International Law in the Courts of India

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1. INTRODUCTION

Domestic courts and tribunals have, in recent years, been taking frequent recourse to international law as a means to settle disputes. Two reasons can be adduced for this trend. Firstly, it could be that domestic courts and lawyers are increasingly exposed to or getting well-versed in international law and its principles. Secondly, due to globalization, there is an inevitable foreign element in majority of the disputes. Both factors are interrelated. Domestic courts are using international law through broad interpretations coupled with domestic constitutional and legal provisions. This is the prevailing perception about international law within various domestic legal jurisdictions. India is no exception.

Domestic courts in various jurisdictions, including India, continue to rely and decide the cases primarily on the basis of their own laws or constitutions while using international law as a supplementary means to substantiate the arguments. Indian courts have been applying international law to fill the gaps in the domestic law and policy. In some domestic

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jurisdictions, international legal norms are referred directly, though this is done subject to certain prior constitutional approvals and procedures.\(^5\)

According to one view, this kind of international-law-dominance is inevitable considering the impact and reach of globalization process in various fields. The dire need for evolving the globally accepted norms to deal with certain kinds of transnational issues, transactions, and problems is increasing. States do accept such a need. However, they, especially the courts, are reluctant to cede their sovereign right to accept or reject such norms on an automatic basis.\(^6\) Regardless of States’ intent, international legal norms embodied through various treaties and agreements have influenced domestic legal framework.\(^7\)

The other view is that international law is entering into domestic legal space through changes that had been brought about to give effect to obligations undertaken under various treaties and agreements.\(^8\) In majority of the domestic legal systems, international law cannot be directly given effect to, or for that matter, it cannot be a stand-alone norm.\(^9\) The effective implementation of international law in the domestic sphere, therefore, is essentially an international legal question bringing to the fore the issues relating to the relationship between international law and municipal law.\(^10\)

A distinction, however, will have to be made between application of substantive international legal norms and of taking recourse to certain for-
eign legal elements. It could be safely asserted that customary international law, multilateral and bilateral treaties and agreements that are in force could be regarded as constituting the core of substantive international legal norms. On the other hand, courts and other tribunals while dealing with various cases might be referring to or would rely on various legal principles and norms drawn from different legal systems. It could, for example, be a foreign law or legislation which could be used as a fact or as an analogy in a judgment. Any interpretation or placement of a foreign legal element could also be regarded as part of the usage of international law, although this could be strictly regarded as part of what could be termed as private international law. In the context of Indian courts at all levels, this interface between international law and private international law is a constant factor.

International law continues to be an exotic legal domain for the Indian courts, at least for certain level of courts. It can also be stated that questions of international law arise primarily at the level of higher judiciary. At the level of lower judiciary in the Indian context, the questions of international law seem to appear very rarely. However, there are certain designated areas of law, particularly with regard to procedural laws, wherein international legal norms and procedures become important, even within a limited context. Some of these areas in the Indian context at the level of lower judiciary can be identified such as, for example, ensuring observance of human rights in custody, enforcement of foreign judgments, implementation of foreign arbitral awards, matrimonial cases and issues concerning maintenance, bail application for foreign nationals with sureties, internet crimes, extradition matters, service of summons in foreign jurisdictions, enforcement of intellectual property rights, recognition and dissolution of marriages that had been solemnized in foreign jurisdictions, breach of contract suits, especially in cases where the suit has been dismissed in other foreign jurisdictions, inter-country adoptions, breach of contract by multinational companies, child custody and alimony rights, and environmental issues and granting of injunctions. This list, in recent years, is expanding to include many new legal issues.

Considering the above context, this article seeks to examine the application and use of international law in the Indian courts. The specific focus of the study will be on higher judiciary and where necessary to lower

11 Id. at 11.
judiciary as well. The assumption is that it is the higher judiciary that is taking recourse to international law frequently. The first part of the study will outline the Indian constitutional and legal context for the application of international law. The second part will deal with the evolution of the Indian court cases that had dealt with international legal issues with specific focus on applicability and acceptance of customary international law. The third part will focus on some important cases in recent years and will make an attempt to outline the future trends. The final part will end with conclusions.

2. INTERNATIONAL LAW IN THE INDIAN CONSTITUTIONAL SCHEME

Article 51 of the Indian Constitution makes reference to “international law and treaty obligations.”\textsuperscript{12} This particular provision, however, is a general provision on the promotion of “international peace and security” followed by the Indian commitment to “maintain just and honourable relations between nations.”\textsuperscript{13} The last two paragraphs of Article 51 specifically refer to “international law and settlement of international disputes.”\textsuperscript{14} To be specific, Article 51(c) seeks to “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.”\textsuperscript{15}

In the context of Article 51, there is an argument that it does not provide a priority to the application of international legal norms. It merely seeks to “exhort the Indian State to make all possible endeavours to adhere to and respect international law.”\textsuperscript{16} This argument comes essentially from the reasons that relate to the placement of Article 51 within the constitutional

\begin{itemize}
\item \textsuperscript{12} India Const. art. 51.
\item \textsuperscript{13} Id. (providing that “[t]he State shall endeavour to (a) promote international peace and security; (b) maintain just and honourable relations between 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”).
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Id. §§ (c), (d).
\item \textsuperscript{16} Id. art. 51.
\end{itemize}
scheme. It appears in Part IV of the Indian Constitution which has been termed as “Directive Principles of State Policy.”17 These Directives, unlike the Fundamental Rights which appear in Part III of the Constitution, are not enforceable by any court.18 However, they are “fundamental in the governance of the country.”19 The Indian State also has the duty to apply these principles that had been embodied in the Directives in making laws.20

The Fundamental Rights which appear in Part III of the Indian Constitution are enforceable and any law made in contravention of fundamental rights is, to the extent of the contravention, shall be void.21 Fundamental rights grant some basic rights to all persons and citizens and they are to be respected. Without going into the extensive debates, discussions and numerous court cases that had saddled the Indian constitutional scheme about the primacy of Part III (Fundamental Rights) and Part IV (Directive Principles of State Policy), it suffices to say that there seems to be a balance achieved between these two parts through various interpretations given by the higher judiciary.22

The drafting history of Article 51 of the Indian Constitution essentially reflects the approach of the Indian State to the issues concerning interna-

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17 *Id.* Part IV.
18 *India Const.* art. 37 (Article 37, in Part IV of the Indian Constitution, provides that “[t]he 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”).
19 *Id.*
20 *Id.*
21 *India Const.* art. 13(2) (providing *inter alia*, that “[t]he 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”).
22 See *India Const.* art 31C, amended by The Constitution (Forty-second Amendment) Act, 1976. This issue specifically appeared with the amendment of the Indian Constitution in 1976. This was the Constitution (Forty-second Amendment) Act, 1976 by inserting Article 31C, which sought to provide that laws made pursuant to Part IV shall not be held void on the ground that it was inconsistent with Part III (specifically Article 14 – right to equality and Article 19 – freedom of speech and expression).
tional relations and the place of international law in that context. Some scholars have argued that the language of Article 51 was drawn mainly from the Havana Declaration adopted by the International Labour Organization (ILO) on November 30, 1939. The soft approach to Article 51 is also attributed to India’s hard engagements with its neighbours such as Kashmir, water sharing issues, boundary problems and host of other issues. India preferred a negotiation in settlement of most of these issues amicably or through arbitration, and sought to reflect that in its constitutional mandate.

The soft constitutional mandate in Article 51 is clear from its references to such phrases as “[t]he State shall endeavour to” and “foster respect for international law.” As we have seen, Article 37 of the Indian Constitution requires that these mandates, including international legal obligations, in Part IV would have to be implemented through appropriate legislations. In order to accomplish this, the Constitution provides for an implementation mechanism through Article 253 which inter alia, vests in the Parliament the power to make laws implementing international instruments to which India becomes a party. This provision appears in Part XI of the Indian Constitution which seeks to outline and determine the scope of

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23 Hegde, supra note 3, at 57; Rao, supra note 3.
24 Some of the issues went to the ICJ. Right of Passage case, Pakistan’s preference to take Indus Water issue to the ICJ is well-known and documented. See Niranjan D. Gulati, Indus Water Treaty: An Exercise in International Mediation (1973); Stephen C. McCaffrey, The Law of International Watercourses (2nd ed. 2007).
25 India Const. art. 51.
26 Id. art. 37.
27 Id. art. 253 (providing that “[n]otwithstanding 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”).
legislative powers shared between the Central Government and the Federal structures, i.e., States.  

Article 253 should be read along with Article 73 of the Indian Constitution. Article 73 which is in Part V of the Constitution defining the scope of executive power of the Central Government provides that “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.” In Article 246, this legislative power is specified through three different lists, namely Union List, State List and Concurrent List which outline the areas of their respective dominance. While Parliament has the sole power to legislate and deal with all subject matters that fall within the Union List, States have the power to legislate with regard to the subject matter within the State List. The subject matters within the Concurrent List overlap between the Union and the States.

The Entry 14 in the Union List vests the Parliament with the power “to enter into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.”

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28 See id. arts. 245-63. Part XI of the Indian Constitution (from Articles 245 to 263) is equally contentious as it seeks to demarcate the legislative powers between Union and the States. Under Article 245(1), the Parliament has power to make laws for the whole or any part of the territory of India, and the Legislature of a State has power to make laws for the whole or any part of the state. Further, it provides that “[n]o law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.” Reference should also be made to Article 260, which seeks to confer on the Central Government power to extend its executive, legislative, or judicial functions to territories outside India. This extension of jurisdiction is exercised through Foreign Jurisdiction Act, 1947 which, inter alia, provides for the exercise of jurisdiction by the Government of India over territories outside India in respect of which the Government of India has acquired jurisdiction by treaty, agreement, grant, usage, political sufferance, or other lawful means.

29 Id. art. 73.

30 See id. art. 246. These Lists (I, II and III) are referred to Article 246 and the subject matters covered under these Lists are provided in the Seventh Schedule of the Indian Constitution.

31 Id. Seventh Schedule, List I, Entry 14.
(the Federal structures) have no authority to conclude treaties and agreements. To put it broadly, States have no authority to undertake directly any international obligations or to implement such obligations sans the concurrence of the Central Government.

There are at least ten topics in the Union List that refer to various kinds of subject matter that fall within the realm of international law and relations. These subject matters include: foreign affairs; diplomatic, consular and trade representation; United Nations; participation in international conferences, associations and other bodies and implementing of decisions concluded there; war and peace; foreign jurisdiction; citizenship; naturalization; extradition; passports and visas; piracy and crimes committed on the high seas or in the air; and offences against the law of nations.

a. Relationship between Articles 51, 253, and 246

As we have observed from the above discussion, there are mainly three provisions, namely Articles 51, 253, and 246 in the Indian Constitution, which deal with creation and observance of international law obligations. What is the relationship between these three provisions? Do they altogether adhere to what is known either as transformation or incorporation doctrine in international law? Transformation doctrine requires international law to be specifically transformed into municipal law by the use of appropriate constitutional machinery, such as an act of parliament. The Indian constitutional scheme under Article 73 and 253 recognises the fact that the making of a treaty is an executive act. However, if it involves, while

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32 See e.g., id. Entry 10, 19; id. Entry 25 (Maritime shipping and navigation); id. Entry 37 (Foreign Loans); id. Entry 41 (Trade and commerce with foreign countries, import and export across customs frontiers, and definition of customs frontiers; also overlapping with Entry 26 of the State List); id. Entry 49 (Patents, copyrights, designs and other forms of Intellectual Property Rights); id. Entry 25 (Fishing and fisheries beyond territorial waters; also overlapping with Entry 21 of the State List).

33 See id. Seventh Schedule, List I.

34 Id. arts. 51, 73, 246.

35 Brahm A. Agrawal, Enforcement of International Legal Obligations in a National Jurisdiction, All India Reporter 71 (2009).

36 See INDIA CONST. arts. 73, 253.
performing its obligations, an alteration of existing domestic law, it would require legislative action.

The relationship between Articles 51, 73, 246, and 253 within the constitutional scheme were first examined by the Supreme Court of India in *Maganbhai Ishwarbhai Patel v. Union of India*.37 The essential question in this case was about the adjustment of the boundary with another country and as to whether it could be done through an executive act or it required an amendment of the Constitution.38 While examining this issue, the Supreme Court referred to the constitutional scheme. The Court noted that according to Article 73, the executive power of the Union extended to matters in which the Parliament had power to make laws.39 It also noted that the Constitution made no provision making legislation a condition of entry into an international treaty in times of either war or peace. The Court noted that:

The executive is qua the State competent to represent the State in all matters international and may by agreement, convention or treaties incur obligations which in international law are binding upon the State. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or other or modifies the laws of the State.40

The Court concluded by stating that “[i]f the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty.”41 Accordingly, the Court pointed out that adjustment of a boundary which international law regards as valid

38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.*; see also MALCOLM N. SHAW, INTERNATIONAL LAW 129, 151 (4th ed. 1997). Treaties concerning relatively unimportant administrative agreements which do not require ratification as they do not purport to alter municipal law need no intervening act of legislation.
between two Nations, should be recognized by the Courts and its implementation can always be with the executive unless a clear case of cession is involved. In such cases, the Court further noted that a parliamentary intercession could be expected and should be had.

The Maganbhai decision is crucial as it overruled Supreme Court’s own earlier opinion. The Court in an earlier advisory opinion upon reference by the President of India, *In re The Berubari Union and Exchange of Enclaves* (hereinafter “*Berubari I*”), had stated that a mere executive action is insufficient to alter boundaries. The *Berubari I* was about the exchange of certain enclaves between India and East Pakistan (now Bangladesh) pursuant to an agreement between two prime ministers. The Government of India had argued that this agreement between two prime ministers could be “implemented by executive action alone without Parliamentary legislation whether with or without a constitutional amendment.”

**b. Transiting from Transformation to Incorporation Doctrine**

The Indian Supreme Court stayed with this *transformation* doctrine framework for a very long time. However, in 1984 with *Gramophone Co. of India v. Birendra Bahadur Pandey*, the Court seemed to have moved to recognise the *incorporation* doctrine. This doctrine treats international law as part of municipal law, particularly with reference to customary international law. The averment of the Court with regard to this needs reference. The Court stated, “[t]wo questions arise, first, whether international law is, of its own force, drawn into the law of the land without the aid of a municipal

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43 *Id.*
44 In re the Berubari Union and Exch. of Enclaves, (1960) 3 S.C.R. 250 (India).
45 *Id.* at 16.
46 Maganbhai Ishwarbhai Patel, A.I.R. 1969 S.C. 783 concluding that “[t]he 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”.
48 Agrawal, *supra* note 35.
statute and, second, whether so drawn, it overrides municipal law in case of conflict.” The court, however, noted that “[t]he doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament.” The Court concluded that the national courts would endorse international law but not if it conflicts with national law.

Although the Indian Supreme Court was trifle ambivalent in Gramophone about the application of the incorporation doctrine, it took more than a decade for it to conclusively speak in its favour. In Vishaka v. State of Rajasthan, the Court, inter alia, stated that any 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 Court, in fact, went a step ahead and formulated certain basic principles and guidelines based on available international instruments. According to the Court:

In … the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance…until a legislation is enacted for the purpose.

The Indian courts have usually attempted to balance their approach towards both transformation and incorporation doctrines. In other words, the courts have always looked for a more harmonious construction of the provisions to be inclusive of international law. The Indian Supreme Court has consistently referred to more holistic and harmonious interpretation of international and municipal law, especially in the event of conflict. While acceding to the primacy of municipal law to international law in the event of inevitable conflict, it had been advocating for a more harmonious inter-

50 Id.
51 Id. at 673.
53 Id. ¶ 16.
interpretation. This approach was outlined in *Maganbhai* itself when the 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.”\(^{54}\) In another case, the Court noted:

> [I]f 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 courts 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.\(^{55}\)

The Indian constitutional scheme is essentially based on transformation doctrine. Article 253 read with Article 73, and Article 246 provides this basis.\(^{56}\) Article 51, as embodied in Part IV of the Indian Constitution, appears to be more aspirational and provides guidance to the construction of law and policy.\(^{57}\) However, as examined above, the Courts have been dealing with several cases outlining the relationship between international and municipal law in different contexts. In the initial years of India’s post-independent era, these cases predictably concerned with boundary and related issues. In the last two decades, the issues dealt by the courts have moved into newer areas such as international environment law and international trade law. There appears to be a change in the approach of the Courts as well as in dealing with some of these issues in the context of international law. We shall attempt to examine some of these in the next section.

### 3. CUSTOMARY INTERNATIONAL LAW: CHANGING PERCEPTIONS

A survey of cases dealt with by the Indian higher judiciary concerning international law during the last five decades shows that there is a consistent

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\(^{56}\) *India Const.* arts. 73, 253, 246.

\(^{57}\) *Id.* art. 51.
emphasis on *transformation* doctrine. Although in some cases, courts had shown some inclination to transit from *transformation* to *incorporation* doctrine particularly with regard to the application of customary international law, that was, however, subject to the adherence to basic constitutional guarantees.

As noted earlier, in *Vishaka* the Supreme Court was ready to accept any international convention not inconsistent with fundamental rights and in harmony with its spirit and to promote the object of constitutional guarantee. The situation, however, would differ if a domestic norm conflicts with customary norm of international law. In such a scenario, the Indian courts have been suggesting many conciliatory approaches while maintaining that domestic law would prevail in case of a clear conflict. These conciliatory approaches are in the form of conflict-free interpretations of domestic law. The effort would be to not read conflict into the interpretations of the domestic law and to look for a harmonious interpretation. As mentioned in *Maganbhai*, “if there is any deficiency in the constitutional system it has to be removed and the State must equip itself with the necessary power.”

The Indian Supreme Court had noted these changing perceptions that had taken place in other jurisdictions in its 1984 *Gramophone* decision itself. In this decision, the Court had gone on to examine the practices in the courts of United Kingdom and France. Referring to 1977 *Trendtex* decision of the Court of Appeal of the United Kingdom, the Indian Supreme Court in *Gramophone* had noted that Lord Denning, who had once accepted the transformation doctrine without question, later veered round to express a preference for the doctrine of incorporation and ex-

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62 Id. at 672, 691.
plained how courts were justified in applying modern rules of international law when old rules of international law changed.63 Trendtex also referred to the changing nature of international law and the specific problems of ascertaining it.64 It also noted that this process created difficulties “in the way of adopting, or incorporating, or recognising as already incorporated, a new rule of international law.” 65

The above difficulties of identifying and applying international law, specifically customary international law, exist within the Indian courts as well. There is also a notable change in the process and the mechanism of international law-making and the evolution of an international legal norm at the global level. The time lag for a norm to evolve and the concurrent State practice that is required to provide consistency to norm creation has also now transformed and considerably shortened. The subject matters that are being dealt with by international law are also now wide-ranging. The impact of international law on domestic laws, particularly with regard to implementation is a real issue.66 The Indian Supreme Court in several of the cases during the last two decades had to deal with these fast-changing

63 Id. at 691; See Trendtex Trading Corp. v. Cent. Bank of Nigeria, [1977] 2 W.L.R. 356 at 365 (Eng.).
64 Trendtex Trading Corp., 2 W.L.R. 356 at 379.
65 Id.
and evolving international legal norms. Some of these areas are related to environment, human rights, international trade, maritime issues, extradition and terrorism.

It was in Vellore Citizens that the Supreme Court had no hesitation in holding aspects relating to sustainable development as part of customary international law and consider them as part of domestic law. Once these principles were accepted as part of customary international law, the Court concluded, that there would be no difficulty in accepting them as part of

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domestic law. Referring to the “precautionary principle” and the “polluter pays principle” the Court regarded them as part of the environmental law of the country noting that these principles were accepted as part of customary international law. However, the Court was not ready to grant a blanket primacy to customary international law and that was clear when the court noted that “…[i]t 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.”

In other words, the rules of customary international law that are not contrary to the municipal law would pass the muster, not otherwise. It took more than a decade for the Supreme Court to lay down some of the basic principles relating to the acceptance of customary international law as part of domestic law. This was done in M/s Entertainment Network (India) Ltd. v. M/s Super Cassette Industries Ltd. The main issue before the Court was about broadcasting of sound records through various FM radio stations without a valid license and payment of royalty. Appellants had asked for the issuance of compulsory license under Section 31 of the Indian Copyright Act. One of the main issues was also related to India’s obligations under various copyright-related international conventions. Examining both the domestic copyright law and also international conventions, the Court noted that the interpretation of a statute could not remain static. The Court further noted that:

While India is a signatory to the International Covenants, the law should have been amended in terms thereof. If the ground realities changed, the interpretation should also change. Ground realities would not only depend upon the new situations and changes in

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69 Id.
70 Id.
71 Id.
73 Id.
76 Id.
societal conditions vis-à-vis the use of sound recording extensively by a large public, but also keeping in view of the fact that the Government with its eyes wide open have become a signatory to International Conventions.77

The court moved a step further and sought to outline the role of international law in the domestic legal sphere.78 These were - (a) as a means of interpretation; (b) justification or fortification of stand taken; (c) to fulfill the spirit of international obligation which India has entered into, when they are not in conflict with existing domestic law; (d) to reflect international changes and reflect the wider civilization; (e) to provide a relief contained in a covenant, but not in a national law; and (f) to fill gaps in law.79

While not conceding entirely the primacy of domestic law to international law in case of conflict, the Supreme Court was ready to accord maximum space to those international conventions that have been negotiated, taking into account different societal conditions in different countries by laying down minimum norms. The Court was even prepared to follow those international conventions to which India was not a party, provided the norms emanating from those conventions were followed as part of an enactment or a Parliamentary statute or by way of an amendment to the existing enactment.

In Aban Loyd Chiles Offshore Ltd. v. Union of India,80 the Supreme Court had to consider the obligations created by the United Nations Convention on Law of the Sea (UNCLOS)81 vis-à-vis its compatibility with the Maritime Zones Act, 1976,82 Customs Act, 1962,83 and the Customs Tariff Act, 1975.84 In fact, Indian domestic law was enacted much before the conclusion of the UNCLOS, 1982. Referring to earlier cases on the subject, the Court reiterated its position that “even in the absence of municipal law,

77 Id.
78 Id.
79 Id.
the treaties/conventions can be looked into and enforced if they are not in conflict with the municipal law.”

To sum up, the Indian Supreme Court is prepared to take into account customary international law and all the related interpretations as part of its law of the land as long as it does not conflict with any domestic law. In the absence of a clear legislation or an enactment, the touchstone of consistency lies within the constitutional guarantees. As long as the international treaties and customary norms are broadly consistent with the basic structures of the Constitution, the Indian courts have no hesitation in applying these international legal norms. As regards the applicability of customary international law, the Indian Supreme Court continues to follow primarily transformation doctrine with some occasional tilt towards incorporation doctrine.

4. FUTURE TRENDS

Considering the operational complexities of various global regimes in several sectors and their impact on the structures of the Indian legal framework in recent years, it is inevitable that the Indian courts moved away from the doctrinal discourse concerning the implementation of international law. Some recent decisions by the Indian Supreme Court had to deal with complex legal and technical issues in the realm of international law. Though doctrinal discourse is important for the domestic courts, the inevitability of applying ‘foreign’ element of a national or international legal aspect is real. It is pertinent to note that all of these cases in the Indian context, perhaps many more, do not refer to international legal norms per se. However, these cases involve some foreign legal and factual elements. The Indian courts seem to be comfortable dealing with them through available domestic legal formulations with the sprinkling of some aspects of international law.

First, Vodafone International Holdings B.V. v. Union of India86 raised complex array of facts with particular reference to corporate structures both within and outside India. In this case, the Indian Income-tax department had raised a tax demand on an overseas transaction concerning Indian

assets which had resulted in huge capital gain for one of the companies.\textsuperscript{87} In this case, the Supreme Court did not go into any of the basic international legal issues although the case had substantial foreign element in terms of investment issues, chain of command, structure and operation of some offshore and Indian companies.\textsuperscript{88} The decision, besides referring to and mapping complex structure of holding companies, made references to foreign direct investment and its impact on India.\textsuperscript{89} It also to an extent referred to the flow of foreign direct investment based on certain parameters by companies.\textsuperscript{90} The case dealt with corporate governance, regulatory framework and its impact on Indian law.\textsuperscript{91}

\textit{Republic of Italy v. Union of India}\textsuperscript{92}, was about the killing of two Indian fishermen off the coast of Kerala by two Italian Marines while on duty on an Italian ship who mistook them for pirates.\textsuperscript{93} These marines were arrested by Kerala State police.\textsuperscript{94} The matter went before both the High Court of Kerala and later to the Indian Supreme Court. The main contention before these Courts, including the Indian Supreme Court was that the State of Kerala being a federal unit had no jurisdiction to try the case.\textsuperscript{95} Italy argued before the Indian Supreme Court that taking into account the existing international legal principles the matter was essentially to be dealt with by two sovereign States.\textsuperscript{96} It was argued before the Court stating that “determination of international disputes and responsibilities as well as proceedings connected therewith, must necessarily be between

\begin{thebibliography}{99}
\bibitem{87} Id. ¶¶ 35-36.
\bibitem{88} Id. ¶ 127.
\bibitem{89} Id. ¶ 68.
\bibitem{90} Id. ¶ 73.
\bibitem{91} Id. ¶ 47.
\bibitem{92} Republic of Italy v. Union of India, (2013) 4 S.C.C. 721 (India).
\bibitem{93} This incident happened at a distance of 20.5 nautical miles within the Indian Sea, i.e., within the contiguous zone. Id. ¶ 2.
\bibitem{94} Id.
\bibitem{95} Id. ¶ 20.
\bibitem{96} Id. ¶ 15.
\end{thebibliography}
The arrest of two Italian Marines for their act of shooting was regarded as violating customary international law. References were also made to the Principles of International Comity and Sovereign Equality amongst States with specific reference to Declaration on Principles of International Law concerning Friendly Relations and Cooperation between States in accordance with the United Nations Charter. The other important issue related to the determination of relationship between Indian Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (Maritime Zones Act) and the United Nations Convention on Law of the Sea (UNCLOS). The Maritime Zones Act, 1976 was enacted prior to the adoption of UNCLOS. Accordingly, it was argued that there was no harmony between the two. Several key provisions of the Maritime Zones Act and the UNCLOS such as, for example, right of innocent passage, the rights of the coastal state in the Exclusive Economic Zone area, issues and measures taken to combat piracy both at the global and local level have all been discussed.

The Court referring to Maganbhai and Gramophone decisions and the parameters outlined with regard to the extent of application of international law in the domestic sphere noted that the Maritime Zones Act is in harmony with the UNCLOS. Further, the Court noted that “it is a settled law in India that once a Convention of this kind is ratified, the municipal law on similar issues should be construed in harmony with the

97 Id. ¶ 13.
98 Id. ¶ 14.
99 Id.
100 UNCLOS, supra note 81.
101 Republic of Italy, 4 S.C.C. 721.
102 See id.
103 Id.
Convention, unless there were express provisions to the contrary.\textsuperscript{104} The Court further noted

Conventions, such as these, have not been adopted by legislation, the principles incorporated therein, are themselves derived from the common law of nations as embodying the felt necessities of international trade and are, therefore, a part of the common law of India and applicable for the enforcement of maritime claims against foreign ships.\textsuperscript{105}

The Supreme Court decided the case of \textit{Novartis A.G v. Union of India} which related to a patent for beta crystalline form of a chemical compound called Imatinib Mesylate on the basis of several technical grounds.\textsuperscript{106} This was a therapeutic drug for chronic myeloid leukemia and for certain kinds of tumours.\textsuperscript{107} It was marketed under the name Glivec.\textsuperscript{108} This patent held by Novartis in Switzerland and in other countries was refused grant of patent by the Indian Patent Office based on its interpretation of Section 3(d) of the Indian Patents Act.\textsuperscript{109} Section 3(d) was included pursuant to an amendment to Patents Act in 2005.\textsuperscript{110} Section 3 of the Indian patent law broadly provided what kinds of subject matter that cannot be patented.\textsuperscript{111} Section 3(d) was part of this and was more specific to disallow patenting of known substances which did not result in the enhancement of the known efficacy of the substance. It also disallowed mere discovery of any new

\textsuperscript{104} Id. ¶ 34.
\textsuperscript{105} Id. ¶ 39.
\textsuperscript{106} Novartis A.G. v. Union of India, A.I.R. 2013 S.C. 1311, ¶3 (India).
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id. ¶ 14.
\textsuperscript{110} Id. One major reason for introducing this provision was to disallow what has been termed as “ever-greening” of patents; Patents (Amendment) Act, 2005, No. 15, Acts of Parliament, 2005 (India).
property or new use for a known substance or mere use of known process, machine or apparatus.\textsuperscript{112}

\textit{Novartis} which held a patent for Glivec internationally was not happy with this provision and took a claim that it was in violation of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs)\textsuperscript{113} under the auspices of the World Trade Organization.\textsuperscript{114} The Supreme Court examined in detail the history and evolution of Indian patent law and policy since its independence and also outlined the benefits it derived for the chemical and pharmaceutical industry.\textsuperscript{115} The case was, in fact, decided more on technical grounds interpreting the making and content of the drug. The case peripherally touched the issue of violations of TRIPs obligations and also its implementation mechanism.\textsuperscript{116} The Supreme Court rejected the grant of patent more on the ground that how different processes

\textsuperscript{112} “[T]he 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 discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant. \textit{Explanation} – For the purpose of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy.” \textit{Id.} \S 3(d).

\textsuperscript{113} Agreement on Trade-related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299.

\textsuperscript{114} Novartis A.G., A.I.R. 2013 S.C. 1311.

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} This contention relating to TRIPs violation was discussed at length when the matter was before the Chennai High Court. The High Court had, however, taken the view that they would be bound by the domestic law, not by the TRIPs obligations. The Court had further noted that the application and interpretation of TRIPs fell outside the scope of its scrutiny. The Court also stated that it is for the States concerned to take up this issue at the WTO forum. For them, the Court reiterated, what mattered most was the domestic law on the subject. Novartis A.G., A.I.R. 2013 S.C. 1311.
could produce Imatinib Mesylate. The Court sent back the case to Indian Patent Office for a fresh review and examination.

The above three decisions by the Supreme Court of India, though discussed briefly, show that foreign elements come in the form of transnational location of parties and the international dimensions of the subject matter of the cases. Vodafone traverses between tax and investment issues. Substantial part of this decision attempts to explain the structure of several national and international companies that hold shares and as to how they seek to control the entire offshore transaction without attracting any tax liability. This also explains in a way how global corporate structures operate across several jurisdictions without violating any of the respective domestic laws. The decision also reflects as to how Indian courts could deal with such issues.

Italian Marines case has more direct references to implementation of a multilateral convention like UNCLOS and other related United Nations Conventions. The consistency of the Indian Maritime Zones Act, 1976, with the provisions of UNCLOS is also a crucial issue. Novartis case, like Vodafone, has both national and international dimensions. Major part of the decision outlines the historical account of the Indian patent system and its policy options. This historical aspect of patents is examined by the Court while examining the relevancy of Section 3(d) provision in the Indian context. Technical aspects and interpretations of the subject mat-

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118 Id. ¶¶ 195-96.
119 Vodafone Int’l Holdings B.V., 6 S.C.C. 613.
120 Id.
121 Republic of Italy, 4 S.C.C. 721.
123 Id. ¶¶ 26-30.
124 Id.
ter take precedence over the more general aspect relating to Section 3(d) compatibility with TRIPs obligations and other related issues.

5. CONCLUSIONS

Indian courts in recent times have been taking recourse to international law frequently. Sometimes they would use international legal norms as a tool to meet the ends of justice when domestic law is of no help. In many other cases, the very nature of disputes would require them to apply international legal norms. The scope of definition of international law needs to be broadened to include not only traditional areas, but also any foreign legal element that may need interpretation or application. Domestic courts usually do not apply international law directly. They would look for an implementing legislation to give effect to international law. This approach is based on the transformation doctrine.

A majority of the States, including India, apply this doctrine. The doctrine of incorporation accepts international law as part of the law of the land. United Kingdom and many other jurisdictions prefer to apply international law directly. In the Indian context, there appears to be an effort to move from the transformation to incorporation doctrine. In Gramophone, Vishaka and later by M/s Entertainment Network (India) Ltd., Italian Marine cases, the Indian Supreme Court seem to transit from transformation to incorporation doctrine. These developments relating to the content, form and mode of reception of international law into India’s domestic legal space span almost three decades and more. In recent times, the Courts, particularly the Indian Supreme court appears to be more comfortable with the application of international legal norms in the absence of clear domestic law on the subject.

In order to understand the evolutionary trajectory of the Indian approach it is crucial to understand the relationship between Articles 51, 73, and 253 of the Constitution. These provisions are read in conjunction with Article 246 which seeks to authorize the executive to enter into treaties and agreements. This relationship between these Articles of the Constitution has been examined in various cases of the Supreme Court from time to time. Maganbhai, Gramophone, Vishaka, Intellectual Forum, and M/s

Entertainment Network Ltd are some of the key cases that deal with and interpret the Indian constitutional scheme. At the same time, these cases also deal with how courts would deal with the application of customary international law. There is one view that customary international law which is not inconsistent with the Indian Constitution could be applied directly. As we have seen in the study, Indian courts have been taking a cautious approach to directly implement customary norms. As long as these customary norms are not in conflict with any domestic law or that they are consistent with the basic structures of the Constitution, the courts have found no difficulty in applying these norms directly.

In recent years, Indian courts are moving towards more specialized areas of international law. As shown in the study, through three important cases of Vodafone, Novartis and Italian Marines, the courts have been examining and applying specialized and complex areas in the field of international trade and economic law, including intellectual property rights, international environmental law and natural resources law. Areas for regulation and application of subject matters are increasingly becoming complex and technical.

The courts will have to eventually specialize in applying complex issues of international law. With the development of technology and other related areas, several complex issues would arise and require specialized attention of the courts in applying international legal norms. It would, therefore, be essential for the Indian Courts to be responsive to the evolution of norms within the context of global legal framework and the judiciary. In this sense, Indian courts, as of now, should be regarded as conservative and tend to be cautious. However, that may not be possible in the future. While Lord Denning was ready to change his stance from the transformation to the incorporation doctrine to accommodate quickly to the changing nature of international law in his Trendtex decision (as quoted in Gramophone), the Indian courts and perhaps the Asian courts should exhibit flexibility to accommodate evolving and increasingly changing normative structures of international law.


127 Trendtex Trading Corp., 2 W.L.R. 356.