VERTICAL ALLOCATION OF AUTHORITY- THE SCOPE OF INTERNATIONAL LAW IN THE INDIAN CONSTITUTTION.

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ABSTRACT

Municipal courts, very often have to face situations calling for the application of the rules of international law, which may or may not conform to the municipal law. Similarly, International tribunals may be called upon to determine the precise status and effect of a rule of municipal law, subject to if the party to the case has consented to do so or if the case has such connections to the municipal law. There may also be situations which require theoretical analysis and determination of the limits of theinternational and municipal law.

Hence in such cases, where a conflict between international law and municipal law exists or has been discovered, the question of supremacy arises i.e. whether international law supersedes municipal law or vice-versa. Hints to answer such questions of supremacy can be found if we understand the constitutional law of the state.

It is seen that national constitutions tend to give direction in administering the rules of international law or treaties as international law does not prescribe any rule on how its laws are set to be imbibed.

This article seeks provide a fresh perspective and answer some pertinent questions relating- to the applicability of international rules directly under domestic law and the enforceability of a treaty with respect to conflicting, or in absence, domestic laws as seen and envisaged in the Indian Constitution with the help of Articles of the constitution and relevant case laws. As it is known that the Indian Constitution has been influenced and has incorporated principles of numerous constitutions of the world, we must analyze such principles which have been adapted to suit our need.

"Geography has made us neighbors. History has made us friends. Economics has made us partners, and necessity has made us allies. Those whom God has so joined together, let no man put asunder."

-John F. Kennedy

INTRODUCTION

International law is perhaps the most important area of law today, as global interdependence deepens and the transnational movement of people, ideas, goods and services continue to grow. It is an ongoing process of resolutions through which the members of the world community identify,

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clarify and secure their common interests in all aspects. We notice that in this process there are a multitude of contestants. The nation-states continue to play a dominant role, but non-state participants such as intergovernmental organizations, NGOs, and private associations are beginning to play increasingly significant roles. The individual, in particular, acting both alone and as a group is an ultimate participant and the stakeholder, performing all the functions relevant to making and applying the law.

In the world arena, allocation of authority takes two basic forms; the *vertical allocation of authority* between the general community and particular states, and the *horizontal allocation of authority* i.e. between states. We shall only deal with the former here and analyze the Indian Constitution in this light. Authority is often conceived as the expectation of community members about who will decide what and how has been a base of power for any decision maker. In the vertical allocation of authority between the general community and particular states, the most visible development is the expansion of the concept of "international concern" along with the simultaneous erosion of the concept of "domestic jurisdiction". With the transnational interaction accelerating and the interdependencies of people everywhere increasing, the authority of the organized community has grown steadily.

DOMESTIC JURISTICTION vs. INTERNATIONAL CONCERN

The dichotomy between matters of international concern and those of domestic jurisdiction are inherent in the very concept of international law. It signifies the necessity of a continuing allocation and balancing of ability between the general community and its component territorial communities, states or regions in ways best designed to serve the common interest. But let us not forget that the two terms- Domestic Jurisdiction and International Concern-are not absolute terms. By international concern, it is meant that certain matters, including events occurring within the territorial boundaries of particular states, are relatively important to a general, transnational community so that such a community can make and apply thelaw to such matters in defense of the common interests of the people affected by those matters. An important function of international law is to permit external decision makers to mediate in matters that would otherwise be regarded as essentially internal to a particular state.

In contrast, domestic jurisdiction refers to matters that are regarded as of chief importance only to a particular state. Ever since the rise of the modern state system, built on the notion of sovereign equality of all states, states have enjoyed and continued to insist on, a large domain of exclusive competence. This insistent demand has been made and protected under such technical concepts as equality of states, sovereignty, independence, and nonintervention. This has also been the thrust in the Westphalian notion of sovereignty.

Sovereignty, as made popular by Jean Bodin[2] in the sixteenth century, referred to the alleged supreme authority and power wielded by the monarch. This concept of sovereignty in Bodin's was fitting in an era of absolute monarchs; it is not at all apt in the contemporary context of *popular sovereignty* (authority of the people) and growing interdependencies. The concept of sovereignty is increasingly giving way to one of state responsibility to protect the rights of citizens. States can no longer insulate themselves behind the veil of sovereignty while violating human rights.

The use of this technical term "domestic jurisdiction" to protect the exclusive competence of internal elites is of recent origin making its first appearance in Covenant of the League of Nations[3]. It reads- *"If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party the Council shall so report, and shall make no recommendation as to its settlement"*. The Charter of the United Nations[4] has adopted this formula with aslight modification which reads- *"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit prejudice the application of enforcement measures under Chapter VII."* The real meaning of Article 2(7) can be meaningfully ascertained only by reference to its application.

The framers of the Charter neither saw fit to deprive the United Nations of the authoritative competence required for the effective performance of its tasks, or curtail the competence nor wanted the organization to pry into matters generally regarded to be within the exclusive domain of individual states. The line to draw between what is essentially of domestic jurisdiction or of international concern is far from obvious.

In the view of the Permanent Court of International Justice in the *Tunis-Morocco case of 1923*[5], the issue was whether the dispute between France and Great Britain over the applicability to British subjects of certain French nationality decrees, proclaimed in 1921 in Tunis and the French zone of Morocco fell within the domain of Article 15(8) and thus lay outside the competence of the League Council. In rejecting the French claim, the court added that the question of treaty obligation "does not, according to international law, fall solely within the domestic jurisdiction of a single state." The court further proclaimed- "the question whether a certain matter is or is not solely within the domestic jurisdiction of the state is an essentially relative question; it depends upon the development of international relations."[6]Determining whether a matter is of "international concern" or essentially within "domestic jurisdiction" thus depends not only on facts but on changing facts in light of the context of the world conditions and relevant legal policies: this permits a continuing readjustment of inclusive and exclusive competences as conditions might require.

THEORIES OF RELATIONSHIP

[2]Bodin: On Sovereignty (1992) Cambridge University Press
[3] Article 15(8)
[4] Article 2(7)
[5]Tunis-Morocco Nationality Decrees, Advisory Opinion 1923 P.C.I.J (ser. B.) No.4 (feb 7).
[6]*Id*. at 24.

In general, there are two principal theories put forward by scholars on the relationship between international and municipal law:

- **Monoism**- This theory regards that both international and municipal law have a common underlying legal basis and derives its origin from the law of nature which binds the states and individuals equally. Hence, state law and international law ultimately regulate the conduct of individuals, one immediately and the other mediately, though, in the sphere of international law, the consequences if such conduct is attributed to the State.
- **Dualism**- This theory grew out of the positivist philosophy of the 19th century which emphasized on the "will of the state" as a sole criterion for creating international law. Under this theory, theinternational and municipal law operates on different levels i.e. while international law regulates mainly the relations and obligations between sovereign and independent States, the municipal law operates and regulates the relations and obligations of individuals within a State.

The controversy between monoism and dualism is more academic than real, as there is no indication that either theory has had a significant impact on the development at the national levels on questions of international law. They merely indicate a general approach towards the implementation of theinternational law at the national level. In fact, some scholars say that international law and municipal law are not comparable as they both have their own sphere of operation and neither can be termed as subordinate to each other. The supremacy of international law in the international sphere is unchallenged in the same way as of municipal law in the State matters. They are mutually independent and normally do not come into conflict with each other. But, at times, a conflict of obligation may occur, or the State is not able to act on the domestic place in the manner required by the international law. In such a situation, whether the municipal court would apply the international law by overriding the municipal law depends on the provisions of the municipal law itself. The supremacy of international law in municipal sphere simply requires that if a State is in breach of its international obligations for which it is internationally responsible, it cannot shelter itself behind domestic law by way of absolution.[7]The international law simply does not purport to govern the contents of national law in the national sphere.

THEORIES ON THE APPLICATION OF INTERNATIONAL LAW WITHIN MUICIPAL LAW

[7] Article 27 and Article 46 of Vienna Convention on the Law of Treaties,1969;Article 13 of 1949 Draft Declaration on Rights and Duties of State; *The Alabama Claims Arbitration*, J.B. Moore, International Arbitrations, Vol 1 (Govt. Printing Press, USA), p.653 (1872)

Endorsing the above two theories on the relationship between international law and municipal law and on the question whether international law may be applied *ex propriovigore*[8] within the municipal sphere, there exist two theories-

- **Transformation or Specific Adoption Theory-** According to positivists, the municipal law is logically a complete system and the rules of international law cannot impinge upon State law unless they undergo the process of transformation and be specifically adopted by, or incorporated into state law. To make a rule effective at thenational level, each State will determine its own mechanism. It is argued that unless there is a 'transformation' of the treaty into municipal law (i.e. legislation for implementing the treaty by 'fine-tuning' its provisions to suit the domestic needs), it cannot be enforced in the municipal field. For positivists, international treaties are mere promises by the State whereas municipal statutes are treated as commands.
- **Delegation Theory-**The critics of the transformative theory maintain that there is no need for international obligations to be specifically adopted into rules of national law and that in thecase of conflict between the two, the international rules would prevail. The application of rules of international law to themunicipalsphere is a singular process which starts with the creation and acceptance of international law rule by the State. The constitutional rules of international law delegate the right to determine the procedure and manner to make treaties effective at the municipal level. The constitutional requirements of the state law are merely a part of the unitary process of creating rules of law and only in this respect the State enjoys complete sovereignty and liberty. The fact that national organs do not behave according to such rules indicates the weakness of international law but does not invalidate the theory, since the State will incur international responsibility where it permits violations of international legal rules to occur.

The conclusion is rather paradoxical: for, the doctrine of incorporation is founded on the principle that the rules of international law are incorporated into municipal law automatically and if a municipal law is enacted with a view to giving effect to certain international law, the question of any conflict between them should not arise. Even, if it is assumed that a conflict does arise, such a conflict would not be a conflict between the rules of international law on the one hand and municipal law on the other, for, after the incorporation of the rules of international law into the municipal law, there is a merger or fusion between the two. A conflict, in such a situation, would have to be resolved by the application of other rules of interpretation applicable to the municipal law like harmonious constriction, pith and substance and so on.

However, there is no indication that either theory is perfect to encompass all the aspects of doctrinal controversy surrounding the relationship between international law and municipal law or has had a significant input on the national laws. The practice of international tribunals and municipal courts suggests that it is a mixture of international law supremacy, municipal law supremacy and

[8]By its own force or vigor.

coordination of legal systems that exist[9]. It is not correct to compartmentalize States into 'monoist' or 'dualist' groups since there are as many ways of giving effect to international law as there are national legal systems. The constitution of a nation is the starting point that how the rules of international law will be applied at the domestic level. Hence, the practice varies among nations. Nevertheless, to get an exact view, each situation must be analyzed by itself to determine whether there will be theprimacy of international law or that of municipal law and for that purpose, a consideration of the practice of international tribunals and of the state courts becomes vital.

INTERNATIONAL LAW WITHIN MUNICIPAL SPHERE

Whether any state follows 'incorporation' or 'transformation' is determined by its own internal law, usually its 'constitution'. A state may in practice follow a variety of approaches for observing rules of international law within its domestic legal system which may not fit neatly into either of the two theories. Therefore, it would be pragmatic to think in terms of 'implementation'. Empirical study shows an uneven pattern in the application of international law that does not turn on the origin of any international law rule custom or treaty), but on its subject matter or likely impact on the domestic legal system. For example, international law regarding universal jurisdiction over torture, though rooted in customary international law, is not accepted in the national legal system without transforming it.

It is necessary to study the practice of states to understand as to how they, within the framework of their internal legal order, apply the rules of international law and resolve the conflict, if any, between a rule of international law and a rule of national law. States generally give effect to the rules of international law, though the procedures vary and are considerably flexible. The doctrinal dispute to this extent is without practical consequences.

Lord Denning, speaking for the Court of Appeal[10], traces the history of the origin and application of the doctrine of transformation and doctrine of incorporation. He observes that the doctrine of incorporation goes back to 1737 to *Bavot vs. Barbuit*[11] in which Lord Talbot LC had opined that "the law of nations in its full extent was a part of the law of England". Illustrating how the changes in international law *ipso facto* brought about changes in the municipal law and the courts recognized such changes and gave effect to them while enforcing the municipal law, Lord Denning held that:

[9] S.K. Kapoor, International Law, 8th edition (Central Book Agency, Allahabad), 1990, p. 112.
[10] Trendtex Trading Corp Ltd. Vs Central Bank of Nigeria (1977) 1 ER 881
[11] Ibid p.888

> "When the rules of international law were changed (by the force of public opinion) so as to condemn slavery[12], the English courts was justified in applying the modern rules of international law. The bounds of sovereign immunity have changed in the last 30 years. The changes have been recognized in many countries, and the courts have given effect to them, without any legislation for the purpose."

Since the rules of international law on a subject changes with the passage of time, declaration of such law, as it were years ago, has no binding effect on the court since international law knows no rule of *stare decisis*[13].

The Supreme Court of India, speaking through Chinnappa Reddy J[14] while answering the twin question whether, "international law is, of its own force, drawn into the law of the land without the aid of municipal statute, and whether, so drawn, it overrides municipal law in case of conflict", held that the "nation must march with the international law even as nations respect international opinion. The doctrine of incorporation itself recognizes the position that the rules of international law are incorporated into national law and considered to be apart of the national law unless they are in conflict with an Act of Parliament." Declaring that "comity of nations or no, municipal law must prevail in case of conflict", Chinnappa Reddy J gave the following reasons for reaching the said conclusion:

> "National courts cannot say yes if Parliament has said no to a principle of international law. National courts will endorse international lawbut, not of it conflicts with thenational law. National courts being organs of the national State and not organs of International law must perforce apply thenational law if theinternational 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 theconflict is inevitable, the latter must yield."

ENFORCEMENT OF TREATIES AND CUSTOMARY INTERNATIONAL LAW

The treaty making the power of the nations and their binding effect on the respective countries and their citizens widely differ depending upon the constitutional system of the country.

The Constitution of the United States provides that the President "*shall have power, by and with the advice and consent of the Senate, to make Treaties provided two third of the Senators present concur.*" The justification for the introduction of the condition "advice and consent" in the constitution was primarily for the reason that the treaties made by the United States are given the status of the

[12] Report of the Royal Commission on Fugitive Slaves (1876) XXV, 4-5 paras
[13] (1977) 1 All ER 78
[14] *Gramophone Company of India Ltd vs Birendra Bahadur Pandey* (1984) 2 SCC 534

supreme law of the land binding on all States and the Federation. Article VI Section 2 of the Constitution thus declares that:

> "…this Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all the 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 in the Constitution or Laws of any State to the contrary notwithstanding"

In the United Kingdom, the Parliament is supreme. Though the customary international law is being regarded as part of the law of England[15], treaties do not enjoy the same position. Though foreign affairs and the treaty making remain the royal prerogatives, which are carried out by the government of the day, treaties do not enjoy the same status as that of royal prerogatives, as the executive government, by entering into treaties, can bypass the supremacy of the Parliament. While the executive has the prerogative to enter into international treaties, the treaty provisions could be given effect to within the national system affecting the existing law only by the sanction of the Parliament.[16]

In France, the Constitution permits the President to negotiate and ratify treaties. There are certain classes of treaties, which require ratification by law like treaties involving cession, exchange or addition of territory etc. Article 53 states:

> "Peace treaties, commercial treaties, agreements concerning international organizations, those which impose a financial burden on the State, those which modify legislative provisions, those concerning personal status, those which affect cession, exchange or addition of territory, may not be ratified or approved except by virtue of a law."

In India, the Constitution directs that the state shall endeavor to foster respect for international law and treaty obligations.[17]Article 51 of the Indian Constitution had its source and inspiration in the Havana Declaration of 1939. With the acceptance of amendments moved by Dr. Ambedkar, H.V. Kamath, AnnathasayanamAyyangar and P. Subbarayan, the draft of Article 40 was adopted by the Constituent Assembly as Article 51. During the debate, all the speakers emphasized thecommitment of India in promoting International Peace and security and adherence to theprinciples of International Law and Treaty obligations. It is significant to note that Article 51(c) specifically mentions 'International Law' and 'Treaty Obligations' separately. According to Prof. C. H. Alexandrowicz the expression 'International Law', in the said paragraphconnotes Customary International Law and 'Treaty Obligations' stands for obligations arising out of International Treaties.

It must be noted here that Article 51 finds its place in Chapter IV of the Constitution which provides for Directive Principles of State Policy (DPSP) and are non – justiciable by virtue of Article

[15] Starke's International Law p.68
[16] Starke's International law p.71
[17] Article 51(c)

37. Even though as one of the DPSP, Art. 51 is not enforceable through a court of law, Dr. Ambedkar had said in the Constituent Assembly that the intention was that the executive and legislature should not only pay lip service to these directive principles but *"they should be made the basis of all executive and legislative action that may be taken hereafter in the matter of governance of the country"*.

Indian Constitution though federal in nature, provides under Article 73 read with the relevant entries in VII Schedule that the foreign affairs and treaty making powers vest in the Central Government. Article 73 declares that the executive power of the Union shall extend to the matter with respect to which Parliament has powers to make laws.

In addition, Article 253 of the Constitution declares that:

> "Parliament has the power to make any law for the whole or any part of the territory of India for implementing any treaty with any other country or countries or any decision made in international conference, association or other body."

Article 253 is thus silent as to the procedures of treaty making. So far as implementation of international treaties is concerned, its mandate is clear that it is only the Parliament which has the exclusive power to make laws for implementation of treaties and international agreements. Indian Constitution thus does not contain any provision, which is comparable to the constitutions of the United States of America, or France.

While addressing the treaty making process in India, the Supreme Court in *Maganbhai Ishwar Bhai Patel vs Union of India*[18] in the context of implementation of an award that demarcated the boundaries between India and Pakistan which came to be challenged before it on the ground of lack of power of the executive government to implement the award without a constitutional amendment authorizing changes in the boundaries of India, by majority held that:

> "Unlike the United States of America where the Constitution is defined in express terms, we in our country can only go by inferences for our Constitution, the circumstances, and the precedents. The precedents of this Court are clear only on the point that no cession of Indian territory can take place without a constitutional amendment. An agreement to refer the dispute regarding boundary involves the acts of two neighboring countries which the executive may do as are necessary for permanently fixing the boundary. A settlement of boundary dispute cannot,therefore, be held to be a cession of territory. 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 hard to be imagined that such gross abuse of power is ever likely. Ordinarly, an adjustment of a boundary which international law regards as valid between two Nations, should be recognized 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

[18] (1969) 3 SCR 254

expected and should be had. This has been the custom of Nations whose constitutions are not sufficiently elaborate on this subject."

Shah J in his concurring opinion expounded that the Indian Constitution does not envisage a legislative backing being a pre-condition to the executive government entering into an international treaty but the obligations arising under agreements or treaties would not, on their own, bind the Indian nations unless a Parliamentary legislation is made to that effect and that, in any event, the legislative backing is a must when the treaty operates to restrict the rights of citizens or modifies the laws of the States. Shah J sums up his views as under:

> "Our Constitution makes no provision making thelegislation a condition of the treaty into an international treaty in times either of war or peace. The executive power of the Union is vested in the President and is exercisable in accordance with the Constitution. 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 on Indian nationals. The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List I of the 7th Schedule. But making of law under that authority 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 citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty."

In the context of the mandate of Article 253 of the Constitution, which confers exclusive power to the Parliament for making laws for giving effect to treaties, Shah J held:

> "The effect of Article 253 is that is a treaty, agreement or convention with a foreign State deals with a 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 other decision made at any international conference, association or other body. In terms, the Article deals with legislative power: thereby power is conferred upon the Parliament, which it may not otherwise possess. But it does not seek to circumscribe the extent of the power conferred by Article 73. 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 such restriction, infringement of the right or modification of the laws, the executive is competent to exercise the power."

The majority opinion, however, is silent about the scope of the executive power of the central government to enter into treaties, which may or may not be given effect to by the Parliament making laws. Questions have also arisen as to whether the executive government would be entitled to enter into 'self-executing' treaties without the Parliament enacting a law authorizing the

government to enter into such treaties and whether in the absence of such law being made by Parliament the provisions contained in such treaties would bind the State.

In *V/o Tractoroexport, Moscow vs M/s Tarapore& Co.&Anr*[19], the Supreme Court, by majority, referring to a passage in Halsbury's Laws of England, held that:

> "There is a presumption that the Parliament does not assert or assume ajurisdiction which goes beyond the limits established by the common consent of nations and statutes are to be interpreted provided that their language permits, so as not to be inconsistent with the comity of nations or the established principles of International law. But this principle applies only where there is an ambiguity and most give way to a clearly expressed intention. If statutory enactments are clear in meaning, they must be construed according to their meaning even though they are contrary to the comity of nations of International law."

Ramaswamy J had expressed an equally strong dissenting opinion giving primacy to international law. In his opinion, "..as far as practicable the municipal law must be interpreted by the courts in conformity with international obligations which the law may seek to effectuate. It is well settled that if the language of a section is ambiguous or is capable of more than one meaning the protocol itself becomes relevant for there is a prima facie presumption that parliament does not intend to act in breach of international law, including specific treaty obligations."[20]

The decision of the Supreme Court in *Gramophone Co. of India Ltd*[21]has another important ramification for the realm of international law. This decision defies the view that domestic tribunals could not adjudicate disputes involving theapplication of international law. The High Court observed: "Though treaty may not be binding for theconstruction of thestatute, it may be used to clarify the expression in thestatute in case of doubt or two meanings".

A new dimension has been added to the meaning of treaty power by Supreme Court[22], wherein it held that though the treaty would not bind the signatory state till the same is ratified, it would be open to the court to infer ratification of the treaties from subsequent agreement entered into by the state party, or by actual implementation of the terms of former treaty or even from the conduct of the state parties.

The factual background that led the Court to enunciate the said principle was that after thesovereign state of Bangladesh came into existence in 1971, on 16th May 1974 an agreement was entered into between Prime Minister of India and Bangladesh regarding the land boundary and related matters including transfer of some enclaves. In October 1982, an understanding was reached between the two governments in connection with the 'lease in perpetuity' in terms of item 14 of Article 1 of the 1974 agreement. This understanding was questioned by a writ petition before the Calcutta High

[19](1970) 3 SCR 53.
[20] Ibid pg.79
[21] (1982) 2 SCC 534
[22]Union of India vs SukumarSengupta, (1990) Supp SCC 545.

Court on the ground that the implementation of the agreements involved a cession of Indian territory to Bangladesh and hence and amendment of the Constitution was necessary and in the absence of which the agreements were void. This challenge failed before the High Court and the decision was affirmed by the Division Bench of the High Court. In afurther appeal to the Supreme Court, it was contended *inter alia* that since the 1982 agreement required ratification which had admittedly not taken place, the subsequent understanding recorded between the two governments in 1982 was *non est*. Rejecting the contention, it was held by SabyasachiMukharji CJ that:

> "An agreement between two countries might be ratified not only by a subsequent formal agreement but by theactual implementation or a conduct, and read properly, in our opinion; the subsequent agreements did ratify the previous agreement."[23]

Yet another Article of the Indian Constitution provides a way to rope in international law within the domestic realm. Article 372 which deal with "Continuance in force of existing laws and their adaptation" reads:

> "(1) Notwithstanding the repeal by this constitution of the enactments referred to in Article 395 but 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 in until altered or repealed or amended by a competent legislature or other competent authority."

Hence by virtue of this Article, all the pre-constitution 'laws in force' (until altered, repealed or amended) except those laws that are repugnant to any provision of the Constitution, are declared to be void. The importance of this provision lies in the fact that continuance of "laws in force" means the continuance of the British Common Law as it was applied by courts in India in the pre-constitution period.[24]

What is important to note here is that the common law treats International custom as part of municipal law unless it is inconsistent with themunicipal law in which case municipal law prevails over international law.[25]This is the modified form of Blackstonian doctrine which treats international law as part of municipal law without any limitation whatsoever. Moreover, according to common law, international treaties, which effect private rights, require modification of statute law and enabling Act of Parliament for their implementation. Those treaties which are not inconsistent with themunicipal law are per se part of themunicipal law and do not need legislative Act for their implementation. Thus 'common law' maintains that the rules of international customary and treaty law, including U.D.H.R (containing customary norms of International Human Rights law), are part of municipal law if they are not inconsistent with municipal law.

JUDICIAL IMPLEMENTATION OF INTERNATIONAL LAWS IN SPECIFIC AREAS

[23] Ibid p.562

[24]Gurudip Singh, 'Human Rights Covenants in India' IJIL, at 222, Civil Rights Vigilance Committee S.L.S.R.C. College of Law v. Union of India, AIR 1983 Kar. 85 at 89.

[25]Chung Chi Cheung v. R. A.C. (1939)

Indian courts have generally been positive in their response to developments in thepublic international law. This has manifested itself in several different areas, including human rights, environmental law, rights of women, etc.

SOVEREIGNTY AND TERRITORY-

As noted earlier, *ManganbhaiIshwarbhai Patel vs Union of India*[26], the petitioners sought to restrain the Indian Government from transferring some territory of Rann of Kutch to Pakistan, by giving effect to thearbitral award, without theapproval of Parliament. The Supreme Court, in the course of its judgement, distinguished this case from the *Berubari Union*[27]. This case was concerned with disputed boundaries, but *Berubari Union case* dealt with the transfer of de facto and de jure Indian territory. According to the Court, the Kutch award, rendered by the arbitral trial (in1968), was an operative treaty which did not require legislation. M. Hidayatullah, CJ observed:

> "Ordinary an adjustment of a boundary which International law regards as valid between two nations should be recognized 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 held…"

About the self-executing nature of the award, the Court observed:

> "When a treaty or award after arbitration comes into existence it has to be implemented and this can only be if all the three branches of the government- the Legislature, the Executive and the Judiciary- or any one of them, possess the power to implement it…In some jurisdictions, the treaty or the compromise read with the Award acquires full effect automatically in the municipal law…Such treaties and awards are self-executing. Legislation may nevertheless be passed in aid of implementing but is usually not necessary."

HUMAN RIGHTS

India has been a staunch proponent of human rights since it gained independence in 1947. Its Constitution comprises a chapter on fundamental rights enshrined in Part III which is not only enforceable but also, thanks to the operation of Article 13, enjoys a status of the highest law of the land. The Constitution also treats as a fundamental right the right to seek remedies for violation of fundamental rights. Accordingly, Articles 32 and 226 of the Constitution enable a right holder to approach for redressal to the Supreme Court and High Courts respectively. Moreover, it incorporates in Part IV a set of Directive Principles of State Policy which is in nature of specific directives cast on the State to uphold and further certain economic, social and cultural interests of the people.

[26] (1969) 3 SCR 254
[27] AIR 1960 SC S45

In keeping with its commitment to human rights, India has been a signatory to most significant multilateral instruments and conventions pertaining to it. These include the Universal Declaration of Human Rights (UDHR), 1948, the International Covenant on Civil and Political Rights (ICCPR), 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966, the Convention on Elimination of All Forms of Discrimination against Women (CEDAW), 1979, and the Convention on the Rights of Children(CRC), 1989.

Surprisingly, the legislature has not been proactive in passing legislation to honor its commitments in this regard until recently, though it may be argued that the Fundamental Rights chapter of the Constitution reflects and upholds most of the rights specified in UDHR, fact remains that no specific law existed to give effect to human rights, until the Protection of Human Rights Act was enacted in 1993. The 1993 Act provides the establishment of National Human Rights Commission, State Human Rights Commission in States and Human Rights Courts for protection for human rights, an important aspect to be noted in this context is the definition of 'human rights'. It is plausible to argue that the definition provided in Section 2(d) is an example of the transformation doctrine of giving force to international treaties within India. Section 2(d) states: 'human rights means the rights relating to life, liberty, equality and the dignity of the individual guaranteed by the Constitution or embodied in the international covenants and enforceable by courts in India'. The subsection (f) defines 'international covenants' to mean International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.

Indian Judiciary has ruled repeatedly that unless there exists a grave inconsistency, all forms of domestic law, including even the Constitution, must be interpreted in a manner consistent with international law. In the landmark judgement of *KeshavanandBharati v State of Kerala*[28], Chief Justice Sikri observed;

> "In 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"

In other words, the Supreme Court was at pains to protect the civil and political rights of its citizens from being diluted or denied. At any rate, the intention was to strengthen the inalienability of these rights.

ADM Jabalpur vs Shivkant Shukla[29]however, must rank as the lowest point in the history of the Indian Judiciary, with reference to the protection of human rights. This decision upheld the suspension of civil rights and liberties during the pendency of national emergencies declared under Article 356 of the Constitution notwithstanding the fact that India was already a signatory to the UDHR and ICCPR. Khanna J however, dissented from the majority, and his opinion referred to widely even today as a source of inspiration for human rights advocates. In the course of this, the learned Judge also dwelt upon the relationship between international and domestic law:

[28](1973) 4 SCC 225
[29](1976) 2 SCC 521.

> "Equally well established is the rule of constriction that if there be a conflict between themunicipal law on one side and the international law or the provisions of any treaty obligations on the other, the courts would give effect to the municipal law. If, however, two constrictions of the municipal law are possible, the courts should lean in favor of adopting such construction as would make the provisions of the municipal law to be in harmony with the international law or treaty obligations. Every statute, according to this rule, is interpreted, so far as the language permits, so as not to be inconsistent with the comity of nations, or the established rules of international law, and the court will avoid a construction which would give rise to such inconsistency unless compelled to avoid it by plain and unambiguous language."

In *Jolly George Verghese vs Bank of Cochin*[30], a question arose as to whether it was permissible to subject debtors to imprisonment in order to compel them to fulfil their contractual obligations. With reference to Article 11 of ICCPR which prohibits such practice, Krishna Iyer, J creatively interpreted Section 51 of Code of Civil Procedure (CPC), 1908, in a manner consistent with Article 11, but at the same time ruled that municipal law cannot be ignored even though there is a conflicting rule of international law in the given context.

In *People's Union for Civil Liberties (PUCL) vs Union of India*[31], the question before the Apex court concerned the legality of telephone tapping. It was contended that Section 5(2) of the Indian Telegraph Act, 1885, could be interpreted to provide adequate safeguards to prevent arbitrariness and misuse. The Court, speaking through Kuldip Singh, J, observed that Article 12 of UDHR and Article 17(1) of ICCPR contained a right against arbitrary or unlawful interference with one's privacy, and consequently, the court construed Section 5(2) in the light of these provisions.

RIGHTS OF WOMEN AND CHILDREN

Chairman, Railway Board vs Chandrima Das[32] concerns a set of facts that raised a huge public outcry over a Bangladeshi national woman, who was gang-raped by some railway officials in Rail Yatri Niwas. On the basis of these facts, the Calcutta High Court directed the Railways to pay her one mission rupees as compensation. It was contended before the Supreme Court that the victim was not an Indian national and thus not entitled to any compensation and the act in question was committed by railway officials in their individual capacities and the Railways were not vicariously liable. It was further contended that the remedy lay in the domain of private law and not in public law. Responding to the second contention, the Court held:

> "Where public functionaries are involved and the matter relates to the violation of fundamental rights or enforcement of public duties, the remedy would still be available under the public law notwithstanding that a suit could be filed for damages under theprivate law."

[30](1980) 2 SCC 360.
[31] (1997) 1 SCC 301
[32](2000) 2 SCC.

The court particularly mentioned Article 2 of the UDHR, which states:

> *"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political, or other opinions, national or social origin, property, birth or other status."*

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

Referring to a series of decisions, which hold that the notion of life cannot be whittled down and that the right of life applied equally to citizens and non-citizens, the Court held:

> "On this principle, even those who are not citizens of this country and come here merely as tourists or in any other capacity will be entitled to the protection of their lives in accordance with the constitutional provisions. They also have the right to "life" in this country. Thus, they also have the right to live, so long as they are here, with human dignity. Just as the State is under an obligation to protect the life of every citizen in this country, so also the State is under an obligation to protect the life of the persons who are not citizens."

The court concluded that the victim, Ms.HanuffaKhatoon was entitled to the protection of Article 21 even if she was not a citizen of India.

In *Vishakha&Ors. Vs State of Rajasthan &Ors.*[33], which addressing to the need for providing protection to women in thework place from sexual harassment in the context of gender equality, right to work with human dignity as guaranteed by the constitution, observed that the contents of international conventions and norms are significant for the purpose of interpretation. The court observed:

> "Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions to enlarge the meaning and content thereof, to promote the object of the Constitutional guarantee.[34]"

The Court further held:

> "Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognized basic human right. The common minimum requirement of this right has received global acceptance. The international conventions and norms are therefore of great significance in the formulation of guidelines to achieve this purpose."

The court thus prescribed certain guidelines and norms for the protection of women from sexual harassment in the workplace.

[33](1997) 6 SCC 241.

[34] Articles 14,15,199(i)(g) and 21 of the Constitution of India.

In *Municipal Corporation of Delhi vs Female Workers (muster roll) &Anr.*[35], the Supreme Court dealt with the issue whether the female workers on muster roll were entitled to benefits of Maternity Benefit Act. The court held after referring to the provisions of Article 11 of the Convention on Elimination of All Forms of Discrimination against Women and the provisions of Universal Declaration of Human Rights, that the Municipal Corporation of Delhi provides the benefits under the Maternity Act to the women employees who have been working on daily wages.

In dealing with the issue of reckoning date for the determination of age of juvenile, the Supreme Court in *Pratap Singh vs State of Jharkhand*[36] sought to interpret the provisions of Juvenile Justice Act, 1986, Juvenile Justice (Care and Protection of Children) Act, 2000, and observed that the Juvenile Justice Act specially refers to international law particularly the relevant provisions of United National Minimum Rules for the Administration of Juvenile Justice. S.B. Sinha J held:

> "The Juvenile Justice Act specially refers to international law. The relevant provisions of the Rules are incorporated therein. The international treaties, covenants and conventions although may not be a part of our municipal law, the same can be referred to and followed by the courts having regard to the fact that India is a party to the said treaties. Some provisions of international law although may not be a part of the municipal law but the courts are not hesitant in referring thereto as to find new rights in the context of the Constitution. Constitution of India and other ongoing statues have been read consistently with the rules of international law. Constitution is a source of, and not and exercise of, legislative power. The principles of international law whenever applicable operate as a statutory implication but the Legislature in the instant case held itself bound thereby and thus did not legislate in disregarded of the constitutional provisions or the international law as also in the context of Articles 20 and 21 of the Constitution of India. The law has to be understood in accordance with the international law. Part III of our constitution protects substantive as well as procedural rights. Implications which arise therefrom must effectively be protected by the judiciary. A contextual meaning to the statute is required to be assigned having regard to the Constitutional as well as international law operating in the field."

The court finally held that the relevant date for reckoning the age of the juvenile would be the date of occurrence and not the date on which he was produced before the board.

Gaurav Jain vs Union of India and Ors.[37], involved the issues relating to rehabilitation of children of prostitutes as to whether the State is obliged to provide the necessary amenities for their education, dignity, care, and protection. The Supreme Court after invoking the provisions of UDHR and the Convention on Elimination on All Forms of Discrimination against Women and the Convention on Rights of Children and reading them into the provisions of Article 21 of the Indian Constitution, proactively issued mandatory directions to the central and state governments and their various

[35](2000) 3 SCC 224.
[36](2005) 3 SCC 551.
[37](1997) 8 SCC 114.

agencies to implement the recommendations made by the NGO's/Committees set up by Court for comprehensive rehabilitation, growth and development of children of prostitutes.

REFUGEE LAW

India has been hosting several thousand refugees from various parts of the world, particularly, from the neighboring countries, such as Sri Lanka, Bangladesh, Myanmar besides several thousand Tibetans, Iranians, etc. India, however, is not a party for 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. India also does not have a domestic law on the subject. Thus, it would seem that India does not have any international obligation to provide asylum or protection to any refugee nor does it have any statutory duty within India to do so. But India has become a member of the Executive Committee of the High Commissioner for Refugees (EXCOMM) 1995 in recognition of its active support and assistance were given to the refugees within India. However, the fact that India is a party to several human rights conventions makes it obliged to treat both citizens and aliens on the basis of the principles of equality and non-discrimination with regard to life and liberties. The Supreme Court of India has interpreted the provisions of Article 14 (Equality) and Article 21 (Right to life) as applicable to refugees as well as aliens. In several cases, the Indian Judiciary has interpreted that Article 21 in its scope includes internationally acknowledged principle of 'non-refoulement' i.e. a refugee's right not to be forced out of the country. Further, the Indian judiciary has provided relief to several refugees over a period of time and also laid down legal principles for the protection of refugees in India.[38] Applying international standards, the judiciary has expressed its unwillingness to let Sri Lankan refugees forced to return to Sri Lanka against their will[39]. In an important case of *Chakma Refugees* case[40], the Supreme Court held that Chakma refugees cannot be forcibly sent back to Bangladesh as their lives might be endangered. Further, it directed the State of Arunachal Pradesh to give protection to the Chakma refugees.

In *Luis de Raedt vs Union of India*[41] and *Khudiram Chakma vs Union of India*[42], the Supreme Court has held that the principle of protection of life and liberty is a right available to aliens on the Indian territory. In *NHRC vs. Union of India*, the Apex court allowed National Human Rights Commission to intervene and lay down standards for reparation. Further, it ordered that the custody of refugees should be given to the UNHRC instead of police and that the refugees be given proper amenities. Similarly, invoking the international convention, the court gave directions for protection of the rights of children in various contexts.[43]

ENVIRONMENTAL LAW

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[38] See survey of RaginiTrakroo, Aparna Bhat, Samhita Nandi, Refugees and the Law, Socio-Legal Information Centre, New Delhi, pp 407-551.

[39] P. Nedumaran vs. Union of India

[40] National Human Rights Commission vs. State of Arunachal Pradesh, AIR 1996 SC 1234.

[41] (1993) 3 SCC 544.

[42] (1994) Supp I SCC 614.

[43] Laxmi Kant Pandey vs Union of India, (1984) 2 SCC 244; VIshaljut vs Union of India, (1990) 3 SCC 318; M.C. Mehta vs State of Tamil Nadu, (1991) 1 SCC 283; M.C. Mehta vs State of Tamil Nadu, (1996) 6 SCC 765; BandhuaMuktiMorcha vs Union of India, (1997) 10 SCC 549.

Beginning with the 1972 Stockholm Declaration on Environment, several multilateral treaties have been concluded for the protection of theglobal environment and sustainable development. The legal developments in this field have swiftly embraced by the global community and generated an ever-increasing legal consciousness with regard to theenvironment and sustainable development. Nations, domestic courts, and individuals feel that there is a role for everyone in this regard. The Indian courts have relied upon the emerging norms and principles of international environmental law as forming part of Indian law without the requirement of statutory transformation. They have given effect to such norms by adopting a pro-active approach towards the protection of environment and sustainable development, in this context, the Supreme Court in *Vellore Citizens Forum vs Union of India*[44] has articulated the contexts of the concept of sustainable development as follows:

> "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 Natural 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 court further observed that the precautionary principle and the polluter pay principle are the salient features of sustainable development. The concept of sustainable development has been reiterated as a fundamental concept of Indian law in the case of *Bombay Dyeing &Mgf. Co. Ltd.(3) vs Bombay Environmental Action Group*[45]. The court has observed that:

> "Even otherwise, once these principles are accepted as part of the customary international law there would be no difficulty in accepting them as part of the domestic law. It is almost accepted theproposition of law that the rule of customary international law which is not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by Courts of Law."[46]

CONCLUDING REMARKS

The Indian Constitution embodies the basic framework for the implementation of international treaty obligations undertaken by India under its domestic legal system. According to this, the Government of India has exclusive power to conclude and implement international treaties or agreements. The President of India is vested with the exclusive power of the Government of India and thus is empowered to enter into and ratify international treaties. This does not mean that international law, ipso facto, is enforceable upon ratification. This is because Indian Constitution follows the 'dualistic' theory with respect to incorporation of international law into municipal law.

[44](1996) 5 SCC 614.

[45](2006) 3 SCC 432; *Indian Council for Enviro-Legal Action Vs Union of India*, (1996) 3 SCC 212*; M.C. Mehta vs Union of India,* (1997) 3 SCC 715. In this regard it may be pointed out that the Supreme Court of India has directed a High Court to set up a green bench

[46](1996) 5 SCC 647.

International treaties do not automatically become part of national law in India. They must be incorporated into the legal system by an act of Parliament, which has the legislative powers to enact laws to implement India's obligations under the international treaty.

Thus, in theabsence of specific domestic legislation enacted by the Parliament, India's international obligations are not justiciable in Indian Courts. However, a perusal of the jurisprudence shows that a pro-active role is being played by the Indian judiciary in implementing India's international obligations under International treaties, especially in the field of human rights and environmental law. Thus, the Indian Judiciary through' judicial activism' fills up the gaps in the municipal law of India and International law, thereby playing an important role in the implementation of international law in India.