). With regard to the Convention against Torture and Other Cruel, Inhumane or Degrading

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concerned social and professional organizations for example, association of Lawyers, doctors, journalists and eminent scientists;(b) trends in philosophical or religious thought; (c) Universities and qualified experts; (d) Parliament; (e) government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).

[76]MANU/SC/0039/2005, para 24

[77] 2013 (3) ACR 3110 (SC)

[78] *Ibid*., para 44

[79] AIR 2010 SC 1974

Treatment or Punishment 1984, the Court held that it is not bound by the contents of the Convention as India is yet to ratify this Convention. In its words,

> It is necessary to clarify that we are not absolutely bound by the contents of the Convention against Torture and Other cruel, Inhuman or Degrading Treatment or Punishment 1984. This is so because even though India is a signatory to this Convention, it has not been ratified by Parliament in the manner provided under Article 253 of the Constitution and neither do we have a national legislation which has provisions analogous to those of Torture Convention. However, these materials do hold significant persuasive value since they represent an evolving international consensus on the nature and specific contents of human rights norms.[80]

The landmark case of *Shatrughan Chauhan vs. Union of India,*[81]is about 15 convicts sentenced to death penalty challenged their sentences on grounds of undue delay in disposal of their mercy petitions by the President. The Supreme Court commuted the death sentence into imprisonment for life. The question arose if entertaining this petition by the Supreme Court amounts to the interference in the prerogative of the Executive, the Supreme Court observed that when judiciary interferes in such matters, it does not really to interfere with the power exercised under Article 72/161 but only to uphold the *de facto* protection provided by the Constitution to every convicts including death convicts."[82]

The Supreme Court further observed that the undue delay (for about a decade) in the processing the mercy petitions had cause adverse physical conditions and psychological stress to the convicts. This is in grave violation of Article 21 of the Indian Constitution. The Court referred to the international instruments like Resolution 2000/65 of the UN Commission on Human Rights, the Question of Death Penalty urging all states that still maintain death penalty not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person[83] The Court also considered the Report of the Special Rapporteur on Extra-Judicial Summary or Arbitrary Execution by UN Commission on Human Rights on 'Restrictions on the Use of Death Penalty' which states that,

> the imposition of capital punishment on mentally retarded or insane persons, pregnant women and recent mothers is prohibited." The Clause 116 in the

[80] *Ibid*, para 199
[81] MANU/SC/0043/2014; AIR, 2014 SC (Supp.) 1376
[82]*Ibid*., para 263
[83]*Ibid*., para 73

> Capital punishment urges that "Government that enforce such legislation with respect to minors and the mentally ill are particularly called upon to bring their domestic criminal laws into conformity laws into conformity with international legal standards.[84]

The UNGA Resolution of 62nd session on moratorium on the use of death penalty,[85] was also referred by the Court. Though these international instruments are soft law with no binding nature, they certainly possess a persuasive ability. They operated as guiding principles at the backdrop for this decision.

In *Samatha vs. State of Andhra Pradesh*,[86]the Court in this case held that Right to development as a fundamental right. It included right to life in the ambit of Right to life under Article 21. The Court held that,

> Declaration of "Right to Development Convention" adopted by the UN and ratified by India, by Article 1 'right to development' became a part of an unalienable human right by virtue thereof, every human person and all people are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms would be fully realised.[87]

The Court further held that "India being an active participant in the successful declaration of the Convention on Right to Development and a party signatory thereto, it is its duty to formulate its policies, legislative or executive, accord equal attention to the promotion of and to protect the right to social, economic, civil and cultural rights of the people, in particular, the poor, the Dalits and Tribes as enjoined in Article 46 read with Article 38, 39 and all other related articles read with the right to life guaranteed by Article 21 of the Constitution."[88]

The Article 21 of the Indian Constitution protects right to life and liberty of a person. This right is inclusive of most of the human rights. The Supreme Court has widened the scope of this Article to include many rights. The Supreme Court interpreted Article 21 along with the provisions of ICCPR and UDHR to decide cases

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[84] *Ibid*., para 74

[85] *Ibid*., para 75. The Resolution reads that "(1) expresses it deep concern about the continued application of the death penalty; (2) calls upon all states that still maintain the death penalty:(a) to respect international standards that provide safeguards guaranteeing protection of the rights of those facing the death penalty, in particular the minimum standards, as set out in the annex to Economic and Social Council Resolution 1984/50 of 25 May 1984.

[86] MANU/SC/1325/1997

[87] *Ibid*., para 74

[88] *Ibid*., para 76

involving human rights. The international human rights instruments play a very important role in India. Few argue that the Supreme Court in an attempt to fill the gap has usurped the Parliamentary prerogative of providing an enabling legislation. But it is true that prioritization of human rights and activism of the Supreme Court is highly valued. The problem arises when this practice of direct application of un-ratified international human rights instruments is extended and considered as a source in itself. It can be argued that such approach paves the way for the direct implementation of international law in general and is not restricted to international human rights alone. There is a possibility of other branches of international law also being given this effect.

4.3 Gender Issues

The Indian Courts over the years came across a series of cases relating to gender discrimination and violence on which there were no adequate laws. Similar to the previous section on human rights, the Court heavily relied on the international instruments when there is lacuna in the domestic legal system. Below mentioned are some case that where international law was incorporated to fill in the gap in the domestic legal system.

In *C. Masilamani Mudaliar & Others vs. The Idol of Sri Swaminathaswami Thirukoil & Others.*[89] The question arose before the Supreme Court whether a widow has the limited or absolute right to the deceased husbands estate. The court in this case relied on the international instruments holding that,

> Law is an instrument of social change as well as the defender for social change. Article 2(e) of Convention on Eradication of all forms of Discrimination Against Women 1979 (CEDAW) enjoins that this Court to breathe life into the dry bones of the Constitution, international convictions and the Protection of Human Rights Act and the Act to prevent gender based discrimination and to effectuate right to life including empowerment of economic, social and cultural rights to women.[90]

The celebrated case of *Vishaka and Others vs. State of Rajasthan and others*,[91] is a case of sexual harassment at work place. There were then no laws in India to address the cases concerning sexual harassment. In the absence of the legislative

[89] AIR 1996 SC 1697
[90] *Ibid.*, 1702, para 22
[91] AIR 1997 SC 3011

measure, the court felt the need for an effective alternative mechanism to address this issue. The Supreme Court referred to Articles 11 and 24 of the CEDAW 1979 which India had ratified and the general recommendations of the UN Committee on the Elimination of Discrimination against Women concerning Article 11. The Court further referred to the official commitment made by the Government of India at the 4th World Conference on Women in Beijing that,

> to formulate and operationalize a national policy on women which will continuously guide and inform action at every level and in every sector, to set up a commission for women's rights to act as a public defender of women's human rights; and to institutionalise a national level mechanism to monitor the implementation of the Platform for Action.[92]

The Supreme Court further referred to Beijing Statement of Principle which envisages the role of judiciary in the LAWASIA region. "These principles were accepted by the Chief Justices of the Asia and the Pacific at Beijing in 1995 as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary."[93] The Supreme Court considering the objectives of the Beijing principles which emphasized on the observance of the human rights, viewed that even in the absence of law enforcing the human rights, it has to give effect to Article 32[94]. Hence, the Supreme Court interpreting Article 21 with various provisions of CEDAW held that,

> International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the Constitutional guarantee….The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the fields when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms from construing domestic law when there is no inconsistency between them and there is a void in the domestic law.[95]

Verma CJ considered it to be "implicit from Article 51(c)" that any international convention not inconsistent with the fundamental rights provisions in the constitution and in harmony with its spirit must be read into those provisions to enlarge the

[92] *Ibid*., p. 3015, para 13
[93] *Ibid.,* p. 3014, para 11
[94] Article 32 provides " the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed"
[95] AIR 1997 SC 3011, p. 3014, para 8

meaning and content thereof. Indeed Article 51 has not been considered to be relevant, but also highly influential, in determining the impact of treaties on the domestic legal system.[96]

The *Apparel Export Promotion Council vs. A.K. Chopra*[97] is similar to *Vishaka* case, was also the case of sexual harassment at work place. The court referring to ILO Seminar held at Manila, CEDAW, Beijing Declaration and International Covenant on Economic, Social and Cultural Rights viewed that "these international instruments casts an obligation upon the Indian State to gender sensitize its laws and the Courts are under an obligation to see that the message of these instruments are not drowned."[98] The Supreme Court while describing the obligation of the court held that:

> the Courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law In cases involving violation of human rights, the Courts must for ever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field.[99]

Anand C.J. further held that,

> message of international instruments such as the Convention on the Elimination of All Forms of Discrimination against Women 1979 and the Beijing Declaration which directs all state parties to take appropriate measures to prevent discrimination of all forms against women, beside taking steps to protect the honour and dignity of women, is loud and clear….The Courts are under an obligation to see that the message of the international instruments is not allowed to be drowned out. This court has in numerous cases emphasized that while discussing constitution requirement, court and counsel must never forget the core principle embodied in the international conventions and instruments and as far as possible give effect to the principles contained in those international instrument.[100]

The Court in *Vishaka* case held that India is a signatory to the CEDAW and accepted obligations in the international platform. But there has been no domestic

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[96] Jayawickrama Nihal, (2009), "India: The Role of Domestic Courts in Treaty Enforcement" in David Sloss (ed.) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, New York :Cambridge University Press, p. 247

[97] AIR 1999 SC 625

[98] *Ibid.*, p.634, para 27

[99] *Ibid.*, p.634, para 28

[100] *Ibid*., p. 634, para 27

enforcement by the Parliament. When the Parliament has failed in its duty, the Court has self-proclaimed itself to act as a monitor and supervisor to ensure the implementation of its directive.[101]

In *I. P. Geetha vs. Kerala Livestock Development Board Ltd.,*[102]the Kerala High Court faced with the issue whether a mother having had a child through surrogacy was entitled to maternity leave. The petitioner claimed that she has to be considered to be equivalent to the mother who has been given birth and is to be eligible for the maternity leave. The Court made distinction between pre-natal and post-natal benefits as per Maternity Benefit Act 1961. The Court held that the pre-natal benefits are not available to the petitioner as she is not directly involved in the process of in vitro pregnancy. The Court further deliberated if she is eligible for post-natal benefit. The court highlighted the application of international instruments like UDHR 1948, the Maternity Protection Convention 1952, the General Conference of the ILO issued in its 88th Session. The court discussed in depth the monism and dualism and held that,

> Jurisprudentially India is Dualistic, but Article 51 (c) exhorts the nation to respect the international covenants. On the hand, Article 253 speaks of Parliament's power to give effect to international conventions. When we consider the value of the international covenants in municipal courts it is observed that it has no binding effect. The international law convention and treaty obligations cannot be enforced though municipal courts though they have considerable persuasive value in interpreting the municipal law.[103]

The Court held that post-natal benefit will also not be available, but any other benefits relating to the rearing of the child would be available irrespective of the fact that the child is born out of surrogacy.

The Supreme Court while deciding these cases has considered the international treaties and conventions as the source of law as long as they are not inconsistent with the laws of the country. In *Vishaka* case, the Supreme Court has held that the international instruments are directly operative as long as they are not inconsistent with the municipal law. The Supreme Court should have interpreted Article 21 of the India Constitution in the light of CEDAW than considering CEDAW

[101] Jain, Neha 'The Democratizing Force of International Law: Human Rights Adjudication by the Indian Supreme Court" (forth coming publication), p 19
[102] 2015 (1) KHC 165
[103] *Ibid*., para 51

as a source in itself allowing a direct application. This approach is welcomed as long as it is restricted to the human right issues and other social issues. There is always a threat that the *ratio* of this case can be used in the cases of other disciplines of international law.

In the case of *NAZ Foundation vs. Government of NCT of Delhi and others*,[104]the NAZ Foundation, an NGO filed a writ petition in the Delhi High Court challenging section 377 of the Indian Penal Code as it is in contravention of Article 14, 15, 19 and 21 of the Indian Constitution. The Delhi High Court decided in favour of the Foundation that section 377 disregards the said constitutional provisions. The appeal was moved to the Supreme Court challenging the decision rendered by the Delhi High Court. The Supreme Court struck down the decision of Delhi High court holding that section 377 does not suffer from any form of constitutional infirmity. This decision of Supreme Court is marked as a black day for human rights in India. This decision reflects the bondages of conservatism that grapples the judiciary. However, the decision rendered by the Delhi High is of greater relevance since it acknowledges the rights of LGBT under the Yogyakarta principles on Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity. The court referred the Yogyakarta Principle for the definition to the expressions 'sexual orientation' and 'gender identity.'[105] This decision of Delhi High Court is much celebrated for its attempt to change the discourse of LGBT rights in India.

The *National Legal service Authority vs. Union of India*,[106] is the case concerning the rights of the 'third gender'. The Supreme Court in this case declared that transgender people are to be considered as 'third gender' for the purpose of safeguarding and enforcing and appropriating their rights guaranteed under the Constitution and other statutes. The Supreme Court for their welfare gave the following directions (1) Hijras, Eunuchs, apart from binary gender, b treated as 'third gender' for the purpose of Part III of the constitution and other statutes; (2) Transgender person's right to decide their self-identified gender is also to be upheld and the Centre and State Governments are to grant legal recognition of their gender identity like male, female or as third gender; (3) they are to be considered as

[104] MANU/DE/0869/2009
[105] *Ibid*, para 44
[106] MANU/SC/0309/2014

economically-social backward class and the reservation shall be applicable to them accordingly; (4) separate HIV Sero- surveillance centres are to be adopted by Centre and State governments; (5) the problems faced by them like fear, shame, gender, dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for S.R.S. for declaring one's gender is immoral and illegal; (6) proper measures for medical care in hospitals including public toilets; (7) social welfare schemes are to be provided for their betterment; (8) creation of public awareness that they are part of social life and are not untouchables; (9) measures to regain their respect and place in society to enjoy social and cultural.

The Supreme Court while adjudicating on the rights of the Transgender referred to various international human rights conventions like Article 6 of the Universal Declaration of Human Rights 1948, Article 16 and 17 of International Covenant Civil and Political Rights 1966, and a detailed enquiry was made to several principles of Yogyakarta Principles on the Application of International Human Rights Law in relation to sexual Orientation and Gender Identity. The foreign judgements on Sex Reassignment surgery (SRS) from Courts of Australia, Canada, New Zealand, UK, and others were discussed.[107] The legislations of other states were looked into to recognise the human rights accorded to the Transgender.[108]

The highlight of this judgement is the special section dedicated to 'India to Follow International Conventions'.[109] The Supreme Court listed international human rights instruments which are instrumental in protecting the rights of the transgender. Among UDHR, ICCPR and Yogyakarta Principles, the Court referred to United Nations Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment 2008. It is important to note that the instruments like Torture Convention 1984 , Yogyakarta Principles are not ratified by India. However the Supreme Court held that "if they are found inconsistent with the fundamental rights guaranteed under Indian Constitution, they must be recognised and followed."[110]

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[107] *Ibid*., the decision in Corbett (1970), *A.G vs. Otahahu Family Court* (1995), *R vs. Kevin* (regarding validity of marriage of Transsexual)(2001), *Christine Goodwin vs. U.K* (2002) were discussed for the merits

[108] *Ibid*., para 25-35.

[109] *Ibid*., para 47-53

[110] *Ibid*, para 53.

This case though was first of its kind to recognise the third gender, it was narrowly constructed to include only Hijras, Enunchs, and the ones who do not fall under binary gender. The Court did not provide an umbrella construction to include lesbians, gay men, bisexuals and cross dressers in its scope. The Court's order of considering the transgender as OBC raises concerns among some of them who were born SC/ST. The Court further maintained its position on section 377 of IPC. With presence of section 377 any measure taken in the interest of transgender community will not be fruitful.[111]

This section similar to the human rights advances the argument that the Indian Courts have effectively protected the gender rights by directly incorporating the international instruments. This section also reflects the position of the Indian Courts on the informal international instruments. The Courts have incorporated the soft international instruments on par with the treaties in their decision while protecting the rights of individuals.

4.4 Refugee Rights

There are many instances when India faced the refugee crisis. India is not a party to the Convention on the Status of the Refugee 1951. However, it showed a greater receptivity than any other state party. The Indian Courts have also reflected reciprocity by expanding the ambit of Article 21 to include the principle of *non-refoulement*. In *Louis De Raedt vs. Union of India*,[112] the petitioner Mr. Louis De Raedt had been staying in India since 1937 except for short period when he visited Belgium. He was not granted citizenship. The Supreme Court held that "pursuant to Article 5(c) the petitioner became a citizen of India. He cannot be expelled out of India as if he is a foreigner."[113] Though the petitioner was not expelled from India, this case is of relevance as if reflects the position accorded to foreigners. The court held that,

> The fundamental right of the foreigner is confined to Article 21 for life and liberty and does not include the right to reside and settle in this country as

[111] Only transgender as third sex, Accessed 3 March 2017, URL: www.livemint.com/Politics/4B70jOcBbvVLMX3poAkG4L/Only-transgenereds-are-third-gender-Supreme-Court.html.
[112] (1991) 3 SCR 554
[113] *Ibid.*, para 2

mentioned in Article 19(1)(e), which is applicable only to the citizen of this country.[114]

Another case of refugee claims is *State of Arunachal Pradesh vs. Khudiram Chakma.*[115]The respondent and other thousands of families known as Chakmas migrated from erstwhile East Pakistan to Assam where they were given shelter as refugees in 1964. Later they were relocated with lands in the State of Arunachal Pradesh. The respondent and other 56 families migrated from the settlement area and negotiated settlement with the local Raja. He donated some lands to them through unregistered deeds. Later the local people complained against Chakmas that they have illegally encroached upon the lands of the local people and are engaged in the extremists activities collecting arms and ammunitions. The Government ordered the relocation of these families to their original settlement areas. The Chakmas brought a suit against this. The Supreme Court highlighted the principle upheld *Louis De Raedt vs. Union of India* case and quoted the texts from the international scholars. The Court quoted from the Blackburn and Taylor that "the most urgent need of a fugitive is a place of refuge. His or her most fundamental right is to be granted asylum under Article 14(1) of UDHR.[116] Although an asylum seeker has no right to be granted admission to a foreign state equally a state which has granted him asylum must not later return him to the country whence he came."[117] While dealing with the rights of the aliens, the Court quoted Warwick McKean that "General international law provides that aliens should be entitled to certain minimum rights necessary to the enjoyment of ordinary private life."[118] It further referred to the writings of Fitzmaurice that the non-discrimination towards the aliens is general rule of international law and the breach of it gives rise to claim from the alien's state.

The Court rejected the claim of respondents for citizenship under Sec 6-A[119] of Citizenship Act and they didn't fall into the said category. It stated that the

[114] *Ibid.*, para 13
[115] (1994 Supp.) 1 SCC 615
[116] Article 14 of UDHR states that everyone has the right to seek and enjoy in other countries asylum from persecution.
[117](1994 Supp.) 1 SCC 615, p. 121, para 79
[118] *Ibid*, para 80
[119] It provides that all persons of Indian origin who came before January 1, 1966 to Assam from territories included in Bangladesh immediately before the commencement of the Citizenship Act 1985 and who had been ordinarily resident in Assam since their entry into Assam shall be deemed to be citizens of India as from January 1 1996. Others who came to Assam after that date and before march 25, 1971 and had been detected to be foreigners, could register themselves.

respondents could not avail the benefits of citizenship that were conferred to persons covered by Assam Accord. It however directed the state government to abide by the principles of natural justice before any relocation order is being made.

The Chakma refugee situation arose again in the *National Human Rights Commission vs. State of Arunachal Pradesh & Others*[120]This is a public interest litigation being a writ petition is filed under Article 32 by NHRC. It seeks to enforce the rights of about 65,000 Chakma/Hojong tribal's under Article 21 of the Constitution alleging that they are being persecuted by sections of citizens of Arunachal Pradesh. The court ordered for the physical protection of the Chakma refugees under Article 21. The Court directed through the writ of mandamus to the State of Arunachal Pradesh to ensure the life and liberty of every Chakma residing within the State and protect them from the attack from organised groups. This protection was made against the non-state actors and not against the state. The Court further directed the state not to physically remove any individual considering that they were in the process of applying for Indian citizenship.[121]

In *Hans Muller of Nuremburg vs. Superintendent, Presidency Jail Calcutta and Others,*[122] the petitioner who was detained by the State of West Bengal was accused of committing certain offences in West Germany for which the Government of West Germany requested extradition. The Court was not convinced of handing him over to the German Authorities except under the Extradition Act. The petitioner claimed to be innocent and stated that the reason West Germany was asking for his extradition was because of him being a communist and he would be subject to political persecution. The Court with due consideration denied the extradition holding that even when there is a request and a good cause for extradition, the government is not bound to consent to the request as the government enjoys a unfettered discretionary power under the Extradition Act. The Court chose to expel him than to extradite him. The Court held that,

> the Foreigners Act confers the power on Executive to expel foreigners from India. It vests the Central Government with absolute and unfettered discretion

[120] (1996) 1 SCC 742
[121] *Ibid*., para 21
[122] (1995) 1 SCR, 1298.

> and as there is no provision fettered this discretion in the Constitution, an unrestricted right to expel remains.[123]

In *Ktaer Abbas Habib Al Qutaifi vs. Union of India*,[124] the petitioners challenged the deportation by the Government and sought the direction from the Court for their release and to be handed over to United Nations High Commissioner for Refugees on the basis of *non-refoulement*. The Court decided in favour of the petitioners. On domestic implementation of international law the Court observed that "there is no law in India which contain any specific provision obliging the State to enforce or implement the international treaties and conventions including the implementation of International Humanitarian Law."[125]It further explained the Principle of *non-refoulement*, as

> the principle of '*Non Refoulement'* is the principle which prevents all such expulsion or forcible return of refugees and should be followed by the Central Government in accordance with Article 51 of the Constitution.[126]..Principle of *Non Refoulement* and its application protects life and liberty of a human being irrespective of his nationality. It is encompassed in Article 21 of the Indian Constitution as long as the presence of the refugee is not prejudicial to the law and order and security of India.[127]

The Court further held that the principle of *non-refoulement* was considered to be customary international law stating that there is substantial if not conclusive authority that the principle is binding on all states independently of specific assent.[128]

In a recent case, *Dongh Lian Kham & Others vs. Union of India and Others*,[129]the petitioners belonging to the minority Ethnic Chin Community in Myanmar faced persecution by the Military Junta in Myanmar. They claimed to have been issued certificates by the UNHCR recognizing them to be refugees and to be protected. They claimed that their visas are to be extended. The Indian Government had rejected visa accusing them of possessing pseudoephedrine tablet a narcotic drug

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[123] *Ibid.*, para 39
[124] MANU/GJ/0433/1998
[125] *Ibid*., para 9. The Court refers to Geneva Conventions 1949 and their enabling the Geneva Convention Act 1960. There is no reason for the Court to mention the Act and the decision of Supreme Court in *Rev. Mons. Sebastian Francisco Zavier Dos Remedious Monterio vs. State of Goa* (1970). Perhaps the Court wanted to remind Government its duty towards the protection of the civilian population.
[126] *Ibid*., para 3
[127] *Ibid*., para 18
[128] *Ibid*.
[129] MANU/DE/4215/2015

under Narcotics Drugs & Psychotropic Substances Act 1985. The petitioners referred to Article 14[130] of UDHR , ICCPR and Convention Relating to the Status of Refugees 1951. They claimed that though India is not a signatory to the 1951 Convention, it is bound by the principle of *non-refoulement* as it has become a part of the customary international law. The Court instead considered principle of *non-refoulement* as an attribute of right to life under Article 21. The Court held that,

> the principle of *'non-refoulment*', which prohibits expulsion of a refugee, who apprehends threat in his native country on account of his race, religion and political opinion, is required to be taken as part of the guarantee under article 21 of the Constitution of India, as '*non-refoulement'* affects/protects the life and liberty of a human being, irrespective of his nationality. This protection is to be available to a refugee but it must not be at the expense of national security. [131]

The Court further held that the petitioners have stayed in India for a long period and have not proved as a threat to the national security. It directed the Government to reconsider their application or deport them to a third country with consultation with UNHRC.

India is not a party to either the Convention on the Status of Refugees 1951 or the Optional Protocol of 1967, but India has a great deal of receptivity towards refugees since independence than many other state parties of the Convention. Along with customary international law, the principle of *non-refoulement* has found its place in the expansive ambit of Article 21 of the Indian Constitution.[132] The Supreme Court has defined *non-refoulement* as duty to protect the life and liberty of individual which includes foreigners.

4.5 Environment Concerns

The laws relating to environmental protection emerged in India only a few decades ago. The Supreme Court took recourse to the international environmental laws to decide cases dealing with environment. The cases relating to the environment is a

[130] Article 14 of the UDHR declares that everyone has a right to seek and enjoy in other countries, asylum from the persecution and that such right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of United Nations.
[131] MANU/DE/4215/2015, para 30
[132] *Bogyi vs. UOI* (1989); *Mohamadi vs. UOI* (1994); *Siddique vs. Government of India*,(1998)

unique realm of law where the laws protecting the environment were developed primarily due to the judicial precedent.[133]

In *Vellore Citizens Welfare Forum vs. Union of India & Others*,[134] the effluents from the tanneries were released to a fresh water source making it unfit for either consumption or for agriculture. During this phase there were no adequate doctrines that had evolved to make the polluters liable. The Supreme Court held that,

> We have no hesitation in holding that 'sustainable development' as a balancing concept between ecology and development which has been accepted as a part of the customary international law. Some of the salient principles of sustainable development, as culled-out from Brundtland Report and other international documents are Inter-Generational Equity, Use and Conservation of Nature Resources, Environmental Protection, the Precautionary Principle, Polluter Pays principle, Obligation to assist and cooperate, Eradication of Poverty and Financial Assistance to the developing countries. Even otherwise once these principles are accepted as part of the customary international law there would be no difficultly in accepting them as part of the domestic law. It is almost accepted proposition of law that the rule of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law.[135]

In *A.P. Pollution Control Board vs. Prof. M. V. Nayudu and others*,[136] a company manufacturing vegetable oil and other which was listed under the red considering its harmful processes did not obtain a NOC before starting the manufacture. The effluents were released to Himayat Sagar and Osman Sagar which supplied water to Hyderabad and Secundrabad. The court in its decision upholding the principle of inter-generational equity said that,

> We shall next elaborate the new concept of burden of proof referred to in the Vellore case The natural resources of the earth, including the air, water, lands, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate. Several international conventions and treaties have recognised the above principles and in fact several imaginative proposals have been submitted including the locus standi of individuals or groups to take out actions as representatives of future

[133] Sinha S.B., (2004), "A Contextualized Look at the Application of International Law :The Indian Approach", *A.I.R. Journal*, 3, p. 33
[134] AIR 1996 SC 2715
[135] *Ibid.*, p.2720, para 10 & 11
[136] AIR 1999 SC 813

> generations, or appointing Ombudsman to take care of the rights of the future against the present[137]

In such cases pertaining to protection of environment, the Supreme Court has referred to various doctrines in the international instrument. These doctrines of environmental law today enjoy the position of municipal law. The environmental laws in India are the result of these judicial precedents. The Supreme Court even in these cases reiterated that customary international law is a part of municipal law instead of limiting its scope to international environmental law.

In *T. N. Godavarman Thirumulpad vs. Union of India and Others,*[138] the Court declared that the national legislations like Bio-Diversity Act 2002, Environment Protection Act 1986 were to be interpreted in the light of international environmental instruments. The Court held that,

> When we examine all those legislations in the lights of the constitutional provisions and various international conventions like Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES), the Convention of Biological Diversity 1992 (CBD) evidently there is a shift from environmental rights to ecological rights, though gradual but substantial.[139]

In *K.M. Chinnappa and T.N. Godavarman Thirumalpad vs. Union of India,*[140]the Karnataka Government had passed certain orders under the Mineral Concession Rules authorizing a mining company to carry out mining activity in the Kudremukha National Park in the Western Ghats. In 1987, Kudremukha was considered as the national park as per 35 (1) of the Wildlife Protection Act of 1972. This area was declared to be the internationally recognized hotspot for bio-diversity conservation in the world. This area was not to be used for non-forest purposes. A petition was filed to restrict the mining activities in the said region. Arijit Pasayat J. referred to many international instruments like Convention on Biological Diversity 1992[141], Stockholm Declaration 1972 and World Charter for Nature adopted by UNGA 1982. It is important to highlight that India had not ratified but acceded to

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[137] *Ibid.,* p. 824, para 51

[138]*T. N. Godavarman Thirumulpad vs.Union of India and Others,* Accessed on 1November 2016, URL: http://judis.nic.in/supremecourt/imgs1.aspx?filename=39078

[139] *Ibid*., para 18

[140] MANU/SC/0960/2002

[141] It is to note that the learned judge read the Provisions of the CBD 1992 though India had not enacted enabling legislation. It was in 2002 that Biological Diversity Act came into operation.

Convention on Biological Diversity, the Court held provisions of the Convention as binding. Arijit Pasayat J. held that,

> in the absence of any inconsistency between the domestic law and the international conventions, the rule of judicial construction is that regard must be had to international conventions and norms even in construing the domestic law. It is therefore, necessary for the Government to keep in view the international obligations while exercising discretionary powers under the Conservation Act unless there are compelling reasons to depart from them.[142]

The Supreme Court in *Research Foundation for Science, Technology and Natural Research Policy vs. Union of India*[143] observed law to be a dynamic aspect and held that the judiciary must equip itself with the new jurisprudence to tackle the new problem. In the words of Sabharwal J.,

> Law has to grow in order to satisfy the needs of the fast-changing society and keep abreast with the economic developments taking place in the country. Law cannot afford to remain static. The Court cannot allow judicial thinking to be constricted by reference to the law as it prevails in England or in any other foreign country. Though the Court should be prepared to receive from whatever source it comes but build up its own jurisprudence. It has to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialized economy.[144]

This decision departs from the traditional common law and tort law. It is based on Article 7 of the draft approved by the working group of the ILC in 1996 on Prevention of Trans-boundary Damages from Hazardous Activities. The Court concluded that these conventions elucidate and go to effectuate the fundamental rights guaranteed by our Constitution and therefore can be relied upon by courts as facets of those fundamental rights and hence enforceable as such.[145]

G. Sundararjan vs. Union of India and Another, [146]

The setting up of a nuclear power plant in Kudankulam triggered large scale agitation and emotional reaction among the people. The Supreme Court was to decide if this project is against the public policy as it has given rise to agitation. The Court held that the nuclear power project was not against the public policy but in the welfare

[142]MANU/SC/0960/2002, para 44
[143] MANU/SC/0013/2005
[144]*Ibid*., para 30
[145] Ibid., para 33
[146] MANU/SC/0466/2013

of people and country's economic growth. However, the Court while directing that safety measures to be taken as per national and international standards held that,

> I may refer with profit to another Convention, namely, the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management dated 5th September 1997, I may hasten to add that India is not a Signatory to the same but the said Convention is worth referring to in order to understand and appreciate the world-wide concern for public policy safety.[147]

The Supreme Court in *Vellore* case has adopted many principles from the Brutland Report considering them as the principles of customary international law. The Supreme Court from 1980's has assumed the role of guardian of India's environment. The Supreme Court is found to locate these principles in the international instrument even in the post-Vellore cases, despite of the fact that such principle could be located in the Part III and Part IV of the Constitution and the umbrella environment legislation i.e. the Environment Protection Act 1986. The Court is criticized for creating legal vacuum and citing the consubstantial norms. Bandopadhyay observes that the Supreme Court desires and struggles to construct a body of laws through their creativity by expanding their scope while constantly projecting that they are working within the limits of the Constitution.[148]

4.6 Extradition

The decision of Supreme Court on cases pertaining to extradition shows that the Supreme Court initially exhibited a rigid behaviour by not taking recourse to international law and rejecting the extradition of the offenders in the absence of treaties. The general practice of extradition is that the extradition treaty is applicable only after Parliament provides it with an enabling legislation. The Supreme Court in *The State of Madras vs. G. G. Menon and another*,[149] refused the extradition on the grounds that laws on extradition made during British possession does not hold good in India after independence. The government of Singapore had requested the extradition of Mr and Mrs Menon on the basis Indian Extradition Act 1903 and the Fugitive Offenders Act 1881 especially Part 11, which applied for the extradition among the

[147] *Ibid*., para 204.
[148] Bandopadhyay, Saptarishi (2010), "Because the Cart Situates the Horse: Unrecognised Movements Underlying the Indian Supreme Court's Internalization of International Law", *Indian Journal of International Law*, 50: 204-251, p. 250.
[149] AIR 1954 SC 517.

group of British Possessions. The Court observed that the 1881 Act would be valid had the Indian Parliament passed a law to its effect. The Court rejecting the claim of extradition held that,

> notwithstanding Article 372 of our Constitution India was no longer a British Possession and therefore the Fugitive Offenders Act, 1881, did not apply to India and they were not bound in the absence of a new treaty to surrender their nationals who may have committed extraditable offences in the territories of India. It is not possible to apply the sections of Fugitive Offenders Act after the coming into force of the Constitution of India.[150]

The Supreme Court took a flexible approach after five decades from the above case, considering extradition laws as a part of both national and international law. The Supreme Court expressed that the offenders should not go unpunished in the absence of treaties between the countries. Hence, to avoid the predicament arising from this lacuna, Supreme Court felt it was necessary to give validity to the past treaties from the colonial period. The following decisions exhibit the integration of the municipal and international law in solving the issues relating to the extradition.

In *Daya Singh Lahoria vs. Union of Indian*,[151] the Supreme Court dealing with the nature of the extradition laws held that,

> There is no rule of international law which imposes any duty on a State to surrender a fugitive in the absence of extradition treaty. The law of extradition, therefore, is a dual law. It is ostensibly a municipal law, yet it is a part of international law also, inasmuch as it governs the relations between two sovereign States over the question of whether or not a given person should be handed over by one sovereign State to another sovereign State. This question is decided by national courts but on the basis of international commitments as well as the rules of international law relating to the subject.[152]

The requirement of the domestic legislation to give effect to the extradition treaty was relaxed. The Court in *Rosiline George vs. Union of India*,[153]observed that India hounoured the past extradition arrangements and they continue to be operative even in the absence of the domestic legislation. In this case, United States requested India to extradite Mr George Kutty Kuncheria as he was charged for fraud and embezzlement of more than one million dollars. The question arose on the validity of the extradition treaty which was concluded between England and United States of

[150] *Ibid.*, p. 520, para 12
[151] AIR 2001 SC 1717
[152] *Ibid.*, p. 1719, para 3
[153] (1994) 2 SCC 80

America, His Majesty entering into the treaty on behalf of the Dominions. The Supreme Court relied on International Agreement Order and held that India was bound by the treaties which were made on behalf of her before independence. The court also held that,

> there is no rule of public international law under which the existing treaty obligations of a State automatically lapse on there being an external change of sovereignty over its territory. India after achieving independence specifically agreed to honour its obligations under the international agreements. At no point of time, India disowned the 1931 treaty, rather, by various overt acts indicated above India accepted the existence of the 1931 treaty between the two countries and repeatedly reiterated that it would honour its obligations under the said treaty.[154]

In *Suman Sood vs. State of Rajasthan*,[155] the Supreme Court upholding the validity of the Extradition Treaty of 1931 stated that,

> it is well-settled legal proposition in International Law that a change in the form of Government of a contracting State would not put an end to its treaties. India, even under British Rule, had retained its personality as a State under International Law. It was a member of the United Nations in its own right. Grant of Independence in 1947 and status of Sovereign Republic in 1950 did not put an end to the treaties entered into by the British Government prior to August 15, 1947 or January 26, 1950 on behalf of India.[156]

In *Abu Salem Abdul Qayoom Ansari vs. State of Maharashtra and another*[157], the Government of India requested Portugal Government for the extradition of Abu Salem who was facing the charges under TADA along with other provisions of Indian Penal Code. India and Portugal do not have extradition treaty between them. Pursuant to Section 4 of the Extradition Act, 1962,[158] the request was made. Appellant filed a writ petition claiming that he should be tried for the cases which were a part of extradited judgement. The court rejected the claim. However, the court discussing the nature of extradition law held that,

> In the context of extradition law, which is based on international treaty obligations, we must keep in mind the emerging Human Rights movements in the post-World War II scenario and at the same time the need to curb

[154] *Ibid.*, , p. 95, para 22
[155] (2007) 5 SCC 2775
[156] *Ibid.*, p.2779, para 22
[157] (2011) 11 SCC 214
[158] Section 4 states that "Where there is no extradition treaty made by India with any foreign State, the Central Government may, by notified order, treat any Convention to which India and a foreign State are parties, as an extradition treaty made by India with that foreign State providing for extradition in respect of the offences specified in that Convention".

> transnational and international crime. The conflict between these two divergent trends is sought to be resolved by expanding the network of bilateral and multilateral treaties to outlaw transnational crime on the basis of mutual treaty obligation. In such a situation there is obviously a demand for inclusion of Human Rights concerns in the extradition process and at the same time garnering more international support and awareness for suppression of crime. A fair balance has to be struck between Human Rights norms and the need to tackle transnational crime. The extradition law, therefore, has to be an amalgam of international and national law.[159]

A recent case of extradition, *Verhoeven, Marie-Emmanuelle vs. Union of India and Others*,[160] where the petitioner, a French national was incepted on the basis Red Corner Notice issued by the Interpol of the Republic of Chile for an offence committed in Chile. The examined the validity of the treaty of Extradition between the states and held that,

> there is no general rule that all treaty rights and obligations lapse upon external change of sovereignty over territory nor is there any generally accepted principle favouring the continuity of treaty relations. The emancipated territories on becoming independent states may prefer to give general notice that they were beginning with a 'clean slate' so far as their future treaty relations were concerned, or may give so-called 'pick and choose' notifications as to treaties as were formally applicable to it before achieving independence.[161]

The Court further clarified that,

> the Extradition treaty between the United Kingdom of Great Britain and Ireland and the Republic of Chile was concluded and signed at Santiago on January 26, 1897 and the ratification exchanged at Santiago on April 14, 1898 are considered to be in force between Republic of India and Republic of Chile.[162]

The Supreme Court opined that the law of extradition cannot be dealt in isolation, both national and international laws should be complimentary to each other. In *Rosiline George vs. Union of India* and *SumanSood vs. State of Rajasthan* the Supreme Court has given effect to the Extradition Treaty which were entered by the British Crown with United States. In the case of *Quattrochi*, an Italian national who was charged with bribery in Indian arms purchase (which is known as the Bofors scandal) fled to Argentina. Government of India claimed that it had no Extradition

[159] *Ibid* p. 250, para 80
[160] 2016(3) SCC 259
[161] *Ibid*, para 19
[162] *Ibid*, para 50

Treaty with Argentina. However, it is noteworthy that an extradition treaty of 1889 existed between the United Kingdom of Great Britain and Ireland and the Argentine Republic which was applicable to British India.[163]The question that arises if India can pick and choose among the applicable colonial treaties i.e. the colonial treaty like Treaty of 1931 is applicable between US and India pursuant to Article 372 but not Treaty of 1889. The application of extradition laws and treaties do not show a clear and regular pattern in India. The past treaties are made applicable to few cases only.

The law of extradition is a peculiar branch which cannot detach itself from the element of politics. Much of the extradition decisions are not strictly confined to the rule of law. However, for the purpose of this study, the section of extradition is of special importance as the decisions from *C.G.Menon* to *Rosiline* and *Verhoeven* exhibit the relaxation in the requirement of transformation. This trend is similar to the territorial cases where the mere executive act is sufficient to give effect to the international obligation. The decisions of extradition go a step ahead as they give effect to the colonial extradition instrument without the Parliament testing its compatibility and applicability.

4.7 International Commercial Arbitration

India enacted Foreign Awards (Recognition and Enforcement) Act of 1961 to give effect to New York Convention on the Recognition and Enforcement of Foreign Arbitral Award. India further went on to adopt United Nations Commission on International Trade Law (UNICITRAL) by repealing the provisions of the Arbitration Act of 1940 and enacting the Arbitration and Conciliation Act of 1996. Justice Keba Mbaye opined that the notion that there was a system of international justice was not shared by countries in Africa, Asia and Latin America, which saw arbitration as a foreign judicial institution imposed upon them. In his words, "As everybody knows, in fact arbitration is seldom freely agreed to by developing countries. It is often included in contracts of adhesion the signature of which is essential to the survival of these countries."[164]

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[163] No operative extradition treaty with Argentina, (2007), Accessed on 16 June 2015, URL: http://Articles.timesofindia.indiatimes.com/2007-02-26/india/27883511_1_extradition-treaty-argentine-republic-argentina.

[164] Mbaye, Keba (1984), "The Complementary Roles of Judges and Arbitrators in Ensuring that International Commercial Arbitration is Effective", *60 years of ICC Arbitration: A Look at the Future*,

The cases on international commercial arbitration can be bifurcated into two sections namely; the cases concerning the scope of public policy as a ground for the denial of arbitral award; and the determination of jurisdiction of the Courts when the seat of arbitration is located in a foreign country. The cases pertaining to the Supreme Court's construction of public policy are discussed as follows.

In *Renusagar Power Co. vs. General Electric Co*.,[165] the appellant Renusagar, a private company engaging in the production and sale of electricity was to set up a thermal power plant "Renusagar Power Station". General Electrical Company who was the responded engaged in the business of manufacturing, selling and servicing of electric products and various ancillary activities. The respondents were to supply the equipment to the appellants for setting up the thermal power station. They entered into a contract which was duly approved by the government. Due to some delay on the part of General Electric in supplying equipment Renusagar reschedules the payment. Renusagar approached the Government to approve the revised schedule of payment of instalments. The government instead directed Renusagar to pay the past instalments. An arbitration proceeding was initiated by General Electric and the award was in its favour ordering Renusagar to pay compensation. The award was challenged; public policy being one of many grounds. The Court held that,

> the public policy and law of India are independent of each other…Since the term public policy covers the field not covered by the words 'law of India', contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.[166]

The Court further held that "the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality."[167] The court ruled that the violations of FERA, default in payment of damages and interests, possibility of unjust enrichment of one of the parties does not amount to contravention of public policy. The ground of public policy was available only when there was contravention to fundamental policy of Indian law.

France: International Chamber of Commerce, 293-295, p. 293; Nariman, Fali S. (2009), "India and International Arbitration", *George Washington International Law Review*,41:367- 379.

[165] AIR 1994 SC 860

[166] *Ibid*, para 65

[167] *Ibid*, para 66

Another ground was added by the Supreme Court in the case *ONGC vs. SAW Pipes Ltd*.[168] to the existing list of acts amounting to contravention of public policy. The ONGC, appellants entered into an agreement with the respondents SAW pipes Ltd. for the supply of pipes. Due to strike of workers in Europe, the respondents delayed the supply of materials for which ONGC deducted a huge amount from the bill to be paid. When the matter was referred to arbitration, the award came out in favour of respondents. The ONGC challenged the award before the Division Bench of the Supreme Court. The Court here encountered with circumstance of defining the scope of public policy. However, added another ground along with the other three held in Renusagar. The Court viewed public policy in the light of Indian Constitution, Indian Contract Act and Arbitration Act and held that, "an award can be set aside if it is contrary to:

(a) fundamental policy of Indian law; or
(b) the interest of India; or
(c) justice or morality or
(d) in addition, if it is patently illegal."[169]

These principles on public policy were reiterated in cases in *ONGC vs. Western Geco International Ltd*.[170] The court in this case further elaborated on the meaning of public policy that it includes fundamental principles as providing a basic for administration of justice, in particular (i) not acted in arbitrary manner and has applied judicial approach; (ii) has acted in accordance with the principles of natural justice; (iii) avoiding unreasonable and irrational decisions. This principle was adopted in the case *Associate Builders vs. Delhi Development Authority*.[171]

In *Bunge London Ltd. vs. E. Piyarellal Import and Export Limited*,[172]an arbitral award was challenged as per section 48 of the Arbitration and Conciliation Act 1996. However, the section 48 of it held that ground for refusal of enforcement should be construed strictly and only patent or gross illegality would operate to prevent enforcement. The Calcutta High Court referred to cases like *ONGC vs. SAW*

[168] AIR 2003 SC 2629
[169] *Ibid*, para 13
[170] (2014) 9 SCC 263
[171] 2014 (4) ArbLR 307 (SC)
[172] MANU/WB/0017/2015

Pipes Ltd.(2003) to decide on the public policy in India. It further looked in to *Shri Lal Mahal Ltd. vs. Progetto Grano Spa* (2013)[173] and highlighted that the reason to attack the foreign award had become very restricted. The court held that it was available when gross illegality was writ large on the face of the award. And such illegality had to be patent. The Court confirmed that the test laid down in *Renusagar Power Co. Ltd. vs. General Electric Company* (1994) is valid to test whether an award is against the public policy. Finding that none of the grounds were met the Court felt that there was no reason to set aside the arbitral award.

Though the principle of *Renusagar* and *ONGC* cases still holds good regarding the grounds of public policy, it is noteworthy that these grounds are very strictly interpreted when the international arbitration is in question. For instance, interpretation of the ground where the award is patently illegal in construed in a very narrow manner.

The next set of decisions are based on the question if the courts have the jurisdiction on the arbitrations whose seat is located in a foreign country. The initial position (*Bhatia* case) was that the awards could be challenged before the Indian Courts though the arbitration was rule by a foreign law in a foreign country. In *Bhatia International vs. Bulk Trading S. A. and another,*[174]The appellant and respondent enter into a contract in which they agreed the place of arbitration to be in Paris. The issue that arose was whether the awards that would be classified as "foreign awards" be challenged under Part I of the Act. The court concluded that Part I would apply even in the conditions where the governing law and contract was governed by foreign law and the seat of proceeding was outside India.[175]

Venture Global Engineering vs. Satyam Computer Services Ltd.,[176]the appellants Venture Global Engineering and the respondents Satyam Computers constituted a company named Satyam Ventures Engineering Services Ltd. with equal equity shareholdings. With appellant becoming insolvent the respondent purchased the

[173] (2013) 3 Arb.L.R. 1 (SC) The Supreme Court further held that sec. 48 of Act does not give an opportunity to have a 'second look' at the foreign award in the enforcement stage. Procedural defects cannot necessarily be considered as a ground for opposing public policy and an excuse for enforcement.
[174] AIR 2002 SC 1432
[175] *Ibid*, para 32
[176] AIR 2008 SC 1061

shares of the appellant on its book value. The same was challenged and the Arbitrator directed the transfer of shares to the respondent. The appellant challenged this order for being in contravention of public policy before the Supreme Court. The question before the court was if it had the jurisdiction to try cases which had its seat of arbitration in a foreign country. The Court held that

> the provisions of Part I of the Arbitration Act would apply to all arbitrations including international commercial arbitrations and to all proceedings relating thereto. We further hold that where such arbitration is held in India, the provisions of Part I would compulsorily apply and parties are free to deviate to the extent that even in the case of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement express or implied, exclude all or any of its provisions.[177]

The *BALCO* case changed the position of Indian Courts on the cases of international arbitration where the arbitration agreement was ruled by a foreign law and seat located in foreign country. The Supreme Court restricted its jurisdiction to the arbitration held in India. In *Bharat Aluminium Co. (BALCO) vs. Kaiser Aluminium Technical Service Inc*.,[178]an agreement was entered into by appellant and respondent according to which the respondent was to supply and install a computer based system for Shelter Modernization at Balcos Korbas Shelter. The agreement specified that the governing law of the agreement will be prevailing law of India and in case of arbitration, the English law will be applicable. This decision overruled the Bhatia and Venture case by holding that that Part I applies only to those arbitrations that are held within India. The determining test is whether the seat of arbitration is in India. The Supreme Court justified that it was not the intention of the Parliament to give extra-territorial operation to Part I of the Act."[179] It is important to note that the Court limited the scope of this case to post BALCO arbitration. The court held that "the law now declared by this Court shall apply prospectively to all the arbitration agreements executed hereafter."[180] Hence for the arbitration agreements in force before BALCO judgement, the Bhatia and Venture precedent shall apply.

[177] *Ibid*, para 10
[178] (2012) 9, SCC 552
[179] *Ibid*,para 123
[180] *Ibid*, para 201

Harmony Innovation Shipping Ltd.vs. Gupta Coal India Ltd. and Others,[181]

This case is an appeal from the High Court. It is noteworthy that the Supreme Court gave effect to the principle of an overruled case. In *Bhatia* and *Venture*, the Supreme Court in made clear that for arbitrations with the foreign seat, the Part I of the Arbitration and Conciliation Act has limited applicability. Subsequently, the judgement in *Bhatia International* was overruled in *Bharath Aluminium Co.* However, the Court in *BALCO* clearly held that "in order to do complete justice, we hereby order that the law now cleared by this court shall apply prospectively to all the arbitration agreements which were executed before BALCO." Hence for Bhatia precedent holds good for all the pre-BALCO arbitration agreements.

Based on this principle the Supreme Court in the present cases concluded that the intention of the parties have to be considered. The agreement specifically provided the contract to be governed by the English law, arbitration seat to be in London, for the arbitrators to be the members of the London Arbitration Association and for the arbitration to be conducted as per the rules of London Maritime Arbitration. The Court held that

> the parties have by agreement provided that the juridical seat of arbitration will be in London…the arbitration agreement shall be governed by the laws of England. A combined effect of all these factors would clearly show that the parties have by express agreement excluded the applicability of Part I of the Arbitration Act 1996 (Indian) to the arbitration proceedings.[182]

The Court refused the compulsory jurisdiction as was held in Bhatia case and gave preference to the intention of parties to the arbitration. The alternate dispute settlement mechanisms are being developed to restrict the interference of the domestic courts in the cases involving the foreign investors (for instance ICSID). The journey from *Bhatia* to *BALCO* portrays that the Indian Courts subject to the pressures of globalization imposed a restriction on their own jurisdiction.

A new ordinance was promulgated to bring amendments to Arbitration and Conciliation Act 1996 called Arbitration and Conciliation (Amendment) Ordinance

[181] AIR 2015 SC 1504.
[182] *Ibid*, para 26.

2015.[183] Some of the key amendments of this ordinance are, firstly, it limited the jurisdiction on the arbitration to High Courts and Supreme Court; secondly, the application of Part I and jurisdiction of the Indian Courts is the choice of parties to arbitration; and finally, the additional ground in public policy i.e. 'patently illegal' to set aside an arbitral award is available only to the domestic arbitration and not international commercial arbitration. This ordinance codifies the essence of the judgements of the Indian Courts which aims to draw and protect the foreign investment.

4.8 Double Taxation Context

The cases pertaining to the double taxation is another area where the courts uphold the Executive's prerogative to enter into treaties without parliamentary approval. The court holds that the tax treaties preside over the legislations in case of conflict. There were cases before the Supreme Court which questioned the show cause by the revenue officer in default of payment of taxes. Section 90(2) of the Income Tax Act is a peculiar provision which makes clear that in case of Double Tax Avoidance Agreement signed by India with any other country, those provisions of income tax shall apply on the assesse which is more beneficial to him. However, if the provisions of DTAA are more favourable to the assesse then the Income Tax Act shall not be applicable. In *CIT vs. Vishakapatnam Port Trust*[184], the court considering that treaties shall operate as *lex specialis* held that the Income Tax Act should give way to the tax treaties whenever there is an interpretation given to it. If there is a conflict between the provisions of the tax treaties and the provisions of the Income Tax Act, the provisions of the treaties shall prevail over.

The *Union of India vs. Azadi Bachao Andolan*[185] which is also known as India- Mauritius Tax Treaty case. India and Mauritius entered into Double Taxation Avoidance Convention (DTAA) 1983 with the purpose of avoidance of double taxation and prevent fiscal evasion with respect to taxes on income and capital gains and for encouragement of mutual trade and investment. The Foreign Institutional

[183] Arbitration and Conciliation (Amendment) Ordinance 2015, Accessed 13 Jjanuary 2017, URL: www.prsindia.org/uploads/media/Arbitration/Arbitration20%and%20Conciliation%20bill.%202015.pdf.
[184] (1983) 144 ITR 146 (A.P)
[185] AIR 2004 SC 1107

Investors (FII) invested large amount of capital in shares of Indian company to derive benefits from the Double Tax Avoidance Convention (DTAC). The respondents alleged that the companies were controlled and managed from various countries other than India or Mauritius and they were not the residents of Mauritius to derive benefits from DTAC. They contended that such investment amounts to treaty shopping which was illegal. The court answering in negative that if the third country investor was to be precluded from getting benefits under DTAC, there would have been a specific provision prohibiting him from doing so. The court further held that:

> In developing countries, treaty shopping is often regarded as a tax incentive to attract scarce foreign capital or technology. Developing countries need foreign investments, and the treaty shopping opportunities can be an additional factor to attract them. The developing countries allow treaty shopping to encourage capital and technology inflows, which developed countries, are keen to provide to them. The loss of tax revenues could be insignificant compared to the other non-tax benefits to their economy. Whether treaty shopping should continue, and, if so, for how long, is a matter which is best left to the discretion of the Executive as it is dependent upon several economic and political considerations. This Court cannot judge the legality of treaty shopping merely because one section of thought considers it improper.[186]

The *Vodafone International Holdings B.V. vs. Union of India*,[187] mainly focused on the control of offshore transactions without involving the tax liabilities. The Supreme Court did not deliberate on the international legal issues though it involved foreign elements like investment issues, chain of commands, structures and offshore activities.[188]

In *Sanofi Pasteur Holding SA vs. Department of Revenue, Ministry of Finance, Government of India, New Delhi*,[189] the Court held that the retrospective clarificatory amendments of Finance Act 2002, do not seek to override the DTAA. In case of a conflict between the domestic law and the DTAA will prevail, in terms of Section 90[190] of the Income Tax Act."[191]

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[186] *Ibid.*, p.1140, para 133
[187] (2012) 6 SCC 613
[188] Hegde, *supra* note12 at p. 83
[189] MANU/AP/0013/2013
[190] Section 90of the Income Tax Act states that Agreement with foreign countries (1) the central Government may enter into an agreement with the Government of any country outside India, (a) for the granting of relief in respect of income on which have been paid both income tax under this Act and income tax in that country, or (b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country, or (c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding

In *Vodafone South Ltd. vs. Deputy Director of Income Tax (International Taxation),*[192] the Karnataka High Court upheld the sovereignty of the Parliament to over-rule the DTAA by enacting a new legislation. It held that

> thus it is clear that the terms of DTAA will prevail over the provisions of the Act if it is shown that the provisions of the amendment are not beneficial to the assesse. The sovereign power of the Parliament extends not only to the making but also breaking the treaty. Unilateral cancellation of tax treaty through an amendment to the internal law subsequent to conclusion of the treaty is a recognised sovereign power. It after the agreement has come into force, an Act of Parliament is passed which contains contrary provision the scope and effect of the legislation cannot be curtailed by the reference to the agreement. The agreement is entered into pursuant to the power conferred upon the Government by section 90. Subsequent legislation cannot be controlled by the agreement.[193]

The Supreme Court provides the over ruling effect to the treaties over the national legislations. This is perhaps the only instance where the treaties have prevalence over the provisions of the Income Tax Act. The liberal attitude of the Supreme Court has led to the precedence of the taxation treaties. The taxation treaties do not require legislative approval. Though the Karnataka High Court upheld the supremacy of the Parliament, the ruling precedent continues to be of *Azadi Bachao* case

4.9 Intellectual Property Rights

The process of globalization brought many changes to the IPR regime in India. India amendments its patent and copyright laws in compliance with the TRIPs. Among the changes brought to the Patent Act of 1970 at various stages, the Patent (Amendment) Act of 2005 is of special significance as it introduced the aspect of 'product patent'. The new product patent had an impact on the drugs of the pharmaceutical company as it provided them greater security while compromising the right to health of many lives in India. The pharmaceutical companies exploited the situation by claiming longer

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law in force in that country, or investigation of cases of such evasion or avoidance, or (d) for recovery of income-tax under this Act and under the corresponding law in force in that country, and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement. (2) where the Central Government has entered into an agreement with the Government of any country outside India under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assesse to whom such agreement applied, the provisions of this Act shall apply to the extent they are more beneficial to that assesse.

[191] MANU/AP/0013/2013, para 13

[192] MANU/IL/01160/2014

[193] *Ibid.*, para 45

patent with the minimal changes to the existing drugs. The decision of the IP Controller and the Courts is appreciable as they did not succumb to the pressures of globalization and cancelled the unfair claims for extended patents.

Norvatis Case

Norvatis, a pharmaceutical company claimed patent for an anti-cancer drug 'Glivec' and obtained EMR for the same in 2003. It further restrained the other pharmaceutical companies from producing the generic drugs same as Glivec. With this the price of the anti-cancer drug was priced at Rs. 1,20,000 against generic version which was Rs. 10,000. When the examination of Norvartis patent application initiated, pre-grant oppositions were filed by pharma companies like Natco Pharma, Cipla, Hetro Drugs, Ranbaxy Laboratories and Cancer Patients Aid Association. The Controller of patents and subsequently the Appellate body refuse Novartis patent application on the basis of sec. 3(d)[194] of the Patent Act 1970.

Novartis AG and its subsidiary in India file a writ petition *Novartis AG v. Union of India*[195] in the Madras High Court challenging the decision of the Appellate authority and alleging that sec. 3(d) of the Patent Act 1970 and the 2005 amendment Act is not in compliance with the TRIPS making it illegal, invalid, unconstitutional and violative of Article 14 of Indian Constitution. The Court encountered the question if the Indian Courts have jurisdiction to test the validity of the legislative Act in the backdrop of an international treaty. The Court had to determine its competence to test the validity of Amended Patent Act 2005 in the backdrop of TRIPS. The Court's attention was drawn to the cases in English Courts especially *Equal Opportunities Commission and Another vs. Secretary of State for employment*. Though the House of Lords opined that they have jurisdiction over the Acts of the Crown and viewed that the Legislation is inconsistent with the European Convention, the Madras High Court declared that this case was not applicable for the reason that it

[194] Sec 3 deals with question as to what are not inventions. Sec 3(d) specifies that "the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere use of a known process, machine or apparatus unless such process results in a new product or employs at least one new reactant. Explanation- For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure forms, particles size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substances shall be considered to be the same substance, unless they differ significantly in properties with regard to their efficacy.

[195] (2007) 4 MJL 1153

differed in facts. The Court held that Dispute Settlement Mechanism in WTO is the right forum for the petitioners to contest the validity of the Act. It held that,

> International Agreement possess the basic nature of an ordinary contract and when courts respect the choice of jurisdiction fixed such ordinary contract, we see no compelling reasons to deviate from such judicial approach when we consider the choice of forum arrived at in International Treaties. Since we have held that this court has no jurisdiction to decide the validity of the amended section, being in violation of Article 27 of TRIPS.[196]

The High Court further upheld the Patent Controller's decision of rejecting the patent as it felt the need to prevent the ever-greening of patent. Norvatis appealed to the Supreme Court on the decision of the Patent Appellate Body which rejected the patent to the Glivec. Though the Supreme Court was to decide on the substance of claim if drug was eligible for patent, it deliberated on the article 3(d) of the Patent Act and also India's obligations under the TRIPS.

In *Novartis AG vs. Union of India & Others*,[197] the Supreme Court at length discussed the evolution of patent regime in India and its compliance to various international patent agreements. It further elaborated the changes India has brought to the existing patent laws by various amendments at different stage to ensure the compliance to TRIPS. It explained that India being a developing economy has done its best to balance between the health of the masses and the IPRs. However the amendment of 2005 to the Patent Act of 1970 was enacted to fulfils India's obligations towards TRIPS. The Supreme Court on patentability of Glivec held that,

> the Norvatis holding the rights of EMR on the drug Gleevec charged Rs. 1,20,000/- per dose which in our view is too unaffordable to the poor cancer patients in India. Thus the grant of product patent on this application can create havoc to the lives of poor people and their families affected with the cancer for which this drug is effective. This will have disastrous effect on the society as well. We therefore uphold the decision on 3(d) of the Act to the extent that product patent cannot be made available to Norvatis.[198]

Bayer Corporation vs. Union of India[199]

Bayer a pharmaceutical company invented a cancer drug and marketed in the name of Nexavar. The cost of the drug for a month amounted to Rs. 2,80,428.

[196] *Ibid*, para 8
[197] (2013) 6 SCC 1
[198] *Ibid*, para 19
[199] AIR 2014 Bom 178

NATCO claimed for a compulsory license before the Controller of Patent under sec. 84 of the Patent Act 1970. NATCO proposed to manufacture the drug for Rs. 8,800 for monthly dose. The Controllers and the IP Appellate Body granted compulsory license to NATCO based on the grounds of reasonable requirement to the public, worked in the territory of India and reasonably affordable price. Bayer contested the IPAB' decision in the High Court of Bombay. The Court upheld the decision of Controller and IPAB in granting compulsory license to NATCO. The Court in this case relied on the TRIPS and Doha Declaration of 2001 and held that,

> Clause 4 of Doha Declaration provided that TRIPS does not and should not prevent members from taking measures to protect public health and promote access to medicines for all. Further clause 5 of Doha Declaration provided that flexibilities to member countries would include the right to grant compulsory license and the grounds upon which it is to granted. We have discussed the provisions of TRIPS and Doha Declaration 2001 in some detail as India is a signatory to it. Therefore, while considering and interpreting the municipal law, the same would have to be necessarily construed in consonance with international treaties and agreements to which India is a party.[200]

The Court tested the eligibility of NATCO for the grant of compulsory license in accordance with the sec 84 of the Patent Act1970. The requirements for grant of compulsory license are,

1. reasonable requirement of the public for the patented invention is not being met; or
2. the patented invention is not available to the public at reasonable price; or
3. that the patented invention is not worked in the territory of India.

The Court considering that all the conditions for compulsory license have met held that;

> The law of patent is a compromise between the interest of the investor and the public suffering from cancer. Public interest is and should always be fundamental in deciding a *lis* between the parties while granting a compulsory license for medicines/drugs.[201]

The grant of compulsory license to NATCO by the Controller and the Appellate tribunal was upheld by the Bombay High Court.

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[200] *Ibid*, para 7
[201] *Ibid*, para 19

In Court arrived at NATCO decision by interpreting section 3(d) of the Patent Act requiring an invention to meet the standards of 'enhanced efficiency' and Bayer decision by issuing compulsory license. These decisions were articulated by keeping in view the exuberant prices of the drugs which were not affordable by the masses in India. India had declared that it has complied with WTO requirement and it shall not further liberalize its IP regime. This position has triggered US to add India in the Priority Watch List of 'Special 301' and the Global IP Centre has come out with a comprehensive list of IPs in which India is expected to enact stricter laws.

4.10 Law of the Sea

This section deals with the cases concerning the international maritime law. The Courts have given direct effect to the international maritime instruments when there is a gap in the Indian laws. However, this direct application is subject to consistency with the Indian laws.

In *M.V. Elisabeth vs. Harwan Investment and Trading Pvt Ltd*.,[202] the Court observed that it was well recognised rule in international law that a merchant ship though generally governed by the laws of the flag state can subject itself to the jurisdiction of a foreign state as it entered its waters. The Geneva Convention on the Territorial Sea and Contiguous Zone 1958 and the Law of the Sea Convention 1982 affirmed that the sovereignty of a state extended over its internal and territorial waters. The Court referred to International Convention Relating to the Arrest of Seagoing Ships 1952 though India was not a party to it. The power of a state to a foreign vessel was recognized in this Convention. The Court held that;

> Although many of these Conventions have yet to be ratified by India, they embody principle of law recognised by the generality of maritime states and can therefore be regarded as part of our common law. The want of ratification of these Conventions is apparently not because of any policy disagreement, as it is clear from active and fruitful Indian participation in the formulation of rules adopted by the Conventions, but perhaps because of other circumstances, such as lack of an adequate and specialised machinery for implementation of the various International Conventions by coordinating for the purpose the concerned Departments of the Governments.[203]

[202] AIR 1993 SC 1014
[203] *Ibid*., para 90

The Supreme Court in *Liverpool & London S. P. & I Asson. Ltd. vs. M.V. Sea Success,*[204] had to deliberate if the default of insurance premium of a seagoing vessel constitutes a maritime claim. The Court referred to the International Convention on Arrest of Ships 1999 in which the right of arrest is granted for claims of insurance premiums. There was no domestic legislation regarding this issue. Sinha J. while justifying the reference to the International Convention on Arrest of Ships 1999 as India was not a signatory state held that,

> if the 1952 Arrest Convention had been applied although India was not a signatory thereto, there is obviously no reason as to why the 1999 Arrest Convention should not be applied. The application of the 1999 Convention in the process of interpretative changes would be subjected to: (a) domestic law which may be enacted by Parliament, and (b) it should be applied only for enforcement of a contract involving public law character.[205]

In *Gaurav Kumar Bansal vs. Union of India,*[206] a PIL was file in Supreme Court seeking it to issue appropriate directions to government to intervene and expedite the release of Indian seamen who were held hostage in the international waters by the Somalian pirates. The Supreme Court held that it is not in its competence to intervene in the matters that was to be dealt by the executive. It explained that an issue of coordination at international level with the foreign states and international bodies is to be left to wisdom of experts. The Supreme Court highlights the importance of piracy law in India. The learned counsel argued for piracy laws as

> India is a signatory to the UNCLOS which defines piracy and pirated Act. It is further submitted that India does not presently have a separate legislation on piracy. Therefore it was decided by the Government to prepare a comprehensive domestic legislation on piracy. Therefore, it was decided by the Government to prepare a comprehensive domestic legislation in piracy in line with the UNCLOS definition of piracy at the earliest as to ensure the effective prosecution of the pirates and to act as a deterrent to pirates.[207]

This attempt was unsuccessful as the Piracy Bill 2012 was not passed. The loopholes and inadequate penal laws were stated as reason for the failed bill.[208]

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[204] MANU/SC/0951/2003
[205] *Ibid*., para 60-61
[206] MANU/SC/0790/2014
[207] *Ibid*, p.4
[208] Piracy Bill 2012, Accessed 17 January 2017, URL: www.prsindia.org/billtrack/the-piracy-bill-2012-2298/.

This case *Aban Loyd Chiles Offshore Ltd. vs. Union of India,*[209]was an appeal from the Bombay High Court. The appellants were carrying out the drilling operations of exploring offshore oil and gas in the territorial waters of India. No custom duties were levied on these operations as they possessed contract with the ONGC. After few years customs duties were imposed on the appellants. The same was challenged in the Bombay High Court and the Court ruled in favour of appellants. The respondents preferred an appeal in the Supreme Court. The Supreme Court had to consider international instruments like UNCLOS and the validity of Maritime Zones Act of 1976. The court held that,

> the doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and are considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of Nations or no, municipal law must prevail in case of conflict. National Courts cannot say yes if Parliament has said no to a principle of international law. National Courts will endorse international law but not if it conflicts with national law. National courts being organs of the national state and not organs of international law must perforce apply national law if international law conflicts with it. But the courts are under an obligation within legitimate limits, to so interpret the municipal statute as to avoid confrontation with the Comity of Nations or well established principles of International law. But if conflict is inevitable, the latter must yield.[210]

The court concluded that Maritime Zones Act 1976 is not in conflict with the international law rather it is in consonance with UNCLOS 1982.

In the recent case of *Republic of Italy vs. Union of India,*[211] two Italian Marines killed two Indian fishermen off the Kerala coast presuming them to be pirates. The questions arose concerning the jurisdiction of the Indian Courts on this offence. The contention was that the case is between two sovereign states and the Indian Courts do not have jurisdiction. The Supreme Court ruled that it has the jurisdiction investigate the case while the Kerala Court did not. The Court held that,

> India is entitled both under its domestic law and the public international law to exercise rights of sovereign upto 24 nautical miles from the baselines on the basis of which the width of territorial water is measure, it can exercise only sovereign rights within the exclusive economic zone for certain purposes. The incident of firing from the Italian vessel on the Indian shipping vessel having

[209] MANU/SC/2045/2008
[210] *Ibid*, para 88
[211] (2013) 4 SCC 721; MANU/SC/0059/2013

> occurred within the contiguous zone, the Union of India is entitled to prosecute the two Italian marines under criminal justice prevalent in the country.[212]

On the applicability of the UNCLOS, the Court held that "Since India is a signatory, she is obligated to respect the provisions of UNCLOS 1982 and to apply the same if there is no conflict with the domestic law."[213]

The decisions in this section reveal that many of international maritime instruments were applied by the courts to fill the gap in the Indian maritime laws as long as they were in conformity with the domestic laws.

5. CONCLUSION

The Indian law is silent concerning the function and duty of the Indian Courts towards international treaties and customary international norms. Neither the Constitution nor the Indian statutory law regulate the relationship between Indian cCurts and international law. However, the Indian Courts have voluntarily engaged themselves in with international law. The reservation and the rigidity the Indian Courts exhibited in 1970's towards international law has slowly changed over years. The engagement of Indian Courts with international law is of vital importance as the Court's precedents on the elements of international law forms the Indian practice.

Since the adoption of customary international law is unregulated, the Indian Courts have relied on the Anglo-American method of automatic incorporation. The decision in *Trendex Trading vs. Bank of Nigeria,*[214] formed the basis of the incorporation approach adopted by the Indian Courts. This excessive reliance on the decisions of the Anglo-American Courts has been criticised as 'juridical dependencia'. The customary international law is regarded as a part of law of the land. The international treaties and instruments have received different treatment from that of the customary principles by the Indian Courts. They have adopted a formalist interpretation of the Constitutional provision and observed that the treaty making is sole prerogative of the Union Executive. The Parliament's power of treaty transformation has also been relaxed by the judiciary holding that mere executive

[212] *Ibid.*, para 100.
[213] *Ibid*., para 97.
[214] (1977) QB, p. 529 cited in Beaulac *supra* note 9 at p. 389

action is sufficient to give effect to a treaty and not all international instruments require treaty transformation.

The study of judicial interaction with international law in various sectorial regimes has revealed that there is no consistency in the decisions by the Indian Courts across the sectorial regimes. In few sections it has adopted a pro-active approach while in others it is quite rigid. However, the objective of the chapter is not to point out the consistency or uniformity but to highlight the emergence of various interpretative and incorporative techniques the court had adopted to decide the cases involving elements of international law. Some of these techniques are direct adoption of un-ratified international treaties to fill the gaps in the domestic law, relaxing the requirement of transformation, harmonious interpretation when there exists a conflict between international and domestic norm, adoption un-ratified international treaty norms by considering them as the principles of customary international law, interpreting the provisions of the Indian Constitution in the light of international treaties and instruments, interpreting the Indian statutes in the light of international instruments, citing con-substantial international and domestic norms, giving effect to the colonial treaties even in the absence of the enabling legislation and considering the informal soft international instruments on par with the international treaties and agreements. These are some of the judicial techniques the Indian Courts have adopted that have channelized the flow of un-ratified international law instruments into the Indian legal system. As consequence of this approach by the Indian judiciary it can be argued that the Courts driven by their sense of judicial activism have deserted their stand of traditional dualism and are moving towards integrationist approach.

CHAPTER-7

CONCLUSION AND RECOMMENDATIONS

Globalisation has triggered the rapid development of international law on every subject that was primarily state-centric. This has spurred the integration between international law and municipal law. The relationship a state has with international law is determined by its constitutional provisions and judicial practice. On the theoretical plane, two schools of thought have discussed the relationship between international law and municipal law. The schools of monism and dualism have long debated the interface between the two legal systems from different perspectives. Monism stresses on the integration of the two systems making international law directly applicable in municipal law through the doctrine of incorporation. Dualism, on the other hand, holds that international law and municipal law are two distinct branches of law so independent of each other that an international norm to be applicable in municipal law has to undergo a process of transformation. The monist-dualist debate is described as futile as the practices of states occupy the middle ground. As a consequence many alternative theories were developed claiming that they would effectively describe the interface between international law and domestic law. The alternate theories of pluralism, co-ordination and constitutionalism were argued to create a new approach between extremities of monism and dualism.

However, the investigation of the nature and characteristics of the traditional monist-dualist schools retains its importance. Despite the persistent debate on the relevance of monism and dualism, the domestic courts when encountered with an instance of international law iterate the school of thought the concerned state belongs. The monism-dualism theories are of relevance as they determine the degree of accommodation and acceptance a national legal system, particularly its constitution and state organs provide to international law. Monism's reliance on the unification of the two legal systems may result in the loss of sovereignty in one way or the other. The state should protect itself from the subjugation and domination that been practiced behind the shield of international law. The integration of two systems of law has been pushed by nations of the global north as they seek to regulate the activities of the weaker states through international law. The school of dualism and its doctrine of transformation are arguably best-suited for the states of the third world. Dualism helps

in self-preservation of the weaker states by minimising the interference of powerful states. The legislative enactment provides flexibility and policy space by allowing the state to shape the implementing treaties according to the state's requirement, including elaborating on the ambiguous terms of the treaties or determining the application and extent of the treaties. Hence a state will have the autonomy to customise the transforming legislation to suit its best interest.

India has adopted the British model of implementing international law which is essentially a dualist model. But since international law became a part of Indian legal system even before its independence, the need to venture into the pre-independent period becomes inevitable to understand contemporary Indian practice. The power of a state to enter into international obligations is one of the determining factors of its international legal personality. The Imperial War Conference 1917 resulted in the granting of Dominion status to the colonies as an expression of gratitude for their services in the WWI. The Dominion status was granted to Australia, Canada, South Africa and New Zealand whereas India was just accorded a special status with a voice in the foreign policy. However, the Government of India Act 1919 that was enacted immediately after the War Conferences neither mentioned special status nor foreign policy as promised.

In the international legal order, a state is vested with capacity to form treaties. The capacity of the dependent states to conclude treaties is undetermined and uncertain. While India concluded numerous international instruments during the period 1919-1947, the British Crown reserved India's external sovereignty, resulting in creation of an anomalous personality. India was not given any independent representation in the international conferences or organisations. The Crown concluded all agreements and conventions under the name 'India'. The rulers of the native states were given the opportunity to participate in the international negotiations along with the Crown. Their participation was limited to acting as rubber-stamp and mouthpieces to the Crown. The native rulers were precluded from exercising their external sovereignty under the suzerainty of the Crown. The native rulers neither had the legal capacity to participate in international negotiations nor did their signatures have any legitimate value. India's participation in the international conferences was merely to garner additional votes for the British Empire.

The Indian Independence Act of 1947 gave effect to the fragmentation of India into Dominion of India, Dominion of Pakistan and independent princely states. This process of partition was deceptively proclaimed by the Crown as secession instead of dismemberment. The UN also shared the Crown's view by erroneously drawing the analogy of partition of British India into Dominions of India and Pakistan with the two instances of secession namely, Irish Free State from Great Britain and Belgium from Holland. The factor which the UN overlooked was that Holland and Britain were fully sovereign states when Belgium and Irish Free State were separated from them. In the case of India and Pakistan, the division which took place was not due to the secession of a part of the territory, but on account of partition by a third party. The old sovereign actively participated in both these secessions, whereas, in the creation of Pakistan, India did not have any role to play. There was no secession of Pakistan from India, but both India and Pakistan emerged from British India at the same time and from the same instrument. It was perhaps the intention of the Crown to portray the Partition of British India as secession so that the past colonial obligations devolved upon India soon after its independence. The theory of clean slate becomes automatically applicable in cases of dismemberment, as it gives birth to a new state. Only Pakistan was the considered as the newly formed state that could start with a clean slate. The India Independence (International Agreements) Order 1947 acted as an inheritance agreement apportioning the treaties between the Dominions. By the time India had gained independence, it was party to about 627 treaties, (that devolved upon her) and member of 51 international organisations. It is puzzling that the principle of *rebus sic stantibus*, that the treaties automatically get terminated upon the change in the circumstances, did not apply to a change in the sovereign.

Article 372 of the Indian Constitution provided continuity to the colonial instruments. These included common laws, statutory laws, international treaty and customary laws. The colonial international instruments include the pre-1919 instruments as applied by the British Crown directly and post-1919 instruments included those signed in the name of India. Article 372 empowered the state organs including the President to repeal or modify the laws that were found inconsistent with the Constitution. It was only a decade later and after the direction of the Supreme

Court in *State of Madras vs. C.G. Menon,*[888] that the government authorized the Law Commission to check the compatibility of the colonial instruments. The most suitable way for a new state to start is by adopting the clean slate method. The clean slate was impossible in the case of India as its succession was coloured and misrepresented as secession instead of dismemberment. But India could have adopted a mechanism similar to that of Nyerere Doctrine, where none of the colonial treaties became applicable unless the new state, within a specified period of time, notified its accession to them. The newly independent states of Tanzania, Uganda and Kenya adopted this approach.

A state can implement international law only in accordance with its constitutional prescriptions and judicial decisions. The examination of the relationship between international law and a national legal system begins from its constitution. Article 51 is the only provision in the Indian Constitution which directly deals with international law. The relative lack of familiarity of the drafters of Indian Constitution with international law is evident from the framing of Article 51. It is placed in the Directive Principles of State Policy (DPSP) which is non-justiciable pursuant to Article 37. Hence non-compliance with international law cannot be challenged in any court of law. However, provisions of DPSP enjoy special attention when read with Part III of the Indian Constitution. The scope of Article 51 is also expanded by the Supreme Court considering it as a framework provision according to which the Legislature and the Executive are to function. This Article, if drafted explicitly without ambiguities in the language and uncertainty, would have operated as a framework provision relating to the implementation of international law in Indian legal system. The ambiguity begins the scope of the term 'state' used in the text of the Article as to whether it extends to the federal state governments. But Article 246 and Article 253 holds only Parliament and Union Executive are competent to engage in treaty negotiations and deliberations. The federal government's participation in the treaty procedure could have been legitimately justified had the scope of this Article been extended to include state structures. The other ambiguities in the language are relating to the international treaty and customary international law. A few among them are the separate mention of treaty obligations and international law. This general reference to customary international law as international law has been debated to

[888]1954 AIR 517.

understand the intention of the drafters. That is whether they intended to attach general bindingness and acceptability to customary international norms much before the judicial pronouncements.

The treaty mechanism in India is studied under formation of treaties and treaty implementation. There is no explicit provision in the Indian Constitution or a *sui generis* mechanism that prescribes the treaty making procedure in India. The function of treaty making is assigned to the Union Executive after a collective reading of the Article 73 with Article 246, Schedule VII, List, 1 Entry 14. The Union Executive may exercise its functions with respect to those subjects in which Parliament has power to make laws. Entry 14 deals with the treaty making function, thereby granting the power to the Executive to carry out treaty functions. The Parliament has not passed any law concerning Entry 14 concerning the treaty making power of the Executive. This has left the Executive's power unchallenged and unfettered. Though the Indian practice requires the treaty entered by Executive to obtain legislative enactment to be operative domestically, the conclusion of a treaty does not require Parliamentary endorsement. Once a treaty is concluded, the responsibility of its compliance is vested on the state and violation of it entails liability. It therefore limits the role of Parliament after a treaty is signed or ratified.

The study has argued that since Parliament is empowered to make law concerning treaty functions, the formation of the treaty is not exclusively the executive's function but a collective function of both Parliament and the Executive. The participation of the Parliament reduces the democratic deficit in the treaty making process. The Parliamentary participation in the treaty making process may be ensured in two ways; by seeking the Parliamentary approval before the commencement of the treaty negotiations or by Parliamentary oversight, a mechanism where the Parliament can supervise the treaty negotiations. The adoption of either one of these or the combination of both methods can serve to build a transparent and accountable treaty adoption process. The treaties have a direct and indirect effect on the lives of the individuals. However, the individuals are seldom aware of the state's participation in the international treaty negotiations. The transparency in the treaty process is highly desirable and it can be achieved through the active participation of the Parliament in the treaty process. Parliamentary approval may be considered as a pre-condition before the Executive negotiates a treaty. The pre-requisite of Parliamentary approval

need not apply to all international treaties and agreements. It is impractical to expect the scrutiny of each and every international instrument from the Parliament. However, certain international instruments of serious consequences (like WTO and related instruments) must be considered for approval before treaty negotiations. This model will provide an opportunity to debate and deliberate upon the nature of the treaty in question and its possible effects at the domestic level. Such deliberations may result in highlighting the concerns regarding the content or domestic application which may be raised by Indian delegation during the treaty negotiations. If the Parliamentary approval is obtained, the likelihood of non-ratification and liability is minimised. The repetition of instances like *India- Patent Protection for Pharmaceuticals and Agricultural Chemical Products*[889], where US filed a complaint that India did not comply with the provisions of TRIPS can be avoided.

Another aspect of the treaty making process is the participation of the state governments. Article 73 and Article 246 preclude the state governments from participating in the treaty making process by considering it a prerogative of the Union Executive. The Supreme Court restricted the participation of the state government in the treaty procedures in *Vandana Shiva vs. Union of India*[890], (known as GATT/WTO ratification case). It held that the Union Government alone negotiates, concludes and ratifies treaties and Parliament legislates when the implementation of a treaty is required. However, inspiration may be drawn from the Canadian system where the federal government has no power to conclude international agreements. It has begun to institutionalise Premier's Conferences to evolve a consensus among the federal structures prior to the government's agreement on critical international commitments.

The other method of regulating the treaty making power of the Executive is by overseeing the negotiations and conclusion of international agreements. This model is reflected in American treaty making process. The Congressional oversight is an important aspect of treaty making. The Congress oversees the executive function during the treaty negotiations and provides suitable suggestions. The Senate and the House of Representatives direct and distribute the oversight functions to various committees on the basis of their jurisdiction and power. The oversight methods include hearings, carrying out investigations, providing consultations, and reviewing

[889]DS50 in URL: www.wto.org/english/tratop_e/dispu_e/cases_e/ds50_ehtml, accessed on 15/6/13.
[890] MANU/DE/0475/1994

reports.[891] This model can be appropriately modified and adopted by India. With sufficient debate on the effects of the international instruments by interest groups and expert committees, Indian delegation will be well-informed and better equipped to place its concerns in negotiations.

The treaty implementation forms the second phase of treaty process in the Indian legal system. Article 253 of the Indian Constitution requires Parliament to pass an enabling legislation to effectuate the international agreement. This provision forms the condition- subsequent for the operation of international instruments. However, the Honourable Supreme Court has in some instances relaxed the requirement of transformation. The Court in the *Maganbhai Ishwar Bhai Patel vs. Union of India*[892], held that the Parliamentary approval may not always be necessary to give effect to a treaty. This resulted in a section of treaties gaining self-executory status without the requisite constitutional or legislative mandate. The argument can be advanced that the Indian Courts are moving towards internationalism by diluting the Parliamentary control over international instruments.

The approach of the Indian Courts in other instances appears to be very narrow and formalist. Firstly, while in the constitutional scheme of things, the treaty making function appears to be a collective function of both Parliament and Executive, the Supreme Court has held in various instances that it the sole prerogative of the Union Executive. Secondly, it has dismissed the idea of Parliamentary approval by restricting the treaty formation function to the executive. Thirdly, it has not provided room for the participation of state governments in treaty negotiations and implementation, thereby undermining the importance of federalism.

The position of Indian Courts towards international customary norms is different from that of international treaties. In the absence of law regulating the method of implementation of international customary norms into domestic law, the Indian Courts have relied heavily on the decisions rendered by Anglo-American Courts. The Supreme Court has appeared to follow the *Trendtex Trading Corp. Ltd.*

[891]Committee on Foreign Relations United States Senate, (2001), Treaties and other International Agreements: The Role of the United States Senate,Government Printing Office: Washington, Accessed on 2 May 2013, http://www.gpo.gov/fdsys/pkg/cprt-106sprt66922/pdf/cprt-106sprt66922.pdf.
[892] AIR 1969 SC 783

vs. The Central Bank of Nigeria[893] precedent in the *Gramophone Co of India Ltd vs. Birendra Bahadur Pandey*,[894]*M.V. Elisabeth and others vs. Harwan Investment and Trading Pvt. Ltd.*,[895] cases holding that international customary law is a part of law of the land. It has neglected in the process critical scholarship which argues that customary international law is essentially a creation of powerful western states. Yet the Indian Supreme Court has positioned it equally among other municipal laws. A norm to gain the status of customary international law has to pass the test of *opinio juris* and consistent state practice. But there have rarely been instances where the Indian Courts have examined the status of the customary norm. In *Vellore Citizens Welfare Forum vs. Union of India and others*,[896] the Supreme Court referred the precautionary, polluter pays, inter-generational equity and sustainable development principles as customary international law, even when the status of these principles as customary norms was still being contested. The Indian Courts have in different instances also incorporated the un-ratified international treaty norms as customary international law. Some of them are the Convention against Torture 1984, Brussels Convention 1952, Vienna Convention on Law of Treaties 1969 and others. The Court justified its position by stating that these treaty norms over the years have gained general acceptance and can be applied as customary international law when there is a legal lacuna in the domestic legal system.

The domestic courts have exhibited various incorporative and interpretative techniques after drawing the inspiration from the foreign courts. The Courts have been thus flexibly interpreting their constitutional mandate in creating a network of jurists, lawyers and academicians in discussing the engagements with international law. The Courts have been participating in the judicial colloquia, which have provided the domestic courts a sort of legitimacy to actively engage in international law, even if it meant surpassing the restrictions from the constitutions and other state organs. India has been very actively participating in such judicial colloquia. For instance, the Judicial Colloquium known as Bangalore Principles jointly organised by INTERIGHTs, a human rights NGO and Commonwealth Secretariat. This inter-judicial cooperation has resulted in the emergence of a new jurisprudence on

[893] (1977) 2 WLR 356
[894] AIR 1984 SC 667
[895] AIR 1993 SC 1014
[896] AIR 1996 SC 2715

comparative law. This network has enabled them to refer to the judgements of the other courts in situations of uncertainty in their domestic law. The foreign decisions have played an important role in the Indian jurisprudence. The excessive reliance on the Anglo-American courts has created 'juridical dependencia'. However, the inter-judicial cooperation can also be utilized for the creation of a network among the Asian-African Courts to provide resistance to the existing hegemonic international laws. For instance, when a court in these regions pronounces a judgement disclosing and deviating from an unjust international norm, the resistance can be built by citing and supporting the court for its decisions.

Various judicial techniques may be drawn out from the study on the sectorial regimes. As explained in the study, there is no consistency among the decisions of the Indian Courts across the sectorial regimes. The *ratio* and in some cases *obiter* have assisted in drawing a pattern on the Court's reception of international law. Some of incorporative and interpretative techniques adopted by Indian Courts while engaging with international law are as follows:

1. The Indian Courts have considered customary international law as a part of the law of the land.The judgement in the case of *Gramophone Co of India Ltd vs. Birendra Bahadur Pandey,*[897]*M.V. Elisabeth and others vs. Harwan Investment And Trading Pvt. Ltd.,*[898] reflect this position of the Indian Courts.

2. In the event of absence of law in the domestic legal system, the Indian courts have implemented un-ratified international treaty norms to fill up the existing gaps. For instance, *Vishaka and Others vs. State of Rajasthan and others,*[899]*Nilabati Behra vs. State of Orissa,*[900]*Gaurav Kumar Bansal vs. Union of India*[901].

3. The Constitutional provisions are interpreted in the light of international instruments by the Indian Courts. For instance, Article 21 has been given a very expansive meaning by the Indian judiciary to include different varieties of rights, like right to life includes right to proper child care, right to medical

[897] AIR 1984 SC 667
[898] AIR 1993 SC 1014
[899] AIR 1997 SC 3011
[900] AIR 1993 SC 1967
[901] MANU/SC/0790/2014

benefits (*Laxmi Mandal vs. Deen Dayal Harinagar Hospital & Jaitun vs. Maternity Home MCD and others*,[902]) rights of *non-refoulement* (*National Human Rights Commission vs. State of Arunachal Pradesh & Others*[903], *Ktaer Abbas Habib Al Qutaifi vs. Union of India*.)[904]

4. The Supreme Court has construed the scope of statutory laws in the light of international norms. For instance in *Aban Loyd Chiles Offshore Ltd. vs. Union of India.*[905]

5. The condition of requirement of transformation has been relaxed by the Indian Courts holding that the executive act is sufficient to give effect to treaties. The cases involving territorial disputes like *Maganbhai Ishwar Bhai Patel vs. Union of India*[906] and extradition claims *Rosiline George vs. Union of India*[907] reflect this deviation.

6. The Indian Courts have implemented un-ratified international norms as customary international law. The decisions in *M.V. Elisabeth and Others vs. Harwan Investment And Trading Pvt. Ltd.,*[908]*AWAS Ireland vs. Directorate General of Civil Aviation*[909], *Jeeja Ghosh and Others vs. Union of India*[910], *Ram Jethmalani vs. Union of India*[911] reflect this position.

7. Harmonious interpretation has been given by Indian Courts in the event of conflict between the domestic and international norm. For example in *Additional District Magistrate, Jabalpur vs. S. Shivakant Shukla.*[912]

8. The Supreme Court has been citing con-substantial norms in its decisions. Consubstantial norms are those norms that happen to exist both in the

[902]MANU/DE/1268/2010
[903] (1996) 1 SCC 742
[904] MANU/GJ/0433/1998
[905] MANU/SC/2045/2008
[906] AIR 1969 SC 783
[907] (1994) 2 SCC 80
[908]AIR 1993 SC 1014
[909] MANU/DE/0832/2015
[910] MANU/SC/0574/2016
[911]MANU/SC/0711/2011
[912] AIR 1976 SC 1207

international and domestic legal systems regulating the same content. For instance in *T. N. Godavarman Thirumulpad vs. Union of India and Others.*[913]

9. The Indian Courts have given effect to the colonial treaties in the absence of enabling legislation. For instance the decision in *Suman Sood vs. State of Rajasthan.*[914]

10. The Indian Judiciary has in various occasions considered informal international law on par with the international treaty norms. The decisions in cases like *National Legal Service Authority vs. Union of India*[915], *Vellore Citizens Welfare Forum vs. Union of India and Others*[916]shows this position.

The adoption of the above judicial methods and techniques reflects the confidence and faith the Indian judiciary has in international law. The following arguments can be raised from the Court's devotion to international law. Firstly, the court's consideration of international customary norms as a part of the law of the land shows that the Court has turned a blind eye to the trajectories of the formation of customary international law. Secondly, the method of interpreting the provisions of the Indian Constitution in accordance with international norms raises the debate international norms are superior to that of Indian Constitution. Thirdly, the equal treatment accorded to the informal international instruments and un-ratified international treaty norms raises the presumption of misunderstanding on the part of the Court concerning the binding nature of the informal instruments. Fourthly, the internationalist tendency of the Court is showcased when it is found frequently citing con-substantial norms. Finally, the Court's implementation of un-ratified international treaty norms to fill gaps in the Indian legal system. It can be argued that reference to un-ratified treaty instruments might have usurped the Parliamentary prerogative of transformation, but at the same time it has protected the human rights.

On the other hand, the Indian Courts have begun to accommodate the pressures of globalization sometimes at the expense of the principle of state sovereignty. The two instances which demonstrated the role of the Indian Courts in facilitating globalised policies are; firstly, the act of self- restraint imposed by the

[913] http://judis.nic.in/supremecourt/imgs1.aspx?filename=39078
[914] (2007) 5 SCC 2775
[915] MANU/SC/0309/2014
[916] AIR 1996 SC 2715

Indian Courts to keep themselves from interfering in the international commercial arbitration (prior to the amended of the Arbitration and Conciliation Act 1996 by Arbitration and Conciliation (Amendment) Ordinance 2015); and the second instance is concerning the cases pertaining to Double Taxation Avoidance Agreements, where the Supreme Court legitimised treaty shopping at the cost of tax loss. The argument can be advanced that the Indian Courts are deviating from their dualist position and are moving towards the integrationist stance.

On the basis of the foregoing analysis the following recommendations can be made:

- The Indian legal system should reaffirm its faith in dualism. The Indian Courts must revert to their dualist stance resisting the urge towards integration.

- The Parliament may regulate the treaty making process either by introducing Parliamentary approval as a condition precedent or by adopting Parliamentary oversight mechanisms. This will check the unfettered treaty making power of the executive and provide a platform for the participation of the state governments in the treaty process. The democratic deficit in the treaties can be minimised to a great extent.

- The Supreme Court in its wisdom has to reconsider the requirement of legislative enactment mandatory for a treaty to be effective in domestic law. If the Indian Courts encounter a situation like *Vishaka*, where it is inevitable for the Courts to apply un-ratified international human rights instruments to uphold the rights of the individual, they must perhaps determine the 'domestic value' of the treaty before direct incorporation. The 'domestic value' of treaty is ascertained by examining the state's participation in the treaty negotiations, its process of ratification, domestic acceptance, reservations etc. Rather than holding all international human rights and environment instruments applicable, the Courts mustascertain the 'domestic value' of un-ratified international instrument before application.

- The Indian Courts may have to revisit the position of customary international law being considered as a part of the law of the land. In the event of incorporating international customary law, the Court must locate the norm in

the multilateral instruments like United Nations General Assembly Resolutions for its general acceptance.

- The Indian Courts must actively build and engage in the network of Asian-African Courts to build resistance against the hegemonic international legal order.

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APPENDICES

APPENDIX- I

THE CONSTITUTION OF INDIA

3. Formation of new States and alteration of areas, boundaries or names of existing States.—Parliament may by law—
(a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State;
(b) increase the area of any State;
(c) diminish the area of any State;
(d) alter the boundaries of any State;
(e) alter the name of any State:
Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired.
Explanation I.—In this article, in clauses *(a)* to *(e)*, "State'' includes a Union territory, but in the proviso, "State'' does not include a Union territory.
Explanation II.—The power conferred on Parliament by clause *(a)* includes the power to form a new State or Union territory by uniting a part of any State or Union territory to any other State or Union territory.

4. Laws made under articles 2 and 3 to provide for the amendment of the First and the Fourth Schedules and supplemental, incidental and consequential matters.—(1) Any law referred to in article 2 or article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions (including provisions as to representation in Parliament and in the Legislature or Legislatures of the State or States affected by such law) as Parliament may deem necessary.
*(*2*)* No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purposes of article 368.

13. Laws inconsistent with or in derogation of the fundamental rights.—(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
(3) In this article, unless the context otherwise requires,—
(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.
(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.

19. Protection of certain rights regarding freedom of speech, etc.—
(1) All citizens shall have the right—
(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India; and
(g) to practice any profession, or to carry on any occupation, trade or business.
(2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.
(3) Nothing in sub-clause (*b*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.
(4) Nothing in sub-clause (*c*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.
(5) Nothing in sub-clauses (*d*) and (*e*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.
(6) Nothing in sub-clause (*g*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—
(*i*) the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business, or
(*ii*) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

21. Protection of life and personal liberty.—No person shall be deprived of his life or personal liberty except according to procedure established by law.

22. Protection against arrest and detention in certain cases. —(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply—

(*a*) to any person who for the time being is an enemy alien; or

(*b*) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—

(*a*) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (*b*) of clause (7); or

(*b*) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (*a*) and (*b*) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe—

(*a*) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (*a*) of clause (4);

(*b*) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(*c*) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (*a*) of clause (4).

37. Application of the principles contained in this Part.—The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

51. Promotion of international peace and security.—The State shall endeavor to—

(a) promote international peace and security;

(b) maintain just and honorable relations between nations;

(c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and
(d) encourage settlement of international disputes by arbitration.

53. Executive power of the Union.—(1) The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.
(2) Without prejudice to the generality of the foregoing provision, the supreme command of the Defense Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by law.
(3) Nothing in this article shall—
(a) be deemed to transfer to the President any functions conferred by any existing law on the Government of any State or other authority; or
*(b)*prevent Parliament from conferring by law functions on authorities other than the President.

73. Extent of executive power of the Union.— (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend—
(a) to the matters with respect to which Parliament has power to make laws; and
(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:
Provided that the executive power referred to in sub-clause *(a)* shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.
(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.

123. Power of President to promulgate Ordinances during recess of Parliament.—(1) If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require.
(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance—
(*a*) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and
(*b*) may be withdrawn at any time by the President.
Explanation.—Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.
(3) If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void.
Explanation II.—In computing for the purpose of this clause the period during which a person has been an advocate, any period during which a person has held judicial

office not inferior to that of a district judge after he became an advocate shall be included.
(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehavior or incapacity.
(5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehavior or incapacity of a Judge under clause (4).
(6) Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.
(7) No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India.

125. Salaries, etc., of Judges.—(1) There shall be paid to the Judges of the Supreme Court such salaries as may be determined by Parliament by law and, until provision in that behalf is so made, such salaries as are specified in the Second Schedule.
(2) Every Judge shall be entitled to such privileges and allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such privileges, allowances and rights as are specified in the Second Schedule:
Provided that neither the privileges nor the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

126. Appointment of acting Chief Justice.—When the office of Chief Justice of India is vacant or when the Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other Judges of the Court as the President may appoint for the purpose.

127. Appointment of *ad hoc* Judges.—(1) If at any time there should not be a quorum of the Judges of the Supreme Court available to hold or continue any session of the Court, the Chief Justice of India may, with the previous consent of the President and after consultation with the Chief Justice of the High Court concerned, request in writing the attendance at the sittings of the Court, as an *ad hoc* Judge, for such period as may be necessary, of a Judge of a High Court duly qualified for appointment as a Judge of the Supreme Court to be designated by the Chief Justice of India.
(2) It shall be the duty of the Judge who has been so designated, in priority to other duties of his office, to attend the sittings of the Supreme Court at the time and for the period for which his attendance is required, and while so attending he shall have all the jurisdiction, powers and privileges, and shall discharge the duties, of a Judge of the Supreme Court.

128. Attendance of retired Judges at sittings of the Supreme Court.— Notwithstanding anything in this Chapter, the Chief Justice of India may at any time,

with the previous consent of the President, request any person who has held the office of a Judge of the Supreme Court or of the Federal Court or who has held the office of a Judge of a High Court and is duly qualified for appointment as a Judge of the Supreme Court to sit and act as a Judge of the Supreme Court, and every such person so requested shall, while so sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a Judge of that Court:
Provided that nothing in this article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that Court unless he consents so to do.

129. Supreme Court to be a court of record.—The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

130. Seat of Supreme Court.—The Supreme Court shall sit in Delhi or in such other place or places, as the Chief Justice of India may, with the approval of the President, from time to time, appoint.

131. Original jurisdiction of the Supreme Court.—Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute—
(*a*) between the Government of India and one or more States; or
(*b*) between the Government of India and any State or States on one side and one or more other States on the other; or
(*c*) between two or more States,
if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends:
Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, *sanad* or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute.

131A. [Exclusive jurisdiction of the Supreme Court in regard to questions as to constitutional validity of Central laws.] Rep. by the Constitution (Forty-third Amendment) Act, 1977, s. 4 (w.e.f. 13-4-1978).

132. Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases.—(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies under article 134A that the case involves a substantial question of law as to the interpretation of this Constitution.
(3) Where such a certificate is given, any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided.
Explanation.— For the purposes of this article, the expression "final order" includes an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case.

133. Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters.— (1) An appeal shall lie to the Supreme Court from any

judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies under article 134A—
(*a*) that the case involves a substantial question of law of general importance; and
(*b*) that in the opinion of the High Court the said question needs to be decided by the Supreme Court.
(2) Notwithstanding anything in article 132, any party appealing to the Supreme Court under clause (1) may urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of this Constitution has been wrongly decided.
(3) Notwithstanding anything in this article, no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court.

134. Appellate jurisdiction of Supreme Court in regard to criminal matters.—(1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court—
(*a*) has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or (*b*) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or
(*c*) certifies under article 134A that the case is a fit one for appeal to the Supreme Court:
Provided that an appeal under sub-clause (*c*) shall lie subject to such provisions as may be made in that behalf under clause (1) of article 145 and to such conditions as the High Court may establish or require.
(2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law.

134A. Certificate for appeal to the Supreme Court.—Every High Court, passing or making a judgment, decree, final order, or sentence, referred to in clause (1) of article 132 or clause (1) of article 133, or clause (1) of article 134, —
(*a*) may, if it deems fit so to do, on its own motion; and
(*b*) shall, if an oral application is made, by or on behalf of the party aggrieved, immediately after the passing or making of such judgment, decree, final order or sentence,
determine, as soon as may be after such passing or making, the question whether a certificate of the nature referred to in clause (1) of article 132, or clause (1) of article 133 or, as the case may be, sub-clause (*c*) of clause (1) of article 134, may be given in respect of that case.

135. Jurisdiction and powers of the Federal Court under existing law to be exercisable by the Supreme Court.— Until Parliament by law otherwise provides, the Supreme Court shall also have jurisdiction and powers with respect to any matter to which the provisions of article 133 or article 134 do not apply if jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of this Constitution under any existing law.

136. Special leave to appeal by the Supreme Court.—(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal

from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.
(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

137. Review of judgments or orders by the Supreme Court.— Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

138. Enlargement of the jurisdiction of the Supreme Court.— (1) The Supreme Court shall have such further jurisdiction and powers with respect to any of the matters in the Union List as Parliament may by law confer.
(2) The Supreme Court shall have such further jurisdiction and powers with respect to any matter as the Government of India and the Government of any State may by special agreement confer, if Parliament by law provides for the exercise of such jurisdiction and powers by the Supreme Court.

139. Conferment on the Supreme Court of powers to issue certain writs.— Parliament may by law confer on the Supreme Court power to issue directions, orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari,* or any of them, for any purposes other than those mentioned in clause (2) of article 32.

139A.Transfer of certain cases.— (1) Where cases involving the same or substantially the same questions of law are pending before the Supreme Court and one or more High Courts or before two or more High Courts and the Supreme Court is satisfied on its own motion or on an application made by the Attorney-General of India or by a party to any such case that such questions are substantial questions of general importance, the Supreme Court may withdraw the case or cases pending before the High Court or the High Courts and dispose of all the cases itself:
Provided that the Supreme Court may after determining the said questions of law return any case so withdrawn together with a copy of its judgment on such questions to the High Court from which the case has been withdrawn, and the High Court shall on receipt thereof, proceed to dispose of the case in conformity with such judgment.
(2) The Supreme Court may, if it deems it expedient so to do for the ends of justice, transfer any case, appeal or other proceedings pending before any High Court to any other High Court.

140. Ancillary powers of Supreme Court.— Parliament may by law make provision for conferring upon the Supreme Court such supplemental powers not inconsistent with any of the provisions of this Constitution as may appear to be necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by or under this Constitution.

141. Law declared by Supreme Court to be binding on all courts.— The law declared by the Supreme Court shall be binding on all courts within the territory of India.

142. Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.— (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.
(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

143. Power of President to consult Supreme Court.—(1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.
(2) The President may, notwithstanding anything in the proviso to article 131, refer a dispute of the kind mentioned in the said proviso to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon.

144. Civil and judicial authorities to act in aid of the Supreme Court.—All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court.

144A. [Special provisions as to disposal of questions relating to constitutional validity of laws.] Rep. by the Constitution (Forty-third Amendment) Act, 1977, s. 5 (w.e.f. 13-4-1978).

145. Rules of Court, etc.—(1) Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court including—
(*a*) rules as to the persons practising before the Court;
(*b*) rules as to the procedure for hearing appeals and other matters pertaining to appeals including the time within which appeals to the Court are to be entered;
(*c*) rules as to the proceedings in the Court for the enforcement of any of the rights conferred by Part III;
(*cc*) rules as to the proceedings in the Court under article 139A;
(*d*) rules as to the entertainment of appeals under sub-clause (*c*) of clause (1) of article 134;
(*e*) rules as to the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the procedure for such review including the time within which applications to the Court for such review are to be entered;
(*f*) rules as to the costs of and incidental to any proceedings in the Court and as to the fees to be charged in respect of proceedings therein;
(*g*) rules as to the granting of bail;

(*h*) rules as to stay of proceedings;
(*i*) rules providing for the summary determination of any appeal which appears to the Court to be frivolous or vexatious or brought for the purpose of delay;
(*j*) rules as to the procedure for inquiries referred to in clause (1) of article 317.
(2) Subject to the provisions of clause (3), rules made under this article may fix the minimum number of Judges who are to sit for any purpose, and may provide for the powers of single Judges and Division Courts.
(3) The minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under article 143 shall be five:
Provided that, where the Court hearing an appeal under any of the provisions of this Chapter other than article 132 consists of less than five Judges and in the course of the hearing of the appeal the Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion dispose of the appeal in conformity with such opinion.
(4) No judgment shall be delivered by the Supreme Court save in open Court, and no report shall be made under article 143 save in accordance with an opinion also delivered in open Court.
(5) No judgment and no such opinion shall be delivered by the Supreme Court save with the concurrence of a majority of the Judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment or opinion.

146. Officers and servants and the expenses of the Supreme Court.—(1) Appointments of officers and servants of the Supreme Court shall be made by the Chief Justice of India or such other Judge or officer of the Court as he may direct:
Provided that the President may by rule require that in such cases as may be specified in the rule, no person not already attached to the Court shall be appointed to any office connected with the Court, save after consultation with the Union Public Service Commission.
(2) Subject to the provisions of any law made by Parliament, the conditions of service of officers and servants of the Supreme Court shall be such as may be prescribed by rules made by the Chief Justice of India or by some other Judge or officer of the Court authorised by the Chief Justice of India to make rules for the purpose:
Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the President.
(3) The administrative expenses of the Supreme Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of India, and any fees or other moneys taken by the Court shall form part of that Fund.

147. Interpretation.—In this Chapter and in Chapter V of Part VI, references to any substantial question of law as to the interpretation of this Constitution shall be construed as including references to any substantial question of law as to the interpretation of the Government of India Act, 1935 (including any enactment amending or supplementing that Act), or of any Order in Council or order made

thereunder, or of the Indian Independence Act, 1947, or of any order made thereunder.

168.Constitution of Legislatures in States.—(1) For every State there shall be a Legislature which shall consist of the Governor, and—
(*a*) in the States of Bihar, Maharashtra, Karnataka and Uttar Pradesh, two Houses;
(*b*) in other States, one House.
(2) Where there are two Houses of the Legislature of a State, one shall be known as the Legislative Council and the other as the Legislative Assembly, and where there is only one House, it shall be known as the Legislative Assembly.

211. Restriction on discussion in the Legislature. —No discussion shall take place in the Legislature of a State with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties.

212. Courts not to inquire into proceedings of the Legislature.—(1) The validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure.
(2) No officer or member of the Legislature of a State in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

214. High Courts for States.—There shall be a High Court for each State.

215. High Courts to be courts of record.—Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

216. Constitution of High Courts.—Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint.

217. Appointment and conditions of the office of a Judge of a High Court.—(1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of an additional or acting Judge, as provided in article 224, and in any other case, until he attains the age of sixty-two years:
Provided that—
(*a)* a Judge may, by writing under his hand addressed to the President, resign his office;
(*b)* a Judge may be removed from his office by the President in the manner provided in clause (4) of article 124 for the removal of a Judge of the Supreme Court;
(*c)* the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.
(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and—

(*a)* has for at least ten years held a judicial office in the territory of India; or
(*b)* has for at least ten years been an advocate of a High Court or of two or more such Courts in succession.
Explanation.—For the purposes of this clause—
(*a)* in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate of a High Court or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law;
(*a)* in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate;
(*b)* in computing the period during which a person has held judicial office in the territory of India or been an advocate of a High Court, there shall be included any period before the commencement of this Constitution during which he has held judicial office in any area which was comprised before the fifteenth day of August, 1947, within India as defined by the Government of India Act, 1935, or has been an advocate of any High Court in any such area, as the case may be.
(3) If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final.

218. Application of certain provisions relating to Supreme Court to High Courts.— The provisions of clauses (4) and (5) of article 124 shall apply in relation to a High Court as they apply in relation to the Supreme Court with the substitution of references to the High Court for references to the Supreme Court.

219. Oath or affirmation by Judges of High Courts.—Every person appointed to be a Judge of a High Court shall, before he enters upon his office, make and subscribe before the Governor of the State, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.
220. Restriction on practice after being a permanent Judge.—No person who, after the commencement of this Constitution, has held office as a permanent Judge of a High Court shall plead or act in any court or before any authority in India except the Supreme Court and the other High Courts.
Explanation.—In this article, the expression "High Court" does not include a High Court for a State specified in Part B of the First Schedule as it existed before the commencement of the Constitution (Seventh Amendment) Act, 1956.

221. Salaries, etc., of Judges.—(1) There shall be paid to the Judges of each High Court such salaries as may be determined by Parliament by law and, until provision in that behalf is so made, such salaries as are specified in the Second Schedule.
(2) Every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such allowances and rights as are specified in the Second Schedule:
Provided that neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

222. Transfer of a Judge from one High Court to another.—(1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.
(2) When a Judge has been or is so transferred, he shall, during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix.

223. Appointment of acting Chief Justice.—When the office of Chief Justice of a High Court is vacant or when any such Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other Judges of the Court as the President may appoint for the purpose.

224. Appointment of additional and acting Judges.—(1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional Judges of the Court for such period not exceeding two years as he may specify.
(2) When any Judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, the President may appoint a duly qualified person to act as a Judge of that Court until the permanent Judge has resumed his duties.
(3) No person appointed as an additional or acting Judge of a High Court shall hold office after attaining the age of sixty-two years.

224A. Appointment of retired Judges at sittings of High Courts.— Notwithstanding anything in this Chapter, the Chief Justice of a High Court for any State may at any time, with the previous consent of the President, request any person who has held the office of a Judge of that Court or of any other High Court to sit and act as a Judge of the High Court for that State, and every such person so requested shall, while so sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a Judge of that High Court:
Provided that nothing in this article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that High Court unless he consents so to do.

225. Jurisdiction of existing High Courts.—Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution:
Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any

act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction.

226. Power of High Courts to issue certain writs.—(1) Notwithstanding anything in article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without—

(*a*) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(*b*) giving such party an opportunity of being heard,

makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.

227. Power of superintendence over all courts by the High Court.—(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

(2) Without prejudice to the generality of the foregoing provision, the High Court may—

(*a*) call for returns from such courts;

(*b*) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(*c*) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces.

228. Transfer of certain cases to High Court.—If the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case and may—
(*a*) either dispose of the case itself, or
(*b*) determine the said question of law and return the case to the court from which the case has been so withdrawn together with a copy of its judgment on such question, and the said court shall on receipt thereof proceed to dispose of the case in conformity with such judgment.

229. Officers and servants and the expenses of High Courts.—(1) Appointments of officers and servants of a High Court shall be made by the Chief Justice of the Court or such other Judge or officer of the Court as he may direct:
Provided that the Governor of the State may by rule require that in such cases as may be specified in the rule no person not already attached to the Court shall be appointed to any office connected with the Court save after consultation with the State Public Service Commission.
(2) Subject to the provisions of any law made by the Legislature of the State, the conditions of service of officers and servants of a High Court shall be such as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the Court authorised by the Chief Justice to make rules for the purpose:
Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State.
(3) The administrative expenses of a High Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of the State, and any fees or other moneys taken by the Court shall form part of that Fund.

230. Extension of jurisdiction of High Courts to Union territories.—(1) Parliament may by law extend the jurisdiction of a High Court to, or exclude the jurisdiction of a High Court from, any Union territory.
(2) Where the High Court of a State exercises jurisdiction in relation to a Union territory,—
(*a*) nothing in this Constitution shall be construed as empowering the Legislature of the State to increase, restrict or abolish that jurisdiction; and
(*b*) the reference in article 227 to the Governor shall, in relation to any rules, forms or tables for subordinate courts in that territory, be construed as a reference to the President.

231. Establishment of a common High Court for two or more States.—(1) Notwithstanding anything contained in the preceding provisions of this Chapter, Parliament may by law establish a common High Court for two or more States or for two or more States and a Union territory.
(2) In relation to any such High Court,—

(*a*) the reference in article 217 to the Governor of the State shall be construed as a reference to the Governors of all the States in relation to which the High Court exercises jurisdiction;
(b) the reference in article 227 to the Governor shall, in relation to any rules, forms or tables for subordinate courts, be construed as a reference to the Governor of the State in which the subordinate courts are situate; and
(*c*) the references in articles 219 and 229 to the State shall be construed as a reference to the State in which the High Court has its principal seat:
Provided that if such principal seat is in a Union territory, the references in articles 219 and 229 to the Governor, Public Service Commission, Legislature and Consolidated Fund of the State shall be construed respectively as references to the President, Union Public Service Commission, Parliament and Consolidated Fund of India.

233. Appointment of district judges.—(1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.
(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

233A. Validation of appointments of, and judgments, etc., delivered by, certain district judges. —Notwithstanding any judgment, decree or order of any court,—
(*a*) (*i*) no appointment of any person already in the judicial service of a State or of any person who has been for not less than seven years an advocate or a pleader, to be a district judge in that State, and
(*ii*) no posting, promotion or transfer of any such person as a district judge,
made at any time before the commencement of the Constitution (Twentieth Amendment) Act, 1966, otherwise than in accordance with the provisions of article 233 or article 235 shall be deemed to be illegal or void or ever to have become illegal or void by reason only of the fact that such appointment, posting, promotion or transfer was not made in accordance with the said provisions;
(*b*) no jurisdiction exercised, no judgment, decree, sentence or order passed or made, and no other act or proceedings done or taken, before the commencement of the Constitution (Twentieth Amendment) Act, 1966 by, or before, any person appointed, posted, promoted or transferred as a district judge in any State otherwise than in accordance with the provisions of article 233 or article 235 shall be deemed to be illegal or invalid or ever to have become illegal or invalid by reason only of the fact that such appointment, posting, promotion or transfer was not made in accordance with the said provisions.

234. Recruitment of persons other than district judges to the judicial service.—Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.

235. Control over subordinate courts.— The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

245. Extent of laws made by Parliament and by the Legislatures of States.—(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.
(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

246. Subject-matter of laws made by Parliament and by the Legislatures of States.—
(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").
(2) Notwithstanding anything in clause (3), Parliament and subject to clause (1), the Legislature of any State *** also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").
(3) Subject to clauses (1) and (2), the Legislature of any State *** has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the 'State List').
(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.

247. Power of Parliament to provide for the establishment of certain additional courts.—
Notwithstanding anything in this Chapter, Parliament may by law provide for the establishment of any additional courts for the better administration of laws made by Parliament or of any existing laws with respect to a matter enumerated in the Union List.

248. Residuary powers of legislation.—
(1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.
(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

249. Power of Parliament to legislate with respect to a matter in the State List in the national interest.—
(1) Notwithstanding anything in the foregoing provisions of this Chapter, if the Council of States has declared by resolution supported by not less than two-thirds of

the members present and voting that it is necessary or expedient in national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force.

(2) A resolution passed under clause (1) shall remain in force for such period not exceeding one year as may be specified therein:

Provided that, if and so often as a resolution approving the continuance in force of any such resolution is passed in the manner provided in clause (1), such resolution shall continue in force for a further period of one year from the date on which under this clause it would otherwise have ceased to be in force.

(3) A law made by Parliament which Parliament would not but for the passing of a resolution under clause (1) have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period.

250. Power of Parliament to legislate with respect to any matter in the State List if a Proclamation of Emergency is in operation.—

(1) Notwithstanding anything in this Chapter, Parliament shall, while a Proclamation of Emergency is in operation, have, power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List.

(2) A law made by Parliament which Parliament would not but for the issue of a Proclamation of Emergency have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.

251. Inconsistency between laws made by Parliament under articles 249 and 250 and laws made by the Legislatures of States.—

Nothing in articles 249 and 250 shall restrict the power of the Legislature of a State to make any law which under this Constitution it has power to make, but if any provision of a law made by the legislature of a State is repugnant to any provision of a law made by Parliament which Parliament has under either of the said articles power to make, the law made by Parliament, whether passed before or after the law made by the legislature of the State, shall prevail, and the law made by the Legislature of the State shall to the extent of the repugnancy, but so long only as the law made by Parliament continues to have effect, be inoperative.

252. Power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State.—

(1) If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the Houses of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State.

(2) Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State.

253. Legislation for giving effect to international agreements.—
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 countries or any decision made at any international conference, association or other body.

260. Jurisdiction of the Union in relation to territories outside India.—
The Government of India may by agreement with the Government of any territory not being part of the territory of India undertake any executive, legislative or judicial functions vested in the Government of such territory, but every such agreement shall be subject to, and governed by, any law relating to the exercise of foreign jurisdiction for the time being in force.

SEVENTH SCHEDULE
(Article 246)

List I—Union List

1. Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination of effective demobilisation.
2. Naval, military and air forces; any other armed forces of the Union.
2A. Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment.
3. Delimitation of cantonment areas, local self-government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas.
4. Naval, military and air force works.
5. Arms, firearms, ammunition and explosives.
6. Atomic energy and mineral resources necessary for its production.
7. Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.
8. Central Bureau of Intelligence and Investigation.
9. Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India; persons subjected to such detention.
10. Foreign affairs; all matters which bring the Union into relation with any foreign country.
11. Diplomatic, consular and trade representation.
12. United Nations Organisation.
13. Participation in international conferences, associations and other bodies and implementing of decisions made thereat.
14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.
15. War and peace.

16. Foreign jurisdiction.
17. Citizenship, naturalisation and aliens.
18. Extradition.
19. Admission into, and emigration and expulsion from, India; passports and visas.
20. Pilgrimages to places outside India.
21. Piracies and crimes committed on the high seas or in the air; offences against the law of nations committed on land or the high seas or in the air.
22. Railways.
23. Highways declared by or under law made by Parliament to be national highways.
24. Shipping and navigation on inland waterways, declared by Parliament by law to be national waterways, as regards mechanically propelled vessels; the rule of the road on such waterways.
25. Maritime shipping and navigation, including shipping and navigation on tidal waters; provision of education and training for the mercantile marine and regulation of such education and training provided by States and other agencies.
26. Lighthouses, including lightships, beacons and other provisions for the safety of shipping and aircraft.
27. Ports declared by or under law made by Parliament or existing law to be major ports, including their delimitation and the constitution and powers of port authorities therein.
28. Port quarantine, including hospitals connected therewith; seamen's and marine hospitals.
29. Airways; aircraft and air navigation; provision of aerodromes; regulation and organisation of air traffic and of aerodromes; provision for aeronautical education and training and regulation of such education and training provided by States and other agencies.
30. Carriage of passengers and goods by railway, sea or air, or by national waterways in mechanically propelled vessels.
31. Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.
32. Property of the Union and the revenue therefrom, but as regards property situated in a State subject to legislation by the State, save in so far as Parliament by law otherwise provides.
34. Courts of wards for the estates of Rulers of Indian States.
35. Public debt of the Union.
36. Currency, coinage and legal tender; foreign exchange.
37. Foreign loans.
38. Reserve Bank of India.
39. Post Office Savings Bank.
40. Lotteries organised by the Government of India or the Government of a State.
41. Trade and commerce with foreign countries; import and export across customs frontiers; definition of customs frontiers.
42. Inter-State trade and commerce.
43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies.
44. Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities.
45. Banking.
46. Bills of exchange, cheques, promissory notes and other like instruments.
47. Insurance.

48. Stock exchanges and futures markets.
49. Patents, inventions and designs; copyright; trade-marks and merchandise marks.
50. Establishment of standards of weight and measure.
51. Establishment of standards of quality for goods to be exported out of India or transported from one State to another.
52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.
53. Regulation and development of oil fields and mineral oil resources; petroleum and petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable.
54. Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.
55. Regulation of labour and safety in mines and oilfields.
56. Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.
57. Fishing and fisheries beyond territorial waters.
58. Manufacture, supply and distribution of salt by Union agencies, regulation and control of manufacture, supply and distribution of salt by other agencies.
59. Cultivation, manufacture, and sale for export, of opium.
60. Sanctioning of cinematograph films for exhibition.
61. Industrial disputes concerning Union employees.
62. The institutions known at the commencement of this Constitution as the National Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial and the Indian War Memorial, and any other like institution financed by the Government of India wholly or in part and declared by Parliament by law to be an institution of national importance.
63. The institutions known at the commencement of this Constitution as the Banaras Hindu University, the Aligarh Muslim University and the Delhi University; the University established in pursuance of article 371E; any other institution declared by Parliament by law to be an institution of national importance.
64. Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance.
65. Union agencies and institutions for—
(a) professional, vocational or technical training, including the training of police officers; or
(b) the promotion of special studies or research; or
(c) scientific or technical assistance in the investigation or detection of crime.
66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.
67. Ancient and historical monuments and records, and archaeological sites and remains, declared by or under law made by Parliament to be of national importance.
68. The Survey of India, the Geological, Botanical, Zoological and Anthropological Surveys of India; Meteorological organisations.
69. Census.
70. Union Public Services; All-India Services; Union Public Service Commission.
71. Union pensions, that is to say, pensions payable by the Government of India or out of the Consolidated Fund of India.

72. Elections to Parliament, to the Legislatures of States and to the offices of President and Vice-President; the Election Commission.
73. Salaries and allowances of members of Parliament, the Chairman and Deputy Chairman of the Council of States and the Speaker and Deputy Speaker of the House of the People.
74. Powers, privileges and immunities of each House of Parliament and of the members and the Committees of each House; enforcement of attendance of persons for giving evidence or producing documents before committees of Parliament or commissions appointed by Parliament.
75. Emoluments, allowances, privileges, and rights in respect of leave of absence, of the President and Governors; salaries and allowances of the Ministers for the Union; the salaries, allowances, and rights in respect of leave of absence and other conditions of service of the Comptroller and Auditor-General.
76. Audit of the accounts of the Union and of the States.
77. Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practise before the Supreme Court.
78. Constitution and Organisation (including vacations) .of the High Courts except provisions as to officers and servants of High Courts; persons entitled to practise before the High Courts.
79. Extension of the jurisdiction of a High Court to, and exclusion of the jurisdiction of a High Court from, any Union territory.
80. Extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which such area is situated; extension of the powers and jurisdiction of members of a police force belonging to any State to railway areas outside that State.
81. Inter-State migration; inter-State quarantine.
82. Taxes on income other than agricultural income.
83. Duties of customs including export duties.
84. Duties of excise on tobacco and other goods manufactured or produced in India except—
(a) alcoholic liquors for human consumption.
(b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

APPENDIX- II

TheGovernment of India Act 1935

2. Government of India by the Crown :- (1) All rights, authority, and jurisdiction heretofore belonging to His Majesty the King, Emperor of India, which appertain or are incidental to the Government , of the territories in India for 'the time being vested in him, and all rights', authority and jurisdiction' exercisable by him in or in relation to, any other territories in India, are exercisable by His Majesty, except in so far as may be otherwise provided by or under this Act, or as he may be otherwise directed by His Majesty :

Provided that any powers connected with the exercise of the functions of the Crown in its relations with Indian States shall in India, if not exercised by His Majesty, be exercised only by, or by' persons acting under the authority of, His Majesty's Representative for the exercise of those functions of the Crown.

(2) the said rights, authority and jurisdiction shall include any rights, authority or jurisdiction heretofore exercisable in or in relation to any territories in India by the Secretary of State, the Secretary of State in Council, the Governor- General, the Governor- General in Council, any Governor or any Local Government whether by delegation from His Majesty or otherwise.

3.The Governor-General of India and His Majesty's Representatives as regards relations with Indian States. — (1) The Governor-General of India is appointed by His Majesty by a Commission under the Royal Sign Manual and has—

(a) all such powers and duties as are conferred or imposed on him by or under this Act; and

(b) such other powers, of His Majesty, not being powers connected with the exercise of the functions of the Crown in its relations with Indian States, as His Majesty may be pleased to assign to him.

(2) His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States is appointed by His Majesty in-like manner and has such powers and duties' in connection with the exercise of those functions (not being powers or duties conferred or imposed by or under this Act on the Governor-General) as His Majesty may be pleased to assign to him.

(3) It shall be lawful for His Majesty to appoint One person to fill both the said offices.

5. Proclamation of Federation of India- (1)It shall be lawful for His Majesty, if an address in. that behalf has been presented to him by each House, of Parliament and if the condition hereinafter mentioned is satisfied, to declare by proclamation that as from the day therein appointed there shall be united in a 'Federation, under the Crown, by the name of, the Federation of India, the Provinces hereinafter called' Governors' Province; and

(b) the Indian States which have acceded or may thereafter accede to the Federation;

and in the Federation so established there shall be included the Provinces hereinafter called Chief Commissioners' Provinces.

(2) The condition referred to' is that States-

(a) the Rulers whereof will, in accordance with the provisions contained in Part II of the First Schedule to this Act, be entitled- to choose not less than fifty-two members of the Council of State; and

(b) the aggregate population, whereof, as 'ascertained in 'accordance with the said provisions, amounts to at least one-half of the total population of the States as so ascertained have acceded to she Federation.

7. Functions of Governor-General- (l) Subject to the provisions of this Act, the executive authority of the Federation shall be exercised on behalf of His Majesty by the Governor-General, either directly or through officers subordinate to him, but nothing in this section shall prevent the Federal Legislature from conferring functions upon subordinate authorities, or be deemed to transfer to the Governor- General any functions conferred by any existing Indian law on any court, judge or officer, or on any local or other authority.
(2) Reference in this Act to the functions of the Governor-General shall be construed as references to his powers and duties in the exercise of the executive authority of the Federation and to any other powers and duties conferred or -imposed on him as Governor-General by or under this Act, other than powers exercisable by him by reason that they have been assigned to him by His Majesty under Part I of this Act.
(3) The provisions of the Third Schedule to this Act shall have effect with respect to the salary and allowances of the Governor- General and the provision to be made for enabling him to discharge conveniently and with dignity the duties of his office.

8. Extent of executive authority, of the Federation (1) Subject to the provisions of this Act, the executive authority of the Federation extend (a) to the matters with respect to which the Federal Legislature has power to make laws;
(b) to the raising in British India on, behalf of His Majesty of naval military and air forces and to the governance of His Majesty's forces, borne on the Indian establishment;
(c) to the exercise of such rights, authority and jurisdiction as are exercisable by His Majesty by treaty, grant, usage, sufferance, or otherwise in and in relation to the tribal areas:
Provided that-
(i) the said authority does not, save as expressly provided in this Act extended in any Province to matters with respect to which the Provincial Legislature has power to make laws;
(ii) the said authority does not, save as expressly provided in this Act, extended in any Federated State save to matters with respect to which the Federal legislature has power to make laws for- that State, and the exercise thereof in each State, shall be subject to such limitations; if any, as may be specified in the Instrument of Accession of the State;
(iii) the said authority does not extend to the enlistment or enrolment in any forces raised in India of any person unless he is either a subject of His Majesty or a native of India or of territories adjacent to India; and
(iv) commissions in any such force shall be granted by His Majesty save in so far as he may be pleased to delegate that power by virtue of the provisions of Part I of this Act or otherwise.
(2) The executive authority of the Ruler of a Federated State shall, notwithstanding anything in this section, continue to be exercisable in that State with respect to matters with respect to which the Federal, Legislature has power to make laws for that State except in so far as the executive, authority of the Federation becomes exercisable in the State, to the exclusion of the executive authority of the Ruler by virtue of a Federal law.

11. Provisions as to defence, ecclesiastical affairs, external affairs and the tribal areas-(1) The functions of the Governor-General with respect to defence and ecclesiastical affairs and with respect to external affairs, except the relations between the Federation, and any part of His Majesty's dominions, shall be exercised by him in his discretion, and his functions in or in relation to the tribal areas shall be similarly exercised.
(2) To assist him in the exercise of those functions the Governor-General may appoint counsellors, not exceeding three in number, whose salaries and conditions of service shall be such as may be prescribed by His Majesty in Council.

12. Special responsibilities of Governor-General- (l) In the exercise of his functions the Governor-General shall have the following special responsibilities, that is to, say-
(a) the prevention of any grave menace to the peace ox tranquillity of India or any part thereof;
(b) the safeguarding of the financial stability and credit of the Federal Government;
(c) the safeguarding of the legitimate interests of minorities;
(d) the securing to, and to the dependants of, persons who are or have been members of the public services of any rights provided or preserved for them by or under this Act and the safeguarding of their legitimate interests;
(e) the securing in the sphere of executive action of the purposes which the provisions of chapter III of Part V of this Act are designed to secure in relation to legislation;
(f) the prevention of action, which would subject goods of United Kingdom or Burmese origin imported into India to discriminatory or penal treatment;
(g) the protection of the rights of any Indian State and the rights and dignity of the Ruler thereof; and ;
(h) the securing that the due discharge of his functions with respect to matters with respect to which he is by or under this Act required to act in his discretion, or to exercise his individual judgment, is not prejudiced or impeded by any course of action taken with respect to any other matter.
(2) If and in so for as any special responsibility of the Governor-General is involved, he shall in the exercise of his functions exercise his individual judgment as to the action to be taken.

18. Constitution of the Federal Legislature- (1) There shall be a Federal Legislature which shall consist of His Majesty, represented by the Governor- General, and two Chambers, to be known respectively as the Council of State and the House of Assembly (in, this Act referred to as "the Federal Assembly").
(2) The Council of State shall consist of one hundred and one fifty-six representatives of British India and not more than one hundred and four representatives of the Indian States, and the Federal Assembly shall consist of two hundred and fifty representatives of British India and not more than one hundred and twenty five representatives of the Indian States.
(3) The said representatives shall be chosen in accordance with the provisions in that behalf contained in the First Schedule to this Act.
(4) The Council of State shall be a permanent body not subject to dissolution, but as near as may be one-third of the members thereof shall retire in every third year in accordance with the provisions in that behalf contained in the said First Schedule.

(5) Every Federal Assembly, unless sooner dissolved, shall continue for five years from the date, appointed for their first meeting and no longer, and the expiration of the said period of five years shall operate as a dissolution of the Assembly.

99. Extent of Federal and Provincial laws-(1) Subject to the provisions of this Act, the Federal Legislature may make laws for the whole or any part of British India or for any Federated State, and a Provincial Legislature may make laws for the Province or for any part thereof.
(2) Without prejudice to the generality of the powers conferred by the preceding sub-section, no Federal law shall, on the ground that it would have extra territorial operation, be deemed to be invalid in so far as it applies-
(a) to British subjects and servants of the Crown in any part of India; or
(b) to British subjects who are domiciled in any part of India wherever they may be; or
(c) to or to persons on, ships or aircraft registered in British India or any Federated State wherever they may be; or
(d) in the case of a law with respect to a matter accepted in the Instrument of Accession of a Federated State as a matter with respect to which the Federal Legislature may make, laws for that State, to subjects of that State wherever they may be; or
(e) in the case of a law for the regulation or discipline of any naval, military, or air force raised in British India, to members of, and persons attached to employed with or following, that force, wherever they may be.

100.Subject matter of Federal and Provincial laws- (1) Notwithstanding anything in the two next succeeding sub-sections, the Federal Legislature has and a Provincial Legislature has not, power to make laws with, respect to any of the matters enumerated in List I in the Seventh Schedule to this Act (hereinafter called the "Federal Legislative List").
(2) Notwithstanding anything .in the next succeeding sub-section, the Federal Legislature, and, subject to the preceding sub-section, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the "Concurrent Legislative List").
(3) Subject to the two preceding sub- sections the Provincial Legislature has and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II the said Schedule (hereinafter called the "Provincial Legislative List").
(4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof.

101. Extent of power to legislate for States- Nothing in this Act shall be construed as empowering the Federal Legislature to make, laws for a Federated State otherwise than in accordance with the Instrument of Accession of that State and any limitations contained therein.

108. Sanction of Governor-General or, Governor required for certain legislative proposals- (1) Unless the Governor-General in his discretion thinks fit to give his previous sanction, there shall not be introduced into, or moved in, either Chamber of the Federal Legislature, any Bill or amendment which-

(a) repeals, amends or is repugnant to any provisions of any Act of Parliament extending to British India; or
(b) repeals, amends or is repugnant to any Governor-General's or Governor's Act, or any ordinance promulgated in his discretion by the Governor- General or a Governor; or
(c) affects matters as respects which the. Governor-General is, by or under this Act, required to act in his discretion; or
(d) repeals, amends or affects any Act relating to any police, force; or
(e) affects the procedure for criminal proceedings in which European British subjects are concerned; or
(f) subjects persons not resident , in British India to greater taxation than persons resident in British India or subjects companies not wholly controlled and managed in British India to greater taxation than companies wholly controlled and managed therein; or
(g) affects the grant of relief from any Federal tax on income in respect of income taxed or taxable in the United Kingdom.
(2) Unless the Governor- General in his discretion thinks fit to give his previous sanction, there shall not be introduced into, or moved in, a Chamber of a Provincial Legislature any Bill or amendment which-
(a) repeals, amends, or is repugnant to any provisions of any Act of Parliament extending to British India; or
(b) repeals, amends or is repugnant to any Governor-General's Act, or any ordinance promulgated in his discretion by the Governor-General; or
(c) affects matters as respects which the Governor-General is by or under this Act, required to act in his discretion; or
(d) affects the procedure for criminal proceedings in which European British subjects are concerned ;
and unless the Governor of the Province in his discretion thinks fit to give his previous sanction, there shall hot be introduced or moved any Bill or amendment which-
(i) repeals, amends or is repugnant to any Governor's Act, or any ordinance-promulgated in his discretion by the Governor ; or
(ii) repeals, amends or affects any Act relating to any police force.
(3) Nothing in this section affects the operation of any other provision in this; Act which requires the previous sanction of the Governor- General or of a Governor to the introduction of any Bill or the moving of any amendment.

200. Establishment and constitution of Federal Court- (1) There shall be a Federal Court consisting of a Chief Justice of India and such number of other judges as His Majesty may deem necessary, but unless and until an address has been presented by the Federal Legislature to the Governor- General for submission to His Majesty praying for an increase in the number of judges, the number of puisne judges shall not exceed six.
(2) Every judge of the Federal Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold office until he attains the age of sixty-five years:
Provided that—
(a) a judge may by resignation under his hand addressed to the Governor- General resign his office;

(b) a judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee of the Privy Council, on reference being made to them by His Majesty, report that the judge ought on any such ground to be removed.

(3) A Person shall not be qualified for appointment as a judge of the Federal Court unless he--,

(a) has been for at least five years a judge of a High Court, in British India or in a Federated State ; or

(b) is a barrister of England or Northern Ireland of at least, ten years standing, or a member of the Faculty of Advocates in Scotland of at least ten years standing; or

(c) has been for at least ten years a pleader of a High Court' in British India or in a Federated State or of two or more such Courts in succession:

Provided that---

(i) a person shall not be qualified for appointment as Chief Justice of India unless he is, or when first appointed to judicial office was, a barrister, a member of the faculty of Advocates or a pleader; and

(ii) in relation to the Chief Justice of India, for the references in paragraphs (b) and (c) of this sub-section to ten years there shall be substituted references' to fifteen years

In computing for the purposes of this subsection the standing of a barrister or a member of the Faculty of Advocates, or the period during which a person has been a pleader, any period during which a person has held judicial office alter he became a barrister, a member of the Faculty of Advocates or a pleader as the case may be, shall be included.

(4) Every person appointed to be a judge of the Federal Court shall, before he enters upon his office, make and subscribe, before the Governor General or some person appointed by him an oath, according to the form set out in that behalf in the Fourth Schedule to this Act.

APPENDIX- III

Indian Independence Act, 1947

An Act to make provision for the setting up in India of two independent Dominions, to substitute other provisions for certain provisions of the Government of India Act, 1935, which apply outside those Dominions, and to provide for, other matters consequential on or connected with the setting up of those Dominions

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1.(i) As from the fifteenth day of August, nineteen hundred The new and forty-seven, two independent Dominions shall be set up in Dominions. India, to be known respectively as India and Pakistan

(2) The said Dominions are hereafter in this Act referred to as the new Dominions ", and the said fifteenth day of August is hereafter in this Act referred to as "the appointed day ".

2.(1) Subject to the provisions of subsections (3) and (4) of this section, the territories of India shall be the territories under the sovereignty of His Majesty which, immediately before the appointed day, were. included in British India except the territories which, under subsection .(2) of this section, are to be the territories of Pakistan.

(2) Subject to the provisions of subsections (3) and (4) of this section, the territories of Pakistan shall be- (a) the territories which, on the appointed day, are included in the Provinces of East Bengal and West Punjab, as constituted under the two following sections (b) the territories which, at the date of the passing of this Act, are included in the Province of Sind and the Chief Commissioner's Province of British Baluchistan ; and (c) if, whether before or after the passing of this Act but before the appointed day, the Governor-General declares that the majority of the valid votes cast in the referendum which, at the date of the passing of this Act, is being or has recently been held in that behalf under his authority in the North West Frontier Province are in favour of representatives of that Province taking part in the Constituent Assembly of Pakistan, the territories which, at the date of the passing of this Act, are included in that Province.

(3) Nothing in this section shall prevent any area being at any time included in or excluded from either of the new Dominions, so, however, that- (a) no area not forming part of the territories specified in subsection (1) or, as the case may be, subsection (2), of this section shall be included in either Dominion without the consent of that Dominion; and (b) nt.. area which forms part of the territories specified in the said subsection (1) or, as the case may be, the said subsection (2), or which has after the appointed day been included in either Dominion, shall be excluded from that Dominion without the consent of that Dominion.

(4) Without prejudice to the generality of the provisions of subsection (3) of this section, nothing in this section shall be construed as preventing the accession of Indian States to either of the new Dominions.

5.For each of the new Dominions, there shall be a Governor-General who shall be appointee by His Majesty and shall represent His Majesty for the purposes-of the government of the Dominion
Provided that, unless and until provision to the contrary is made by a law of the Legislature of either of the new Dominions, the same person may be Governor-General of both the new Dominions.

6.(1) The Legislature of each of the new Dominions shall have full power to make laws for that Dominion, including laws having extra-territorial operation.
(2) No law and no provision of any law made by the Legislature of either of the new Dominions shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of this or any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Legislature of each Dominion include the power to repeal or amend any such Act, order, rule or regulation in so far as it is part of the law of the Dominion.
(3) The Governor-General of each of the new Dominions shall have full power to assent in His Majesty's name to any law of the Legislature of that Dominion and so much of any Act as relates to the disallowance of laws by His Majesty or the reservation of laws for the signification of His Majesty's pleasure thereon or the suspension of the operation of laws until the signification of His Majesty's pleasure thereon shall not, apply to laws of the Legislature of either of the new Dominions.
(4) No Act of Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to either of the new Dominions as part of the law of that Dominion unless it is extended thereto by a law of the Legislature of the Dominion.
(5) No Order in Council made on or after the appointed day under any Act passed before the appointed day, and no order, rule or other instrument made on or after the appointed day under any such Act by any United Kingdom Minister or other authority, shall extend, or be deemed to extend, to either of the new Dominions as part of the law of that Dominion.
(6) The power referred to in subsection (i) of this section extends to the making of laws limiting for the future the powers of the Legislature of the Dominion.

7. (1) As from the appointed day-
(a) His Majesty's Government in the United Kingdom have no responsibility as respects the government of any of the territories which, immediately before that day, were included in British India ;
(b) the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States, all functions exercisable by His Majesty at that date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the rulers thereof, and all powers, rights, authority or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise , and
(c) there lapse also any treaties or agreements in force at the date of the passing of this Act between His Majesty and any persons having authority in the tribal areas, any obligations of His Majesty existing at that date to any such persons or with respect to the tribal areas, and all powers, rights, authority or jurisdiction exercisable at that date by His Majesty in or in relation to the tribal areas by treaty, grant, usage, sufferance or otherwise.

Provided that, notwithstanding anything in paragraph (b) or paragraph (c) of this subsection, effect shall, as nearly as may be, continue to be given to the provisions of any such agreement as is therein referred to which relate to customs, transit and communications, -posts and telegraphs, or other like matters, until the provisions in question are denounced by the Ruler of the Indian State or person having authority in the tribal areas on the one hand, or by the Dominion or Province or other part thereof concerned on the other hand, or are superseded by subsequent agreements.
(2) The assent of the Parliament of the United Kingdom is hereby given to the omission from the Royal Style and Titles of the words " Indiae Imperator " and the words " Emperor of India " and to the issue by His Majesty for that purpose of His Royal Proclamation under the Great Seal of the Realm.

8.(1) In the case of each of the new Dominions, the powers of the Legislature of the Dominion shall, for the purpose of making provision as to the constitution of the Dominion, be exercisable in the first instance by the Constituent Assembly of the of that Dominion, and references in this Act to the Legislature of the Dominion shall be construed accordingly.
(2) Except in so far as other provision is made by or in accordance with a Jaw made by the Constituent Assembly of the Dominion under subsection (i) of this section, each of the new Dominions and all Provinces and other parts thereof shall be governed as nearly as may be in accordance with the Government of India Act, 1935 ; and the provisions of that Act, and of the Orders in Council, rules and other instruments made thereunder, shall, so far as applicable, and subject to any express provisions of this Act, and with such, omissions, additions, adaptations and-. modifications as may be specified in orders of the Governor-General under the next succeeding section, have effect accordingly:
Provided that-
(a) the said provisions shall apply separately in relation to each of the new Dominions and nothing in this subsection shall be construed as continuing on or after the appointed day any Central Government or Legislature common to both the new Dominions ;
(b) nothing in this subsection shall be construed as continuing in force on or after the appointed day any form of control by His Majesty's Government in the United Kingdom over the affairs of the new Dominions or of any Province or other part thereof ;
(c) so much of the said provisions as requires the Governor General or any Governor to act in his discretion or exercise his individual judgment as respects any matter shall cease to have effect as from the appointed day ;
(d) as from the appointed day, no Provincial Bill shall be reserved under the Government of India Act, 1935, for the signification of His Majesty's pleasure, and no Provincial Act shall be disallowed by His Majesty thereunder ; and
(e) the powers of the Federal Legislature or Indian Legislature under that Act, as in force in relation to each Dominion, shall, in the first instance, be exercisable by - the Constituent Assembly of the Dominion in addition to the powers exercisable by that Assembly under subsection (1) of this section.
(3) Any provision of the Government of India Act, 1935, which, as applied to either of the new Dominions by subsection (2) of this section and the orders therein referred to, operates to limit the power of the legislature of that Dominion shall, unless and until other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion in accordance with the provisions of subsection (1) of this

section, have the like effect as a law of the Legislature; of the Dominion limiting for the future the powers of that Legislature.

9.(1) The Governor-General shall by order make such provision as appears to him to be necessary or expedient- (a) for bringing the provisions of this Act into effective operation ;

(b)for dividing between the new Dominions, and between the new Provinces to be constituted under this Act, the powers, rights, property,, duties and liabilities of the Governor-General in Council or, as the case may be, of the relevant Provinces which, under this Act, are to cease to exist ;

(c)for making omissions from, additions to, and adaptations and modifications of, the Government of India Act, 1935, and the Orders in Council, rules and other instruments made thereunder, in their application to the separate new Dominions ;

(d) for removing difficulties arising in connection with the transition to the provisions of this Act ;

(e)for authorising the carrying on of the business of the Governor-General in Council between the passing of this Act and the appointed day otherwise than in accordance with the provisions in that behalf of the Ninth Schedule to the Government of India Act, 1935;

(f)for enabling agreements to be entered into, and other acts done, on behalf of either of the new Dominions before the appointed day ;

(g)for authorising the continued carrying on for the time being on behalf of the new Dominions, or on behalf of any two or more of the said new Provinces, of services and activities previously carried on behalf of British India as a whole or on behalf of the former Provinces which those new Provinces represent ;

(h)for regulating the monetary system and any matters pertaining to the Reserve Bank of India ; and

(i)so far as it appears necessary or expedient in connection with any of the matters aforesaid, for varying the constitution, powers or jurisdiction of any legislature, court or other authority in the new Dominions and creating new legislatures, courts or other authorities therein.

(2) The powers conferred by this section on the Governor-General shall, in relation to their respective Provinces, be exercisable also by the Governors of the Provinces which, under this Act, are to cease to exist ; and those powers shall, for the purposes of the Government of India, Act, 1935, be deemed to be matters as respects which the Governors are, under that Act, to exercise their individual judgment.

(3) This section shall be deemed to have had effect as from the third day of June, nineteen hundred and forty-seven, and any order of the Governor-General or any Governor made on or after that date as to any matter shall have effect accordingly, and any order made under this section may be made so as to be retrospective to any date not earlier than the said third day of June Provided that no person shall be deemed to be guilty of an offence' by reason of so much of any such order as makes any provision thereof retrospective to any date before the making thereof.

18.(1) In so far as any Act of Parliament, Order in Council, to existing order, rule, regulation or other. instrument passed or made before laws, etc. the appointed day operates otherwise than as part of the law of British India or the new Dominions, references therein to India or British India, however worded and whether by name or not, shall, in so far as the context permits and except so far as Parliament may hereafter otherwise provide, be construed as, or as including, references to the new

Dominions, taken together, or taken separately, according as the circumstances and subject matter may require :
Provided that nothing in -this subsection shall be construed as continuing in operation any provision' in so far as the continuance thereof as adapted by this subsection is inconsistent with any of the provisions, of this Act other than this section.
(2) Subject to the provisions of subsection (1), of this section and, to any other express provision of this Act, the Orders in Council made under subsection (5) of section three hundred and eleven of the Government of India Act, 1935, for adapting and modifying Acts of Parliament shall, except so far as Parliament may hereafter otherwise provide, continue in force in relation to all Acts in so far as they operate otherwise than as part of the law of British India or the new Dominions.
(3) Save as otherwise expressly provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed day shall, so far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf.
(4) It is hereby declared that the Instruments of Instructions issued before the passing of this Act by His Majesty to the Governor-General and the Governors of Provinces lapse as from the appointed day, and nothing in this Act shall be construed as continuing in force any provision of the, Government of India Act, 1935, relating to such Instruments of Instructions.
(5) As from the appointed day, so much of any enactment as requires the approval of His Majesty in Council to any rules of court shall not apply to any court in either of the new Dominions.

APPENDIX- IV
Indian Independence (International Arrangements) Order, 1947

1.The international rights and obligations to which India is entitled and subject immediately before 15 August 1947, will devolve in accordance with the provisions of this agreement.

2.(a) Membership of all international organizations, together with the rights and obligations attaching to such membership, will devolve solely upon the Dominion of India.

3.(a) Rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of India will devolve upon that Dominion.
(b) Rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of Pakistan will devolve upon that Dominion.

4.Subject to articles 2 and 3 of this agreement, rights and obligations under all international agreements to which India is a party immediately before the appointed day will devolve both upon the Dominion of India and upon the Dominion of Pakistan, and will, if necessary, be apportioned between the two Dominions.