IMPLEMENTATION OF HUMAN RIGHTS TREATIES UNDER INDIAN LAW: A SURVEY

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Master of Philosophy

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DEDICATED

TO

THE INNOCENT VICTIMS

OF

HUMAN RIGHTS VIOLATIONS

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- Puhazh G.P.

ABBREVIATIONS

CEDAW	-	Committee on the Elimination of Discrimination Against Women
ECOSOC	-	Economic and Social Council
F.I.R	-	First Information report
ICCPR	-	International Covenant on Civil and Political Rights
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
ICJ	-	International Court of Justice
ILO	-	International Labour Organisation
NCW	-	National Commission for Women
NGOs	-	Non-Governmental Organisations
NHRC	-	National Human Rights Commission
POTA	-	Prevention of Terrorism Act
PUCL	-	People's Union for Civil Liberties
UDHR	-	Universal Declaration of Human Rights
UNESCO	-	United Nations Educational Scientific and Cultural Organisation
UNHCHR	-	United Nations High Commission for Human Rights
UNHCR	-	United Nations High Commission for Refugees
UNICEF	-	United Nations International Children's Emergency Fund

CHAPTER I

INTRODUCTION

Chapter I

Introduction

Human rights and fundamental freedoms form part of every society. The concept of Human rights is not new. It can even be traced back to the origins of human society on earth. There is a general mistaken notion that the concept of human rights is western and that the origin of the concept of human rights in world history first found its expression in Magna Carta of 1215,[1] and later in the American Declaration of Independence 1776, American Bill of Rights of 1791 and the French Declaration of the Rights of Man of 1789.

But long before this, many ancient societies, such as Indian, have had deep human values. This concept of human rights was enshrined in the law of Dharma, about 5000 years ago, with a view to establishing a harmonious social order free from traces of conflicts, exploitation and miseries.[2] The law of Dharma of the Vedic Period, the Supreme Law, sustained individuals together in society,[3] and provided for the rights of man.[4] What is manifest in the readings of Indian civilization is that human rights philosophies had enjoyed a significant place in this ancient civilization.[5] It was a highly developed civilization of the time and the rights of man were deeply embedded in it.[6]

But then, the Muslim invasions and British colonization changed the scenario. The prime objectives of these invaders were to enslave the people by despotism, absolutism and tyranny and had scant intentions to serve the people[7]. This created anarchy in the society and resulted in large-scale violations of human rights among the masses. Added to that, the First and Second World Wars witnessed mass destruction of human lives, thus reminding the world community of the importance of

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1. See Farqan Ahmad, "Human Rights and Developing Nations: Provisions, Problems and Perspective", in eds., Z.A. Nizami , Devika Paul, *Human rights in the Third World Countries* (New Delhi,1994), p.31.
2. S.N. Dhyani, *Fundamental of Jurispurudence: The Indian Approach* (New Delhi, 1991) p.79.
3. Ibid., p.82.
4. Ibid., p.83.
5. Yogesh K. Tyagi, "Third World Response to Human Rights", *Indian Journal of International Law*, Vol.21, No.1, 1981, p.120.
6. Ibid., p.108.
7. Dhyani, n.2, p.57.

the protection of some basic rights that human beings should possess. Right to life, being the most important one was at peril during the wars.

There was a need for awareness among the human beings as well as the states about what their limitations are while dealing with human beings. These limitations are undoubtedly termed as human rights. Of course, there would never have been any significance for the concept of right, unless its existence is usually threatened. Hence, by developing the concept of equality and curbing the violations of other's rights the concept of human rights can be fully enhanced and developed.

After the two devastating World Wars, in order to prevent the world from pushing into war and destruction again, the United Nations took birth in 1945.The main objective of the United Nations was to "maintain international peace and security and to that end, to take effective, collective measures for the prevention and removal of threats to the peace and for the containment of acts of aggression or other breaches of peace."[8]

Threats to peace may not only arise from the use of force against the territorial integrity or political independence of a state but also, as it happened in the recent past in former Yugoslavia, Somalia and Rwanda, from the acts of genocide or fratricidal wars that made a mockery of the solemnly declared charter principles of re-affirming faith in fundamental human rights in the dignity and worth of human persons.

Hence, assuring human rights for all remains a daunting challenge, especially given the impunity with which they continue to be violated in all parts of the world. Billions continue to live in extreme poverty, and the huge disparity between rich and poor countries continue to grow. Violent conflicts, increasingly ethnic in nature, have proliferated, uprooting entire communities, forcing millions of people free from their homes. Political extremism and terrorism continue to target countless innocent civilians. Unemployment, discrimination and social exclusion bedevil all societies. And though globalization has brought the world closer together, it has also benefited elements of uncivil society, reflected in the increase in corruption, organised crime

[8] Article 1(1) of the UN Charter.

and transnational trafficking in illicit drugs, arms, toxic materials, even in human beings, particularly of women for sexual exploitation.[9]

In order to strengthen the process of universalisation of human rights, the Universal Declaration of Human Rights (UDHR) was adopted on 1948, followed by six major UN sponsored conventions namely - The Genocide Convention 1949[10], The racial discrimination 1965[11], The International Covenant on Civil and Political rights 1966[12], The International Covenant on Economic, Cultural and Social rights 1966[13] and Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984[14], and The Convention on the Rights of the Child 1989[15],Convention on the Elimination of All Forms of Discrimination against Women 1979[16]

A vast majority ~~number~~ of states are parties to these treaties. It is argued that state's credentials in international society depend in part at least on the acceptance of and compliance with its obligations under human rights treaties.[17] Some international organizations grant their membership only to those states, which ratify certain human rights treaties.[18] In effect, the international community considers human rights as an integral part of civilization.

India is also a party to all these human rights treaties, although with some reservations, like many other countries. But when it comes to implementation aspect, whether India is fulfilling its international obligations enshrined in these treaties, even

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9. Human Rights Today, UN Briefing papers at p.1; Also see www.un.org.
10. United Nations, *Treaty series*, Vol .78, p.277
Entered into force on 12 January 1951
11. United Nations, *Treaty series*, Vol .660 p.195
Entered into force on 4 January 1969
12. United Nations, *Treaty series*, Vol.999, p.171
Entered into force on 23 March 1976
13. United Nations, *Treaty series*, Vol.993, p.3
Entered into force on 3 January 1976
14. United Nations, *Treaty Series*, Vol.1465,p..85
Entered into force on 26 June 1987.
15. A/RES/44/25
Entered into force on 2 september 1990
16. United Nations, *Treaty series*, Vol.12449, p.13
Entered into force on 3 September 1981
17. Yogesh Tyagi, "The Conflict of Law and Policy on Reservations to Human Rights Treaties" (2000) *British Year book of International Law*, Vol. p.181.
18. Ibid.

though each treaty has its own monitoring mechanisms, is still in question.[19] Among the various fields of international law, the protection of human rights has the greatest number of international mechanisms for guaranteeing and verifying its implementation[20].

Since India does not have any self-executing treaty mechanism, any treaty to be implemented or incorporated into the domestic area needs a specific legislation enacted by the Union Parliament. It is sad to note that India has not enacted any domestic legislation to incorporate the human rights treaties to which it is a party. In spite of this, the Indian judiciary has played a pro-active role by interpreting various provisions of the Constitution with the help of the principles laid down in these human rights treaties, thus indirectly implementing various provisions of these treaties under the Indian legal system[21].

In this study, an attempt is made to evaluate how far these treaties are implemented in the national legal system, and it also includes a critical evaluation of the judiciary's contribution in this respect. Since implementation involves social transformation, it is worth examining the concept of human rights, its relationship with natural rights and the historical development of human rights before we directly move into the implementation aspect.

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19. The Human Rights Committee monitors implementation of the International Covenant on Civil and Political Rights. The Committee on Economic, Social and Cultural Rights monitors implementation of the International Covenant on Economic, Social and Cultural Rights. The Committee on the Elimination of Racial Discrimination; The Committee on the Elimination of Discrimination against women; The Committee against Torture, and The Committee on the Rights of the Child monitors the implementation of International Convention on the Elimination of All Forms of Discrimination against Women, Convention against Torture and Cruelty, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child respectively. State parties outlined the legislative, judicial and administrative measures taken to ensure that government policies and practices conform to treaty principles, in the periodic reports submitted to the committees. More over the Human Rights Committee, the Committee against Torture and the Committee on the Elimination of Racial Discrimination allow for communications from individuals.

20. Benedetto Conforti, "National Courts and The International Law of Human Rights." in eds., Benedetto Conforti and Francessco Francioni, *Enforcing International Human Rights in Domestic Courts* (Martinus Hijhoff Publishers, The Hague, 1997).

21 *Vishaka* v.*State of Rajasthan* AIR 1997 SC 3011; *Sunil Batra* v. *Delhi Administration* AIR 1978 SC 1675 etc.

I.1 The Concept of Human Rights.

Human rights are recognised as the right of every human being by virtue of his being a member of human family. Even though human right is applicable universally to all human beings, it has so far escaped a universally accepted definition[22]. Section 2(d) of Protection of Human Rights Act, 1993 defines human rights to mean the "right relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the international covenants and enforceable by courts in India."

According to Webster's Dictionary 2000, human rights means "the right to organise politically or to worship freely, thought of as belonging inherently to each human being and not to be taken away or interfered with by arbitrary or repressive government action." Human rights are based on the assumption that the individual has certain attributes, which are derived from the inherent dignity of individual human being, the attributes that cannot be legitimately taken away through the exercise of state power. In the words of Inter-American Court of Human Rights, these are individual domains, which are beyond the reach of the state or to which state has but limited access.[23]

Thus, human rights cannot be dissociated from a man without impairing his dignity. These rights are inherent because the nature imputed these rights to every living being as the right to life and such other rights which are usually called as natural rights. Initially, the meaning of human rights was confined to the narrow bounds of freedom from arbitrary government. Thus, human rights are described as those minimal rights that every individual must have against the state or other public authority by virtue of his being a member of the human family, "irrespective of any

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22. K.S. Iyer, *Human Rights Vibrant Issues* (Indian Publishers & Distributors, Delhi, 1998), p.3
23. Rick Lawson, "Out of Control of State Responsibility and Human Rights; Will the ILC's definition of the 'Act of State' meet the Challenges of the 21st Century?" In Monique Castermans (Eds), *The role of the nation State in the 21st Century* (Kluwer Law International, London, 1998), p.8.

other consideration."[24] Some authors call it as the implicit substantive moral theory inherent in the human kind.[25]

Thus human rights owe its origin to natural rights under the natural law theory. A naturalistic theory is a theory that there is some natural order in which persons have a place, a natural order charaterised by natural harmony[26]. In their view, natural rights are those rights, which a person has by virtue of his nature as a human being. In that sense, the concept of human rights is closely related to natural rights, which is discussed as follows.

I.2 Relationship between Natural Rights and Human Rights

The Universe has a law of its own. It is manifested in all forms of life. This law guides the scheme of events in the universe. No proper definition of natural law has been given so far. However, some of the characteristics of natural law have been identified. They are mainly justice, equity and reason. The right reason is the logic behind the natural law. The rights under this natural law are known as natural rights. The natural law propagators believe that the nature gives all these rights and man should identify these rights for the well being of human kind. The state is obliged to pass the test of natural law when it makes law.

The positivists are of the view that once the competent authority enacts a law then there is no question of testing the justness, fairness or reasonableness of that law[27]. But the naturalists are of the view that there are certain inalienable rights, which human beings have and cannot be taken away by any authority. Naturalists claim that law is best explained by the reference to natural moral principles, principles inherent in the notion of ideal society and the moral potentialities of persons.[28] One of the main proponents of natural law, John Locke, in his 'Two Treatises of Government' advocate that when the king becomes a tyrant, the people have the right

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24. D.D. Basu, *Human Rights in Constitutional Law* (Prentice Hall of India, New Delhi, 1994), p.5.
25. L.K. Thakur, *Comparative and International Human Right* (Tarun Offset, Delhi 2000), p.2.
26. Thomas Morawetz, *The Philosophy of Law- An Introduction* (Collier Macmillan Publishers, London, 1980) p.40
27. Ibid, p.38
28. Ibid

to resist, which means if the king fails to protect the basic rights of his subject, he ceases to be a king.

Under natural law, every individual has certain rights, which is called as human rights in a broad terminology. Since human rights are natural to a human being, all human rights can be called as natural rights. These are the minimum basic rights, which the state has to recognize while making laws. These rights existed even before the advent of the concept of state. The state, briefly, does not create, but recognises rights and its character will be apparent from the rights that, at any given period, secure recognition.[29] Hence, it cannot be said that these rights are derived from state.

What is just, reasonable and fair depends upon reasons. This 'reasoning power' is given by nature. Reason is a law for all men, not merely for the wise.[30] There is a sense in which all men are equal, even after allowance has been made for the inevitable differences of rank, native endowment and wealth.[31] They ought all to have at least that minimum of rights without which human dignity is impossible and justice requires that the law should recognise such rights and protect men in the enjoyment of them.[32] Justice is, therefore, a law for states, the bond that holds them together, not of course in the sense that a state cannot be unjust, but in the sense that, in so far as it becomes so, it loses that ground of harmony, which makes it a state.[33] Thus, natural rights are part of natural law. Hence, they are superior to and inviolable by human authority. They exist independently as the law of the land with higher sanctity than legal rights.

In this century, as in the past, jurists as well as other experts have used the phrase '*Natural Justice*' in a way, which implies the existence of moral principles of self-evident and unarguable truth.[34] The word '*nature*' literally means the innate quality of the things of objects. However, the development of the word '*nature*' gets the meaning of human rights and it creates a positive duty in International level too.

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29 Harold J. Laski, *A Grammar of politics* (George Allen & Unwin Ltd, London, 1960), p.89

30 G.H. Sabine, *A History of political theory* (George G. Harrap & Co Ltd, London, 1963), p.153

31 Ibid

32 Ibid

33 Ibid

34 Paul Jackson, *Natural Justice* (Universal Publishing Co, Delhi, 1999), p.1.

I.3 Historical Development

The human civilization has always had concern for human rights throughout the history. The world became divided into political units called states and each claimed sovereignty. The idea of state sovereignty traditionally meant that individuals were subjects of state sovereignty and that they were the exclusive concern of the state.[35] The claim of a state to exclusive jurisdiction over its individuals has slowly weakened over long period of history. A small beginning for recognition of human rights in Europe was made since Peace of Westphalia of 1648, which ended a long religious war between the Catholic and the Protestant Princes.[36]

A second area of international concern for individuals found in the Battle of Solferino of 1859.In that time Count Henri Dunant, a Swiss philanthropist established the Red Cross Society, a voluntary Organisation which worked for the amelioration of the conditions of the sick and the wounded soldiers in the battlefield.[37]This movement accepted by the states and made some restrictions on war for the protection and amelioration of the individuals who for no fault of theirs, participated in the war. The first international agreement for this adopted in 1864 and it has been on the basis of experience of different wars, in 1899,1907,1929,1949 and 1977.[38]

A third area of evolution of international concern for human rights related to colonies. The establishment of the League of Nations in 1920 laid down an international principle, self-determination, and provided a modest institutional mechanism, paving the way for decolonisation of most of the European colonies. A fourth area of evolution of international concern for human rights related to protection of minority rights. After the First World War the European situation clearly showed that it was necessary to establish a system of international guarantees for protection of minority rights.

All these developments led to states authorizing and empowering international organizations, even it in a small measure, to take initiatives in the socio-economic

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35 V.S.Mani, "Human Rights and the United Nations; A Survey", *Journal of the Indian Law Institute*, vol.40, no.1-4 (1998), p.39

36 Ibid.

37 Ibid.

38 Ibid.

fields. In fact the Treaty of Versailles, 1919 contained the Constitutions of two important international organizations, namely the League of Nations and the International Labour Office (later renamed International Labour Organisation or ILO). The mandate of the ILO is to promote social justice for the working people everywhere through formulating the policies and programmes to improve the working and living conditions of the workers, create international labour standards, assist the labourers in their respective territories, and also assist them in with technical advise, training and education in these fields. The ILO Declaration 1944 affirmed that "all human beings irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity". These ides strongly influenced not only the drafting of the UN charter, but the subsequent evolution of human rights, both within and outside the UN.

The UN General Assembly adopted the Universal Declaration of Human Rights (UDHR) on 10th December 1948. UDHR drafted and recommended by the Commission of Human Rights to the General Assembly, through Economic and Social Council (ECOSOC). The preamble of the UDHR emphasizes that, "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.[39] It also emphasises that, a common understanding of the human rights and freedoms enshrined in the UN charter " is of greatest importance for the full realization of the pledge".[40]

Articles 1 to 21 of the Declaration relate to Civil and Political Rights, Articles 22 to 27 relate to Economic, Social and Cultural Rights, and Articles 28 to 30 deals with general application. The UDHR in Article 29(2) itself recognises that ultimate goal of international effort is in meeting the just requirements of morality, public order and the general welfare in a democratic society.[41] UDHR provided the normative basis for all future activities of the UN in the field of human rights. It led to the drafting of the two International Covenants on Human Rights in 1966-both of

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39 Preamble of the UDHR, UN General Assembly Resolution...(III) of 1948, 1st para.

40 Ibid 7th para.

41 See Publications of the United Nations Department of Public Information, *The International Bill of Human Rights*, DPI/925/Rev.1-93-25952-June 1993-20M,p.9

which, along with UDHR constitute the International Bill of Rights.[42] Later another phase on the international level, in safeguarding human rights, by the Regional Arrangements setting up of European Commission of Human Rights, became effective in settling various human rights issues. But it was later realized that, the actual realization of these human rights could be accomplished in their own communities and in their own conditions of social life. International aid in various forms could be gained through the home forum. The enjoyment and exercise of human rights within State presupposes a general level of political, economic and social discipline and ability, which can be attained by education, training and hard work by the home forum and, not with orders and regulations of the positive law.

United Nations Charter begins with the words "we the peoples of the United Nations" which denotes a great human advancement over the covenant of the League of Nations, which began with the phrase "the League contracting parties." The purpose was to emphasise that the charter was an expression of the will of the peoples of the world.[43]

The preamble of United Nations states "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person. In the equal rights of men and women and of nations large and small."

One of the purposes of the organisation is stated to be "the achievement of international cooperation in solving international problems of economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinctions as to race, sex, language or religions."

The General Assembly is assigned the duty of initiating studies and making recommendations for assisting in the realization of human rights and fundamental freedoms. The Economic and Social Council (ECOSOC) is required to set up commissions for the promotion of human rights under Article 68 of the United

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42 Mani n 35, p.48.

43. Upendra Baxi, *Human Rights and Institutional Framework for Implementation* (Delta shelf Publication, New Delhi, 1991), P.6

Nations Charter. [44] The Trusteeship system also appeal for respect and encourages human rights and fundamental freedoms.[45] United States of America's 'Due Process' concept influenced international human rights instruments to a greater extent and also played a crucial role in developing international humanitarian instruments.

The concepts of civil and political liberties were finally declared as civil rights in 1966 in the International Covenant on Civil and Political rights and it incorporates the traditional or fundamental rights conceived and proclaimed in the wake of the success of the industrial revolution.[46] The Human Rights Committee is established pursuant to the provisions of part IV of the Covenant.[47]

The International Covenant on Economic and Social Rights was also adopted and its outstanding feature is that it begins by saying that the state parties to the covenant "undertake to take steps individually and co-operations especially economic and technical".[48] We have enough number of human rights documents at the international level. It is noteworthy that all the documents named as human rights documents are at the international level only. How far they can protect the human rights of each individual in each state is the gargantuan question. This leads to another issue as to what is the legal specification adopted by India and various other countries to comply with the obligations under the international convention.

I.4 Objectives of the present study

The objectives of the present study are: -

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44. Article 68 of the UN charter says, "The economic and social council shall setup commission in economic and social fields and for the protection of Human Rights, and for the protection of Human Rights and as such commissions as may be required for the performance of its functions".
45. Article 76 (c) of the UN Charter reads, "The basic objective of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be: to encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world".
46. Ibid n.24, p.36
47. Michael O Flaherty, *Human Rights and The United Nations* (Sweet and Maxwell, London, 1996), p.31
48. Thakur n.25, p.35

1. To analyse whether India has implemented international human rights treaties by enacting suitable national legislation thus fulfilling its international treaty obligation.
2. To portray the domestic implementation by taking major Indian statutes into consideration.
3. To portray the role of Indian courts in domestic implementation.

I.5 Methodology and materials

The study will be mainly based on Primary sources and also secondary sources. The primary sources consist of International human rights conventions, and the relevant Indian laws, both procedural and substantial. The study also analyses various important cases decided by Indian Supreme Court dealing with Human rights issues. Further, the study will utilise secondary sources such as books, articles and reviews and comments of eminent jurists, academicians and scholars from different fields.

I.6 Chapterisation

This dissertation is divided into four chapters. The present one is the first chapter introducing this topic of dissertation.

The second chapter deals with the effectuation of international treaties in the Indian legal system and its constitutional and legal framework. It also analyses the status of human rights treaties under Indian legal system.

The Third chapter conducts a survey about the implementation of human rights treaties under Indian law. The study specifically deals with the implementation in three aspects viz, Prisoners rights, Rights of the women and children, Right to environment as a human right. It also deals with the role of Indian judiciary in implementation of these treaties.

The concluding chapter is the fourth one that contains findings emanating from the study and some suggestions.

CHAPTER II

EFFECTUATION OF HUMAN RIGHTS TREATIES UNDER INDIAN LAW: CONSTITUTIONAL AND LEGAL FRAMEWORK

Chapter II

Effectuation of Human Rights Treaties Under Indian Law: Constitutional and Legal Framework

Treaties are considered to be the main source of international law[1]. When it comes to human rights, treaties play an important role. Human rights treaties have contributed to the development of customary rules and general principles of international law. They create obligations not only among parties but also between parties and individuals.[2] More important, these treaties have become a source of inspiration to many judges and lawyers in their interpretation of domestic legislation. Some international organizations grant their membership only to those states, which ratify certain human rights treaties.[3] The ratification of human rights treaties demonstrates the ratifying state's adherence to civilised standards. As a result, a state's credentials in international society depend in part at least on the acceptance of and compliance with its obligations under human rights treaties[4].

As far as India is concerned, it is a party to many human rights instruments even before its independence. It was an original member of the League of Nations, and a party to a number of international agreements.[5] Under traditional international law, the concept of free consent in negotiations and conclusion of treaties in particular, and the assumption of international obligations did not exist; the principle of sovereignty, without principle of self-determination, stayed as a formal shell without reference to the people's will. What was good for Britain was good for India too.[6] It is easy to say that during the colonial rule, India's sovereignty was in a state of suspended animation. One could easily accept the fact that territorially British-India was not the one and the same as free India.

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1 Art. 38 (1) (a) of ICJ statute

2 Yogesh Tyagi, " The Conflict of Law and Policy on Reservation to Human rights Treaties". *British Year book of International Law* (2000) p. 181

3 Ibid.

4 Ibid.

5 V. S. Mani, "Effectuation of International Law in India", Asian *Yearbook of International Law*, Vol. 5 (1997), p. 150

6 Ibid.

At independence free India comprised of 562 princely kingdoms of varying 'sovereignty' plus the British-India, which consisted of mainly its presidencies under its control[7]. Hence, it could be argued with considerable persuasiveness that free India should not attempt to pursue with the legal obligations of British India, as most of its treaties were territorial in application. Even though India attained independence in 1947, the political system it incorporated in the Constitution saw a tremendous influence of the British system. Hence, before going into the constitutional provisions regarding treaties in India, it is useful to have a general overview of state practice in respect of absorption of treaty obligation into municipal law.

II.1 Treaty Making Power in Various Countries

Even though a state has ratified an international instrument and thereby become a party to it, it has no direct binding effect on the municipal law of the state unless and until it has been implemented by the legislature of that state or deemed incorporated by virtue of its national Constitution. Because of the doctrine of national sovereignty, the municipal courts of a nation state may not enforce any law other than national Constitution or laws passed by its national legislature.

In commonwealth countries, the present constitutional patterns of states appear to indicate that the executive branches of government possess unlimited competence to assume treaty obligations on behalf of the state[8]

In United Kingdom, international conventions are not part of the law of the land, even though U.K. has ratified them, and if a transformation doctrine were not applied, the crown could legislate for the subject without parliamentary consent.[9] As a consequence treaties are only part of English law if an enabling Act of parliament has been passed.[10]

In United States of America, treaties are divided into two categories viz, Self-executing and non self-executing treaties. Self-executing treaties are those, which become adopted even without an enabling Act of the legislature. On the other hand non self-

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7 Free India consists of Presidencies of Madras, Calcutta, Bombay and 562 princely states.

8 Hans Blix, *Treaty Making Power* (London Stevens and Sons Limited, New York, 1960), p. 258.

9 Ian Brownlie, Principles of public International Law, (Oxford University Press, Oxford, 1990), Pp.47-48

10 Ibid.

executing treaties are those which could be adopted only by an enabling Act of legislature. Article VI, para 2 of United States Constitution stipulates that, "all treaties made or which shall be made under the authority of United States, shall be the Supreme Law of the land". Self executing treaties or Conventions ratified by the United States are binding on American courts, even if it is in conflict with previous American statutes, provided that there is no conflict with United state's Constitution.[11]

In the former Federal Republic of Germany, Article 25 of the Constitution provides that the general principle of international law shall become part of the domestic law and directly creates rights and duties for the inhabitant of the Federal Republic. However, there is no such provision regarding treaties and accordingly they do not effectuate in to the municipal law without competent enabling legislation.

In Canada as in UK, no treaties form part of the domestic law. It implies that, the mere fact that Canada has acceded to an international convention would not lead to the conclusion that all the rights contained in that convention have been given status of constitutionally protected rights by including them in the Charter of Rights. Courts can refer international covenants for interpreting ambiguous provisions in a Canadian statute.[12]

In the former Soviet Union, International law is given primacy over internal law. Among the principles of Soviet foreign policy that are embodied in the USSR constitution Art.29 lists, "fulfilment in good faith of obligations arising from generally recognised principles and rules of international law and international treaties signed by the USSR". Similarly, the law on procedure for Concluding, Executing and Denouncing International treaties of the USSR (1978) states that the Soviet Union, "Concludes and executes international treaties in accordance with the constitutional foundations of its foreign policy and generally recognised principles and norms of international law".[13]In short, when participating in the creation and implementation of international legal norms

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11 J.G.Starke, *Introduction to International Law*, (Butterworth &Co (Publishers) Ltd, London, 1989), p.89

12 D. D. Basu, *Human Rights in Constitutional Law,* (Prentice Hall of India, New Delhi, 1994), p. 17.

13 G.I. Tunkin, *International Law*, (Moscow Progress Publishers, Moscow, 1986), p.98

the USSR is guided both by the constitutional principles that governs foreign policy and generally accepted principles and norms of international law.[14]

II.2 Indian Constitutional Provisions Relating to Adoption of International Law

Indian Constitution lays down a broad framework for the adoption of treaties in the domestic legal system. The first and foremost one is

Art. 51 of the Indian Constitution.

Article 51 of the Indian Constitution says that:

"The state shall endeavour to:

a. Promote international peace and security;
b. Maintain just and promote honourable relations between nations;
c. Foster respect for international law and treaty obligations in the dealings of organized people with one another; and
d. Encourage settlement of international dispute by arbitration".

The main aspect of Article 51 is that it represents one of the Directive Principles of state policy embodied in Part-IV of the Constitution. These Directive Principles are not enforceable through a court of law, but "are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws".[15]

While introducing Part IV, Bhim Rao Ambedkar said in the Constituent Assembly:

> "It is the intention of the Assembly that in future both the legislature and the executive should not merely pay lip service to these principles enacted in this part, but that 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". [16]

But then this non-justiciability of Directive Principles posed severe doubts on their implementation. If the implementation of Part IV violates any of the 'Fundamental

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14 Ibid.

15 Article 37 of The Constitution of India 1950

16 Constituent Assembly debates (1948-49), Vol. 7 p. 476, quoted in P. C. Rao, op. cit, p.3

Rights' enshrined in Part-III, which one should prevail? This apparent conflict between Part III and Part IV went on for quite a long time and finally the Supreme Court has resolved this through various cases, which will be discussed below.

The postulations made in Part IV of the Constitution under the head 'Directive Principles of state policy' are in many cases of a wider import than those made in Part III as 'Fundamental Rights'. Hence, the question of priority in case of conflict between the two clauses of the provisions may easily arise. What will be the legal position if a law enacted to enforce Directive Principles violates a fundamental right? Initially, the courts adopted a stricter view in this respect and ruled that a Directive Principle could not override a Fundamental Right, and in case of conflict between the two, a Fundamental Right would prevail over the Directive Principle. [17]

In course of time, the court changed its view towards the Directive Principles and started giving some value to them. The court adopted the view that in determining the scope and ambit of the Fundamental Rights, the Directive Principles should not be ignored and that the court should adopt the principle of harmonious construction and attempt to give effect to both as far as possible. Therefore, without making the Directive Principles justiciable as such, the courts began to implement the values underlying these principles to the extent possible. On the same lines, while reviewing the reasonableness of the restrictions placed on the freedoms guaranteed by Article 19(1), the Directive Principles are taken into account and a restriction in promoting any of the objectives of the Directive Principles can be regarded as reasonable. In 1976, the 42nd amendment was made to the Constitution which expanded the scope of Article 31C[18], giving directions

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17 *State of Madras v. Chempakam Dorairajan AIR 1951 SC 226.*
The court judging the validity of a Government order alleged to be made to give effect to a Directive Principle but which was challenged to give effect to a Directive Principle but which was challenged as being violative of a Fundamental Right, made an observation:
"The Directive Principles of state policy have to conform and to run subsidiary to the chapter of Fundamental Rights. The court ruled that while the Fundamental Rights were enforceable, the Directive Principles were not and the laws made to implement Directive Principles could not take away Fundamental Rights."

18 Article 31 C reads as follows, " Notwithstanding anything contained in article 13, no law giving effect to the policy of the state towards securing (all or any of the principles laid down in Part IV) shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19... (and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy)

that the directives themselves are not directly enforceable in the courts, and if any law is passed to implement any of the directives contained in Part IV of the Constitution, they would be totally immune from unconstitutionality on the violation of Fundamental Right conferred by Articles 14, 19, and 31[19]. In other words, Articles 14 and 19 shall not stand in the way of implementation of the Directive principles to this extent, the directives will indirectly prevail over the Fundamental Rights specified in Article 14 and 19. But any statutory effort to give overriding effect to the Directive Principles of state's policy is held not constitutionally valid and the Supreme Court struck down this provision of 42nd Amendment as unconstitutional.[20]

II.2.1 Treaty Incorporation in Municipal Law:

A treaty to be incorporated in the municipal legal system consists of two stages. One is treaty formation; the other is treaty implementation. Lord Atkin observed in *Attorney General of Canada v. Attorney General of Ontario*[21]

> "It will be essential to keep in mind the distinction between (1) the formation and (2) the performance, of obligation constituted by treaty, using that word as comprising any agreement between two or more sovereign states. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of parliament to the necessary statute or statutes".[22]

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19 Article 31 was omitted by the 44th Constitution Amendment Act 1977

20 *Minerva Mills v. Union of India* AIR 1980 SC 178; In this case the Supreme Court held that the forty-second Amendment Act 1974 had totally excluded the jurisdiction of the court to strike down any law passed to achieve the objective of Directive Principle when such law had the effect of destroying or abridging any of the fundamental rights provided under articles 14 and 19.The Supreme Court held such an amendment as "destroying the basic features" of the Constitution.

21 (1937) A. C. 326

22 Ibid p.347

Even after the commencement of the Constitution this legal position continues to hold way in India[23]. Following the Government of India Act 1935,[24] the Indian Constitution also deals with distribution of legislative powers.[25] It is provided that subject to the provisions of the Constitution, the Union Parliament is empowered to make laws for the whole or any part of the territory of India and the legislature of a State may make laws for the whole or part of the state. Parliament alone is competent to make laws having extra territorial operation. A plain reading indicates that it is territorial in application. But when it is qualified by Art. 246, the distribution of legislative powers become clear as it distributes subjectwise, between Parliament and legislatures of states. The Seventh Schedule of the Constitution contains three Lists: the Union List or List I, the State List or List II and the Concurrent List or List III. The Union List enumerates matters with respect to which Parliament shall have exclusive powers of legislation. The State List enumerates matters with respect to which legislature of any state shall have exclusive power to make laws. The Concurrent List enumerates matter with respect to which both the Parliament and state legislatures shall have power to make laws. Entry 97 of the Union List sets out the residuary field of legislation there under as follows: "Any other matter not enumerated in List II or List III including any tax not mentioned in any of those Lists". This provision actually does not empower the Parliament or state legislature to enact laws, as making of laws is the function of any legislature, but it merely distributes the power of legislation between centre and state[26].

But in some exceptional cases Parliament have the power to enact law on a State subject, cutting across the seventh schedule classification.

Thus Art. 253 provides

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23 *See Maganbhai v. Union of India, AIR 1969 SC 783, 793, 807.*
State of Gujarat v. Vora Fiddali, AIR 1964 SC 1043, 1059.

24 The seventh schedule of Government of India Act 1935 contained three legislative lists, namely the Federal Legislative List or List I over which the Federal Legislature had exclusive powers of legislation, the concurrent legislative List or List III over which both the federal and the provincial legislative list or List II over which the provincial legislatures had exclusive power of legislation (s. 100) The Governor –general was given powers to empower either the Federal legislature or a provincial legislature to enact a law with respect to any matter not enumerated in any of the Lists in the seventh schedule(s. 104)

25 Chapter I of Part XI of the Constitution deal with distribution of powers.

26 *Union of India v. H. S. Dhillon, AIR 1972 SC 1061, 1069*

"Notwithstanding anything in the forgoing provisions of this chapter, Parliament has power to make any law for the whole of 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."

Hence Art. 253 enables the Union Parliament to legislate in any subject matter, which falls under List II of Entry 14, i.e., State List, to give effect to any international agreements or treaties or conventions. Indeed, Art. 253 was conceived for conferring this power on Parliament[27]. It is not intended to override the other provisions of the Constitution, which impose limitations on the executive or legislative organs of the State.[28] Entry 14 of List I empowers Parliament to legislate in respect of making and conclusion of treaties. It is therefore, open to Parliament to impose limitations subject to which, or regulate the manner in which, treaties can be entered into on behalf of India. There is also no impediment to provide for parliamentary approval of treaties.[29]

The Constitution does not accord a formal role to Parliament in treaty making[30]. But in some cases treaties should get parliamentary sanction to get implemented. One such instance is when the treaty directly affects the rights of the citizen. In *Birma v The State*[31], an arrest in pursuance of an extradition treaty in another state was held illegal, as the treaty was not incorporated into the Indian law by legislative enactment. Hence an extradition treaty can only be carried into effect by an Act of Parliament, as the executive has no power, without statutory authority to decide whether extradition should be granted and if so, in what terms.[32] Regarding treaties which do not directly affect the rights of citizens, it is a moot question how far they can be enforced in the muncipal courts in the

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27 See *Shiv Kumar Sharma v. Union of India, AIR 1969 Delhi 64, 73*
Maganbhai v. Union of India, AIR 1969 SC 795, 805.

28 P. C. Rao, *The Indian Constitution and International law* (Taxman publishers, New Delhi, 1993), p. 130

29 For the view of the Government of India on this subject i. e. " Laws and Practices concerning the conclusion of treaties", U. N. Leg Doc ST/LEG/Ser. B/3, p. 63. See also Baxi, " Law of Treaties in the contemporary practice in India", 14 *I. Y. B. I. A*, 137, 152-76(1965); K. Narayana Rao, " Parliamentary approval of Treaties in India", 9-10 *I. Y. B. I. A. 22*-39 (1960) 0p cit in P. C. Rao p. 130.

30 Rao, n.28 p.130

31 AIR 1951 Raj 127, the court held that, " treaties which are part of International law do not form part of the law of the land unless expressly made so by the legislative authority".

32 *State of West Bengal v. Jugal Kishore, AIR 1969 SC 1171, 1175*

absence of enabling statute.[33] As treaties are not made the Supreme law of the land by the Constitution, as in the United States.[34] Hence, the distinction between self-executing and non-self executing treaties would not be relevant in India.[35] Though the Union Parliament is authorized to make laws for implementing treaties,[36] what type of treaties requires implementation is not decided by the Parliament. Obviously, the question is left to be regulated on the basis of the law that prevailed prior to Constitution, or to be solved by the courts.[37]

As already discussed above, parliamentary consent is very much needed to implement a treaty, which affects the rights of a citizen directly. The U.N (Security Council) Act was passed in 1947, enabling the Central Government to apply any measures called upon by the Security Council under Art. 41 of the Charter, 'not involving use of force'. It is thus clear that the executive requires the sanction of Parliament to fulfil the country's obligation under the charter in so far as they would entail alterations in municipal law.[38] Similarly, the Warsaw Convention of 1929 regarding International Carriage by Air was given effect to in India by the Carriage by Air Act 1934 and later by the Carriage by Air Act of 1972, because the treaty required alteration in municipal law. The United Nations (Privileges and Immunities) Act 1947 is another example[39].

A second set of treaties, which require parliamentary sanction, are treaties involving (regarding) cessation of territories. This is needed when a territory is ceded to another country as cessation of territory affects the rights of the citizens as also the geography of the country. The Constitution does not contain provisions either on the power to cede Indian territory in favour of a foreign state.[40] It is an essential attribute of sovereignty. Art 1 of the Constitution of India specifies what are the territories of India[41]

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33 T. S. Rama Rao, " Some Problems of International Law in India" *Indian Year book of Indian Affairs* (1957), p. 36

34 Ibid.

35 Ibid.

36 See Art. 253 and the seventh schedule List I, Entry 14

37 Rama Rao, n.33, p.37

38 Ibid.

39 Convention on the Privileges and Immunities of the United Nations 1946

40 Rama Rao, n.33, p.39

41 Art. 1 reads as follows:
India, that is Bharat, shall be a Union of States
The state and the territories thereof shall be specified in the First Schedule

The Union Parliament has got the power to admit any state into the Indian Union.[42] Hence, as per Art.1 of the Constitution of India, a territory can be annexed by India and no parliamentary approval is needed, irrespective of mode of acquisition.

The Calcutta High Court rejected the contention that Indo-French treaty ceding Chandernagore to India was not enforceable because Parliament had not given legislative effect to it.[43] But Parliamentary consent is highly necessary in the case of an Indian territory being ceded to a foreign country or given independent states. It is apt to say that more than a parliamentary sanction a constitutional amendment is necessary. In re Berubari,[44] this question came up for consideration before the Supreme Court of India in a reference made by the President. The Supreme Court held that an agreement that involved a cession of a part of the territory of India in favour of a foreign state could not be implemented by Parliament by passing a law under Art. 3 of the Constitution, [45] but only by a constitutional amendment in exercise of the powers conferred on Parliament under Art. 368, since the power to amend the Constitution must " inevitably include the power to cede national territory in favour of a foreign state".[46]

The territory of India shall comprise-
The territories of the states; the Union Territories specified in the First Schedule; and Such other territories as may acquired.

42 Art. 2 reads as follows: " parliament may by law admit into the Union or establish new states on such terms and conditions as it thinks fit".

43 *Union of India v. Manmull Jain, AIR 1954 Cal. 615*

44 *AIR 1960 SC 858*

45 Ref made by the President of India under Art. 143

46 This question came up for consideration before the Supreme Court of India in a reference made by the President of India under Art143. The facts of the case are as follows: The Indo-Pak agreement entered into in1958 for resolving border disputes, provided interalia (i) for the transfer of one half of the Berubari Union by India to Pakistan and (ii) for the exchange of old Cooch-Bihar enclaves. Berubari union comprised an area of nine square miles in the state of west Bengal with a population of about 12000. When the central government sought to implement the agreement, a powerful political agitation was started against the proposed transfer of territory to Pakistan. Their upon the president referred the matter to the Supreme Court for its advisory opinion under Article 143. The questions referred to were 1. Is any legislative action necessary for the implementation of agreement relating to berubari union, and (2), if so, is law of Parliament under Article 3 sufficient or is an amendment of the Constitution in accordance with Article 368 necessary or both.

On behalf of the union government, it was contended that the agreement did nothing more than to ascertain the true boundary of India and therefore, its implementation did not involve handing over any Indian territory but only territory which did belong to Pakistan and this could be done in the exercise of the executive power of the union. The Supreme Court rejected this contention and held that transfer agreement involve session of territory included in the scheduled and it was out side the scope of the Parliament legislation. The power of Parliament under Article 3 to diminish the area of any state does not cover ceding of Indian Territory to a foreign state. Accordingly, the court held that the parliament had no power under Article 3(C) to make a law to

Hence any treaty to be implemented in the domestic sphere needs a specific enabling legislation as per India's legal framework.

II.2.2 Status of Human rights instruments

One of the purposes of the United Nations is to achieve international co-operation "in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion[47] and to be a centre for harmonizing the actions of nations in the attainment of this purpose.[48] It is noteworthy that the Charter contains six provisions entirely devoted to the protection and promotion of human rights. Of these Article 56 is of vital importance as it directly imposes an obligation on member states in good faith "to take joint and separate action in co-operation with the organization for the achievement of the purpose set forth in Article 55(c) which demands "Universal respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".

Hence the process of strengthening and universalisation of human rights stated with Universal Declaration of Human Rights, 1948. Significantly, several countries have given due weightage to the provisions of Universal Declaration of Human Rights, 1948, by incorporating them in their national Constitutions and made them judicially enforceable.

However, the provisions of the Charter do not define or enumerate the human rights and fundamental freedoms, which the members of the United Nations are bound to

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implement the berubari agreement an agreement, entered into with government of the foreign state ceding Indian Territory to a foreign state. The aforesaid agreement could only be implemented by an amendment of the constitution in accordance with article 368. The territory ceded may be a part of the state or union territory. Construing the scheme of Articles 2 and 3 the court held that article 3 deals with internal readjustment intense of the territory of the constituent state of India. The area diminishes under Article 3 (C) continuous to be part of the territory of India. Article 3 (c) does not therefore provide for cession of the territory of a foreign state. Hence, an agreement involving a transfer of territory to a foreign state cannot be implemented simply by passing a law under Article 3. For this an amendment of the constitution is necessary.

47 Art. 1 (3) of the UN charter reads as,
"The purposes of the United Nations are: To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;"

48 Art. 1(4) of the Charter reads as,
"The purposes of the United Nations are: To be a center for harmonizing the actions of nations in the attainment of these common ends".

enforce within their respective territories. Also the charter does not define human rights.[49]Without a clear definition, the obligations of states remain unclear and undefined.[50]Similarly UDHR did not specifically provide for international machinery for its implementation.[51] It does not have the status of a treaty. But, however, as already discussed, the domestic law of many states drew inspiration from this declaration.

After the Universal Declaration of Human Rights 1948 as, the two covenants were adopted by the United Nations as part of the international bill of rights viz, the International Covenant on Economic, Social and Cultural Rights; 1966 and the International Covenant on Civil and Political Rights, 1966. The latter covenant has an optional protocol to which states may become parties separately. India has acceded to the two covenants except the optional protocol on 27th March 1979, subject to certain reservations.[52] The principles set forth in both the covenants have close resemblance with Part III and part IV of Indian Constitution respectively. These two covenants contain only obligations of state parties and do not confer any right upon the individual directly that could be enforced in any municipal courts. No time limit has been prescribed within which state parties are required to enact enabling legislation. Even then the Indian Courts by the technique of interpretation of constitutional provisions applied these covenants in a number of cases.[53]

Apart from these covenants, India is a party to many other UN conventions that deal with subjects as prevention and punishment of genocide,[54] the rights of the child,[55] the political rights of women,[56] elimination of racial discrimination,[57] slavery[58], apartheid[59]etc.

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49 V.S.Mani, "Human Rights and the United Nations; A Survey", *Journal of the Indian Law Institute*, vol.40, no.1-4 (1998), p.39

50 Ibid

51 Ibid p.48

52 For the text of India's instrument of accession, see U. N doc. ST/LEG/SER. E/10, pp. 124-5, 20 IJIL 118-119(1980)

53 *Vishaka* v. *State of Rajasthan* AIR 1997 SC 3011; *Sunil Batra* v. *Delhi Administration* AIR 1978 SC 1675 etc.

54 GA resolution 260A (III) of 9 December 1948

55 Convention On the Rights of the Child (1989), A/RES/44/25.

56 Convention on the political Rights of the Women (1953), United Nations, *Treaty Series*, Vol.193, p.135

57 International Convention on the Elimination of All Forms of Racial Discrimination (1965), United Nations, *Treaty Series*, Vol.660, p.195.

These international conventions confer right upon the citizens and duty/obligation upon the state parties to prevent and prohibit some acts. Hence an enabling legislation is highly necessary to give effect to these conventions. Of course, some conventions specifically direct the state parties to enact a domestic legislation for their implementation within a reasonable time.[60]

Most areas of human rights concern such as humanitarian law, apartheid, genocide, torture and violations of the right to life are governed by the norms of jus cogens.[61] The International Court of Justice has time and again emphasized the Principle of Prohibition of Genocide as part of general international law. In one case, the Court said: "By their very nature, the outlawing of acts of aggression and of genocide, as also from the principles and rules concerning the basic rights of human person, including protection from slavery and racial discrimination are the concerns of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection, they are obligations ergaomnes (against the whole world)[62]. As early as 1951, it had already ruled in the context of Genocide Convention that, "the principles underlying the convention are principles which are recognized by civilized nations as binding on states, even without any conventional (i.e. treaty) obligation" [Reservation to the Genocide Convention case 1951].[63]

Hence it could be easily argued that even without an enabling legislation, these treaties should be implemented in the domestic realm and the courts should take cognisance of the offences enumerated in the above conventions. But that would not be possible because firstly, none of these conventions talk about the measure of penalty to be imposed upon the perpetuators because imposing penalty is an attribute of sovereignty

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58 ILO *Convention (No. 105) concerning the abolition of Forced Labour* (1957), United Nations, Treaty Series, Vol.320, p.291
Entered into force on 17 January 1959

59 International Convention on the Suppression and punishment of the Crime of Apartheid (1973), United Nations, *Treaty Series*, Vol.1015, p.243.

60 Art V of Genocide Convention 1949. It reads as follows, "The contracting parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

61 Manoj. K. Sinha, Implementation *of Basic Human rights* (Manak Publication, New Delhi, 1999), p. 22

62 Barcelona Traction case 1970 *ICJ Reports* 1970, p.33

63 *ICJ Reports* 1951, p.23

and only through legislative mechanism penalty could be introduced for a recognized crime. In fact, some of the conventions direct the state to provide effective penalties for the perpetuators.[64]

Secondly, since we believe in "procedure established by law",[65] it is highly necessary to have a statutory procedure to try a person charged with an offence. It is more apt to say that to charge a person on particular offence itself requires a procedure established by law as no person's life and personal liberty could be deprived without a just and fair procedure established by law.

Thirdly, It is against the principles of justice and norms of democracy to implement a treaty which affects the rights of the citizens without legislative sanction, as the executive authority is not competent to sanction invasion of the rights of citizens merely because Parliament has the power to legislate in regard to the matter on which executive order is passed.[66] The executive authority cannot acquire new rights against the citizens by making treaties.[67] No new offences can be created without statutory sanction by a mere treaty. No privileges or immunities can be enforced by treaty without the need of confirmatory legislation if they involve exemption from the operation of local law.[68] But if the existing statutory laws are in conformity with the treaty principles a specific legislation is not necessary.

Thus, international human rights obligations are not different in this respect from other international obligations. A state may incorporate its international human rights undertakings directly into its legal system, or may implement them by national legislation, or may give them effect without legislation.[69] Only some human rights agreements include specific undertakings to implement human rights obligations by particular means or in particular ways.[70]But lack of such specific provisions in a treaty

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64 see n.54

65 Art 21 of Indian Constitution, 1950

66 *State of M. P. v. Bharat Singh AIR 1967 SC 1170, 1173-1175*

67 *Maganbhai* v. *Union of India* AIR 1969 SC 783

68 see n. 23 p. 138

69 Louis Henkin., "International Human Rights Standards in National Law: The Jurisprudence of The United States". in Benedetto Conforti and Francessco Franncioni, eds.,*Enforcing International human rights in domestic courts* (Martinus hijhoff publishers, The Hague,1997).

70 For example, the Conventions on the Prevention and Punishment of the Crime of Genocide commits state parties to enact legislation necessary to provide effective penalties for persons guilty

does not absolve a state party of any obligation i.e., domestic implementation. International law only imposes an obligation on states to implement their obligation. It does not prescribe any specific procedure. It is left to the states as to how to implement their international obligations. In India any human rights instrument to be implemented in the domestic sphere either needs an enabling legislation or amendment to its existing statutory laws to make it in conformity with the treaty principles.

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of genocide, and to punish such persons. A state party to the International Covenant on Civil and Political Rights assumes obligations "to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present covenant" [Article 2(2)]. The covenant also requires states to ensure that any person whose rights are violated shall have an effective remedy have the right thereto determined by competent judicial or other authorities.

CHAPTER III

IMPLEMENTATION OF HUMAN RIGHTS TREATIES UNDER INDIAN LAW: A SURVEY

Chapter III

Implementation of Human Rights Treaties Under Indian Law: A Survey

This chapter surveys the implementation of human rights treaties in Indian law. Mainly this chapter deals with three different groups of human rights viz, Prisoners rights, Rights of the Women and Children and Right to Environment as a human right.

III.1 Prisoner's Rights

Human rights are considered inalienable. However, there are situations wherein larger societal interests requests some curtailment of the same of some individuals. The most important among them is placing a person in imprisonment. The question here is whether the accused have rights? What are the human rights that are important to protect within the Indian criminal justice system? And more important again perhaps, to what extent should the human rights of the accused be protected when other important interests of society are under attack and in possible conflict with the interest of the accused? These are difficult questions to answer, because there is a perpetual conflict between the interest of the accused and fundamental interest of the society.[1] Over-emphasis on the protection of one interest is bound to have an adverse impact on the other and, therefore an even balance has to be struck between these [2] two rights There is a pre-conceived notion that any protection given to a suspect or accused is bound to injure the interest of the society by encouraging crime and making his detection difficult if not impossible. It is this pre-conceived notion that makes the life of this particular section of people, most vulnerable at the hands of state agencies. Hence, in order to protect this vulnerable group laws are not only made at the national level but also in the international level too.

III.1.1 Torture

In common parlance, infliction of pain on the mind or body of another person is known as Torture. It has always caught the attention and concern of human rights thinkers. With the development of human rights law, it becomes a matter of concern

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1. P.N. Bhagwati, "Human Rights in the Criminal Justice System." (1985) *Journal of Indian Law Institute*, Vol.27. p.1.
2. Ibid.

with an intention to check it as it could be easily said that custodial human rights violation is the gravest form of human rights violation.

The ever-increasing complexity of society was instrumental in deviating the traditional canons of definitions of torture, i.e, torture is perpetrated by an individual on an individual. Social institution especially in the form of state is the main torture inflicting mechanism in the contemprary world. Torture by various systems in its various forms and dimension are affecting the individual physically, psychologically, morally, socially and economically.

III.1.1.1 International Instruments

Article 5 of the Universal Declaration of Human Rights[3] and Article 7 of ICCPR,[4] provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Common Article 3 to the Four Geneva Conventions 1949, prohibits parties from committing at any time or any place acts of "Violence to life and persons, mutilation, cruel treatment and torture" or "Outrages against human dignity in particular humiliating and degrading treatment. Thus, the prohibition of torture constitutes a fundamental guarantee.

Articles 5(f)[5] and 3(f)[6] of the statutes of the International Criminal Tribunals for former Yugoslavia and Rwanda respectively, prohibits torture as a 'Crime against humanity.' Also, Article 10(1) of ICCPR states that, "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

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3. Article 5 of UDHR, 1948 reads as follows, " No one shall be subjected to torture or to cruel, inhuman degrading treatment or of punishment."
4. Article 7 of ICCPR,1966 reads as follows,"No one shall be subjected to torture or to cruel, in human or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation"
5. Article 5(f) of ICTY statute reads as follows, " The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character and directed against any civilian population (a) Murder;
(b) Extermination (c) Enslavement (d)Deportation (e) Imprisonment (f) Torture (g) Rape (h) Persecutions on political, racial and religious grounds and (f) other inhumane acts.
6. Article 3(f) of ICTR statute reads as, "The International Tribunal of Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. (a) Murder;(b) Extermination (c) Enslavement (d) Deportation (e) Imprisonment (f) Torture (g) Rape (h) Persecutions on political, racial and religious grounds and (f) other inhumane acts.

At the first UN Congress on the prevention of crime and the treatment of offenders, held on 30 August 1955 in Geneva, the Standard minimum rules for the treatment of prisoners were adopted and eventually approved by ECOSOC on 31st July 1957. The UN General Assembly adopted a code of conduct for law enforcement officials on 17th Dec. 1979. Many regional human rights instruments also provide guarantees against Torture.[7]

In 1975, the General Assembly adopted the Declaration on protection of all persons from being subjected to torture, cruel, inhuman or Degrading treatment or punishment. In 1984, General Assembly adopted the Convention against Torture and other cruel, Inhuman or Degrading treatment or punishment[8].

Article 1 of the UN torture convention defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third persons has committed or is suspected of having committed, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

Even though at the international level there is a definition for torture, Indian laws are silent about this. Nowhere in any Indian criminal law there is a direct reference to Torture.It is this aspect which made Indian prisoners more vulnerable victims at the hands of the executive authorities. The emergency period is a case in point, where, while the executive machinery trampled upon the rights of the citizens, our judiciary remained as a mute spectator of those events.[9] Indian judiciary at those times missed an opportunity to invoke not only international law but also the relevant provisions of the constitution to the aid of citizens whose rights were deprived by the state machinery. Later there was a change in the mindset in judiciary and it took upon itself the task of incorporating such international laws by means of interpretation to

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7. Art XXV of The American Declaration of the Rights and Duties of Man, 1948 (ii) Art.5 of The African Charter on Human and Peoples Rights, 1981 (iii) Art.3 of the European Convention on Human rights 1950.
8. United Nations, Treaty Series, Vol.1465, p.85
9. A.D.M. Jabalpur v. Shivakant Shukla AIR 1976 SC 1207.

provide remedies to the citizens whose rights were deprived in the post emergency period.

The post emergency period witnessed the rejuvenation of the judiciary, hitting against, criticizing and guiding the executive, legislating for and on behalf of the legislature, and incorporating international law into the domestic law without any legislation and even making legislations out of international norms. This activism has may advantages as well as disadvantages, which will be the core of forthcoming discussions. Let us now proceed to see how far Indian constitution and the judiciary has dealt with prisoners as well as arrested person's rights.

III.1.1.2 Indian Constitutional provisions

The constitutional rights in the context of criminal jurisprudence are contained in Articles 20,21 and 22 of the constitution. Article 20 prohibits ex post facto operation of criminal law and confers immunity against double jeopardy and protection against self-incrimination. Article 21, which sprung into life with the decision of the Supreme Court in *Maneka Gandhi* v. *Union of India*,[10] provides that no person shall be deprived of his life and personal liberty except according to the procedure established by law. and then article 22 proceeds to enact protection against arrest and detention in certain cases. Clause (1) of that article provides that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice and clause (2) enacts that every persons who is arrested and detained in custody shall be produced before the magistrate within a period of twenty-four hours and no person shall be detained in custody beyond such period without the authority of a magistrate. Clauses (4) to (7) provide certain safeguards in case of preventive detention, which is accepted as a necessary evil.[11] It can be easily said that these fundamental articles of Indian Constitution drew inspiration from International Bill of human rights and has many provisions similar to. International Covenant on Civil and Political Rights 1966.[12]

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10. AIR 1978 SC 597.
11. Ibid. n.1. p.2.
12. Articles 20(1), (2), (3), 21, 21 of Indian Constitution are similar to Articles 15(1), 14(7), 14(3)(9), 6(1) and 9(1), 9(2), (3) and (4) of ICCPR, respectively.

III.1.1.3 Other Major Indian Laws

Based on the abovesaid constitutional mandates, our criminal laws also contain many safeguards in line with international conventions. The code of criminal procedure 1973, The Indian Evidence Act 1872, Indian penal Code 1860 Contains provisions relating to the rights of the accused or suspect. Section 50 of CrPC mandates the State to inform the person about the grounds of arrest.[13] Section 56 requires the person arrested to be taken before the magistrate or officer-in-charge of police station[14] and sec.57 makes the production within twenty-four hours[15]. Also the protection against jeopardy is enshrined in Sec. 300 of Code of Criminal procedure.[16]

Similarly, Sec. 330 and 331 of Indian Penal Code[17] deals with the protection against cruel or in human Treatment during Investigation.

The Indian Evidence Act also contains some provisions relating to the protection of accused persons rights, Sec. 24 provides for protection against Cruel or

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13. Section 50 of CrPC reads as " (1) Every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest. (2) Where a police officer arrests without warrant any person accused of a nonbailable, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange sureties on his behalf.

14. Sec. 56 reads as, "A Police officer making an arrest without warrant shall, without unnecessary delay and take or send the person arrested before a Magistrate in charge of a police station."

15. Sec. 57 of CrPC states that, "No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of time necessary for the journey from the place of arrest to the Magistrate's Court.

16. Sec. 300(1) of Cr. p.c. reads as, "A person who has once been tried by a Court of Competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction remain in force, not to be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different change from the one made against him.

17. s. 330 of Indian Penal Code reads as follows, "Who ever Voluntarily causes hurt for the purpose of extorting from the sufferer or any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, on to give information which may lead to the restoration of any property, or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine." S.331 reads as, "whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine."

In human treatment during investigation[18] Sec. 25 mandates that any confession made to a police officer shall not be proved as against a person accused of any offence. To give more effect to Sec. 25, Sec. 26 provides for the inadmissibility of confession by accused while in custody.[19]

As the use of criminal process against an individual is essentially a coercive power. The state, placing the citizens in custody has obligations too. These obligations no doubt shall be consistent with the worth of the human personality. J. Krishna Iyer said, "If the control measures prove pathological the state itself becomes a criminal."[20]

India has adopted certain basic individual rights, which cannot be contravened by legislative action. The right to personal liberty is a dominant concept under Art. 21 of the Indian constitution, Art. 20 that embodies the protection against self-incrimination and double jeopardy affords protection to individuals who are vulnerable to state action for having violated the law. Thus it is very clear that personal liberty and human dignity includes right not to be subject to torture, to arbitrate arrest and the right to a fair, prompt and public trial.[21]

But the average citizen of this country is unaware of the rights he has. Awareness about the rights of the individual helps to evaluate the actions of the government in a society governed by rule of law. This awareness keeps the government from any encroachment upon the rights of the individual. An individual should be perpetually vigilant and in a position to minutely scrutinise the actions of the government. Thus the responsibility is central to law enforcement and fundamental to individual liberty though there is a hide and seek game between the state and the individual with a search for an opportunity to challenge other.

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18. Sec. 24 of Indian Evidence Act reads as, "A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court to have caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supporting that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.

19. Sec. 26 reads as, "No confession made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a magistrate, shall be proved against such person".

20. V.R. Krishna Iyer, *Law Lawyer and Justice* (B.R. Publishers, Delhi), p.1.

21. K.D. Gaur, "Human rights of Detainees and Prisoners" 1982 6 *Cochin University Law Review*, p.393.

III.1.1.5 Judicial Response in Cases of Arrest and Torture

In many cases dealing with torture, the Supreme Court has invoked various provisions of International Conventions to widen the ambit of Art.21 of the constitution. Thus in Sunil Batra v. Delhi Administration.[22] The court got a chance to determine the validity of solitary confinement and keeping a prisoner in fetters. In the petition filed it is argued that solitary confinement of a prisoner in iron was cruel and unusual punishment and so it violated the right to life and personal liberty under Article 21 and right to equality under Article 14. Justice Desai, speaking for the majority, admitted that there was no provision in the Indian Constitution like the Eighth Amendment of the American constitution which forbids cruel and unusual punishment. But, he validly pointed out that conviction did not degrade the convict to be a non-person, vulnerable to major punishments imposed by the jail authorities without observance of due procedural safeguards. He also emphasized courts duty towards a prisoner as he was in prison under its order and direction.[23] Justice Krishna Iyer observed.

"True, our Constitution has no due process clause, or the VIII Amendment; but in this branch of law after Cooper and Maneka Gandhi the consequence is the same. For what is punitively outrageous, scandalizing unusual or cruel or rehabilitatively counter productive is unarguably –unreasonable and is shot down by Articles 14 and 19".[24]

The Court further observed,

> "We cannot be oblivious to the fact that the treatment of a human being which offends human dignity imposes avoidable torture and reduces the man to the level of a beast would certainly be arbitrary and can be questioned under Article 14".[25]

Thus the court has indirectly implemented the principles laid down in International Bill of rights and UN Torture Convention. Similarly in *Francis corallie Mullin* v. *The Administrator, Union* Territory *of Delhi.*[26]

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22. AIR 1978 SC 1675.
23. Manoj K. Sinha, *Implementation of Basic Human Rights* (Manak Publications, New Delhi,1999), p.330.
24. see n.20. p.1790.
25. Ibid. p. 1735.
26. AIR 1981 SC746.

The Court held that even a convict is entitled to rights guaranteed by Art. 21 of the constitution and he shall not be deprived of his life or personal liberty except according to the procedure established by law. The Court observed.

The right to life enshrined in Art. 21 cannot be restricted to mere animal existence. It means something more than just physical survival. The right to life includes the right to live with human dignity and all that goes along it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, also freely moving out and mixing and mingling with fellow human beings.[27]

In Nilabati Behara[28] raises an important and interesting question. To what extent can the provisions of such international covenants/conventions be read in to National Laws? This issue had been the subject matter of a decision in Australia viz., Minister for Immigration and Ethnic Affairs v. Teoh (1995) 69 Australian Law Journal 423. Here the Court observed that apart from influencing the construction of a statute or subordinate legislation, an international convention may play a part in the development by the Courts of the common law. The provision of an international Convention to which Australia is a party especially, the one which declares that universal fundamental rights may be used by the Courts as a legitimate guide in developing the common law—and court further says—"The main criticism against reading such conventions and convents in to national laws is one pointed out by Mason, CJ, "the ratification of these conventions and covenants is done, in most of the countries by the executive acting alone and that the prerogative of making the law is that of the parliament above, unless the parliament legislates, no law can come into existence." It is not clear whether our parliament has approved the action of the Government of India ratifying the said 1966 Covenant[29].

Assuming that it has, the question may yet arise whether such approval can be equated to legislation and invests the covenants with the sanctity of a law made by parliament.

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27. Ibid., 752.
28. A.I.R. 1997 SC 1207
29. see n.27

As pointed out by this Court in *S.R. Bommai* v. *Union of India*[30], every action of Parliament cannot be equated to legislation. Legislation is no doubting the main function of the parliament but it also performs many other functions all of which do not amount to legislation.

III.1.2 Compensation for unlawful arrest and detention

While dealing with the prisoners rights, the 'right to compensation assumes high importance. Because when a person is illegally detained or arrested, the state is misusing its sovereignty, which flows from the people themselves. The state thus fails to do its duty towards the sovereign, the people. Art. 9(5) of the ICCPR states that 'anyone who has been a victim of unlawful arrest or detention shall have enforceable right to compensation." India has put a reservation to this Article[31] Despite this reservations, our judiciary has been relying on this Article to award compensation to victims of illegal detention and arrest. An attempt is made in the forthcoming discussion to evaluate those decisions and to see how far the judiciary's activism is proper.

There are a lot of instances of judicial activism in the matter of compensation being awarded to victims of lawful arrest and detention, by incorporating international covenants and otherwise. The forthcoming discussion is with regard to those decisions and their propriety.

III.1.2.1 International Instruments dealing Compensation

Art. 9(5) of the ICCPR 1996 provides that any person who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. While acceding to this covenant in 1979, the Government of India declared, Inter alia, "under the Indian legal system, this is no enforceable right to compensation for persons Claimant to be victims of unlawful arrest or detention against the state.[32] This declaration put the victim in a disadvantageous position.

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30. (1994) 3 S.C.C.1.
31. See Accession by India to the Human Rights Documents 20 *Indian Journal* of *International Law* 118 (1980)
32. Ibid

III.1.2.2 Right to Compensation: - Indian Scenario

In India, there is no specific legislation as such, which governs the liability of the State for the torts Committed by its Servants generally.[33] However, Section 357, and section 358(1) Cr PC, 1971, Sec. 140 of the Motor Vehicles Act. 1988 deals with awarding of Compensation, while the former deals with the compensation to be awarded to a person arrested without proper grounds, the latter is a compensation to be awarded by the owner of the vehicle if death or permanent disablement result from an accident out of the use of a motor vehicle, which is irrelevant as far as the scope of this study is concerned. Regarding sec.358 (1) and 357 of CrPC, the scope is limited.

As far as section 358 (1)[34] is concerned, the compensation is limited to the groundless arrest. The Sec. 357, CrPC deals with compensation to the given to the victim from the fine imposed.

The constitutional provisions do not speak anything about compensation. Our Compensatory jurisprudence is evolved through the judicial law making. The Supreme Court held the view that due compliance with fundamental rights are secured by the right to compensation[35] and that Art. 21 will be denuded of its significant content if the powers of the Supreme Court were limited to passing orders of release from illegal detention.

Art. 32(1) of the constitution gives the right to move to Supreme Court and Art. 13(2)[36] prevent the state from making any law, which takes away or abridges the rights conferred by this part.

The above discussion amply establishes the fact that persons where unlawfully deprived of their personal liberty by the officials are legally entitled to claim compensation/damages from the state. For that the Motor Vehicles Act made it compulsory the third party insurance to all motor vehicles to avoid the risk of not

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33. Jacob P. Alex, "Constitutional Tort: -Need for a Novel Out look". *AIR* 2001 *Journal, p.* 206

34. Sec. 358(1) of CrPC reads as, ". Whenever any person cause a police officer to arrest another person, if it appears to the magistrate by whom the case is heard that there was no sufficient ground of causing such arrest, the Magistrate may award such compensation not exceeding one hundred rupees, to be paid by the person so arrested, for his loss of time and expenses in the matter, as the Magistrate thinks fit"

35. *Rudal Shah* v. *State of Bihar* A.I.R. 1983 SC 1086. In this case, the accused was acquitted by the session const on June 3 1968, but he was not released until Oct.16, 1982. The Supreme Court immediately ordered for his release and awarded compensation for his illegal detention.

36. Art. 13(2) of Constitution of India reads as, "The state shall not make any law which takes away or abridges the rights conferred by this part (Part III) and any law made in contravention of this clause shall, to the extent of contravention be void".

getting compensation. In the Contract Act, the compensatory jurisprudence plays a greater role. Compensation is for the bringing the other party to the same footing as before the contract making. The loss should be removed. It is not considered as a punishment but as a tool to help the victim. State can take action against the police or violators for this.

III.1.2.3 Courts' Approach in Awarding Compensation

Supreme Court invoked the principle of Human Rights jurisprudence and evolves the concept of constitutional Test to compensate the victims of 'Governmental Lawlessness"[37] For awarding compensations, courts often refer to International norms. This can be analysed through various case laws.

In *Rudal Shah* v. *State of Bihar*, A.I.R[38]. 1983 S.C.1086, the petitioner was acquitted by a sessions court on June 3, 1968. He was, however, released from jail on October 16, 1982. The petition was filed in the supreme Court of India while he was in jail and be was released only after submission of the petition. His prayer was that, "Compensation for his illegal detention in the Jail for over 14 years." Holding the detention illegal, the Court observed: "The refusal of this court to pass an order of compensation in favour of the petitioner will be doing mere lip service to his fundamental right to liberty, which the state Government so grossly violated. Art-21 guarantees the right to life and liberty will be denuded of its significant content if the powers of this court were limited to passing orders of release from illegal detention."

In *Nilabati Behera* alias *Lalita Behera* v. *State of Orissa and others*[39], the Court introduced the concept of public law in order to award compensation. The court made reference to Art-9 (5) of the ICCPR, which indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right. The remarkable aspect here is that India has made a reservation to this right.[40] The consequence of making a reservation is that the country is not bound by that particular provision. The judiciary's activism here has made a position that even though the executive has taken one stand with respect to India's international relationships or obligation the judiciary can overlook it and can drag the country to obligations which

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37. see n.31
38. see n.34
39. A.I.R. 1993 S. C. 1960.
40. see n.12.

it never intended to have. Court held that award of compensation in a proceeding under Art-32 by the Supreme Court or under Art.226 by the High Court is a remedy available in public law based on strict liability for contravention of fundamental rights. It is held that the defence of "Sovereign immunity" does not apply in such a case even though it may be available as a defence ~~of "sovereign immunity" does not apply in such a case even though it may be available as a defence~~ in private law in an action based on tort. Court further said, "We may also refer to Art-9 (5) of the ICCPR, 1966. Which indicates that an enforceable right to compensation is not alien to the concept of enforcement of guaranteed right."

Court justifies the award of monetary compensation by saying, "it follows that a claim in public law for compensation for contravention of human rights and fundamental freedoms. The protection of which is guaranteed in the constitution, is an acknowledgement of remedy for enforcement and protection of such rights and such a claim based on strict liability made by restoring to a constitutional remedy provided for the enforcement of fundamental rights is distinct from and in addition to the remedy in private law for damages for the tort 'resulting from the contravention of the fundamental right, when that is the only practicable mode of redress available for the contravention made by the state or its servants in the purported exercise of their powers and enforcement of the fundamental right is claimed by resorting to the remedy in public law under the constitution by recourse to Articles 32 and 226 of the constitution."

Court further said, "the power available to this court under Article 142 is also an enabling provision on this behalf. The contrary view would not merely render the court powerless and the constitutional guarantee a mirage, but may, in certain situations, be an incentive, unless under extraneous conditions the court is powerless to grant any relief against the state, except by punishing of the wrong doer for resulting offence and recovery of damages under private law by ordinary process".[41] Accordingly the court directed the respondent to pay a sum of Rs. 1,50,000 to the petitioner as compensation and a further sum of Rs. 10,000 as cost to be paid to Supreme Court legal Aid Committee.

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41. *Nilabati Behera* v. *State of Orissa* (1993) 2SCC 746 at p.764.

In *Charan Lal Sahu* v. *Union of India*[42], Court while dealing with the Bhopal gas leak tragedy, suggested that with regard to compensation, delay should be avoided in providing effective relief to the victims. The government and legislature should take immediate, effective measures for enacting laws having regard to these suggestions, consistent with international norms and guidelines as contained in the Draft UN Code of conduct on Transnational Corporations.

In *People Union for Civil Liberties* v. *Union of India*,[43] a writ petition was filed under Art. 32 for issuance of mandamus or other appropriate order to

(1) institute a judicial inquiry in to the force encounter by Imphal police on April 3, 1991 in which two persons were killed

(2) to direct appropriate action to be taken against the earning police officials, and to

(3) to award Compensation to the members of the families of the deceased.

Police caught five persons, killed two of them and kept police custody of the others, and released bail only on July 22, 1991.

"It is held that the defence of sovereign immunity does not aupply in such a case even though it may be available as a defence in private law in an action based on tort. It is held further that the award of damages by the supreme Court or high court in a writ proceedings is distinct from and in addition to the remedy in private how for damages. It is one mode of enforcing the fundamental upon Art. 9(5) of ICCPR, 1966, which says, "Anyone who had been the victim of unlawful arrest or detention shall have an enforceable right to compensation.[44]

Ordering to pay huge amount as compensation by the state means ordering the tax payer to pay the compensation, since the money has to go from the public exchequer, which is the money of the people. Of course, in the interest of justice the Court should do this. But it should also direct the state to recover the amount from the wrongdoer, not only that the wrongdoer howsoever high should be proceeded against under normal criminal law for the offence committed.

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42. (1990) Supp. 2 SCC 613.
43. A.I.R. 1997 S.C. 1203.
44. A.I.R. 1997 S.C. 1206.

In *D.K. Basu* v. *State of West Bengal*,[45] the Court laid down the some guidelines to be followed in cases of arrest or detention: Thus the court has did a commendable job in case of unlawful arrest and detention but more is to be done to attain the level of significant implementation of these human rights treaties.

III.1.3 Death penalty

Hanging a person to death is the most heinous form of penalty a country can have. Indian legal system also contains this penalty, but it argued that it is awarded in the rarest of rare case.[46] It is to be invoked only in exceptional cases.[47]

III.1.3.1 International Instruments dealing with death penalty

International standards of human rights call for either the abolition of death penalty or, at a minimum, its use in only extremely limited case. In April 1999, the United Nations Commission on Human rights passed a resolution calling on all states "to establish a moratorium on executions, with a view to completely abolishing the death penalty" (Commission on Human Rights Resolution 1999/61). Article 6, paragraph 2 of the International Covenant on Civil and Political Rights Provides:

> "In Countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provision of the present covenant and to the Convention on the prevention and punishment of the crime of genocide. This penalty can only carried out pursuant to a final, judgment rendered by a competent court."

The Commission on Human Rights has also urged States "not to impose the death penalty for any but most serious crimes" and "progressively to restrict the number of offences for which the death penalty may be imposed." As, International Standards advocate only limiting the death penalty to the minimum. It does not call for its abolition as such.

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45. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.
46. *Bachan Singh* v. *State of Punjab*, AIR 1980 SC 898.
47. Third periodic Report submitted by India (hereinafter referred to as the Third Report) CCPR/C/76/ Add.6, 17 June 1996, p.20.

III.1.3.2 Death penalty- Indian scenario

In India, the principle of limiting the death penalty to heinous crimes is supported by constitutional doctrine. India's higher courts have routinely ruled that the death penalty must be imposed only in "the rarest of rare cases."

In one case, *Ragendra Prasad* v. *State of U.P*[48]. Krishna Iyer, J., took a different view stating that the Criminal law of Raj vintage has lost some of its validity, not withstanding its formal persistence in print in the penal code so far as section 302[49] of Indian penal code is concerned. Section 302 of IPC and Section 354 (3) of Cr. p.c.[50] have to be read in the lights of part III and IV of the constitution. In this case, Krishna Iyer. J argued for the abolition of death penalty, took the view that death sentence would not be justified unless it was shown that the criminal was dangerous to the society. He observed death sentence should only be awarded in the rarest of rare cases.

Despite these principles, Indian courts have in practice applied the death penalty to a wide range of offences. Under the Indian penal code death penalty can be imposed on a person serving life imprisonment for murder; For dacoity with murder,[51] for abetting the suicide of a child or insane person[52]; for waging war against the government;[53] for abetting the mutiny by a member of the armed forces and for fabricating false evidence with intent to secure the conviction of another person for a capital offence when conviction ensues.[54] Death sentences may also be imposed for a

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48 AIR 1979 SC 916

49. Section 302 IPC, "Whoever Commits murder shall be punished with death or imprisonment for life, and shall also be liable to fine."

50. Section 354(3) of Code of Criminal procedure, 1913 states, "when the conviction is for an offence punishable with death, in the alternative with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and , in the case of sentence of death, the special reasons for such sentence.

51. Sec 396 of IPC reads as, " If any one of the five or more persons who are co-jointly committing dacoity, commits murder in so committing dacoity everyone of those persons shall be punished with death or imprisonment for life, or so rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine".

52. Sec 305 of IPC reads as, "If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any other person in a state of intoxication, commits suicide, whoever abets the commission of suicide, shall be punished with death or imprisonment for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine".

53. Sec 121 of the IPC reads as, "Whoever wages war against the government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life, and shall also be liable to fine"

54. Sec 194 of IPC reads as follows, " Whoever gives or fabricates false evidence
Intending thereby to cause, or knowing it to be convicted of an offence which is capital by the law for the time being in force in India, shall be punished with imprisonment for life or with

number of offences committed by members of the armed forces under the Army Act 1980, the Air Force Act, 1950 and the Navy Act, 1956.

In recent years, the list of Capital crimes has expanded even further. Special courts were established under the Terrorist Affected areas (Special Courts) Act, 1994 and Terrorist and Disruptive Activities (Prevention) Act, 1987 can impose the death sentence for certain broadly defined 'terrorist acts'. There is a wide spread opinion and demand that since these Acts were highly misused it should be repealed and finally TADA (Terrorist and Disruptive Activities (Prevention) Act, 1987 was repealed. But recent Prevention of Terrorism Act, 2001 is enacted the replica of erstwhile TADA which also provides for Death penalty in many cases. In 1987, the Government of India passed the Commission of Sati (Prevention) Act, 1987, which applied the death penalty to individuals convicted for abetting a successful sati. In May 1988, second convictions for drug trafficking were made punishable by death under Narcotics, Drugs and Psychotropic Substances (Amendment) Act, 1988.

In the Strict legal sense, India does not have any obligation to abolish death penalty since it is not a party to both the Second optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the Death penalty, and the UN convention on Torture, but India has an obligation to minimize the infliction of death penalty as a party to ICCPR.[55] But the irrevocability and fallibity of Death penalty makes it intolerable. Former Supreme Court Chief Justice PN Bhagwati wrote: "The Possibility of error in judgment Cannot therefore be ruled out on any theoretical considerations. It is indeed a very live possibility and it is not all unlikely that so long as the death penalty remains a constitutionally valid alternative, the court or the state acting through the instrumentality of the court may have on its conscience the blood of an innocent man." Hence even if the death penalty is not abolished, at least the mode of execution is, hanging by rope should be abolished as it is the cruelest form of execution.[56] This mode of execution was challenged in *Deena* v. *Union of India.*[57] The main contention of this case was that hanging by rope as

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rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; - and if an innocent person is convicted and executed in consequence of such false evidence shall be punished either with death or the punishment herein before described".

55. As per Article 6 para 2 of ICCPR 1966.

56. For example, Nathuram Godse, the man convicted of murdering Mahatma Gandhi, was suspended for fifteen minutes from the scaffold before finally dying.

57. (1993) 4 SCC 645.

prescribed by section 354(5) CrPC 1973 was barbarous, in human and degrading and, therefore, violative of Article 21. But the Court unanimously held that the method prescribed by section 354 (5)[58] for executing the death sentence by hanging by rope was not violative of Article 21.

Here the Court rigidly stuck on the procedure established by law' with utter disregard for it stand of 'procedure established by law should be just, fair and reasonable.[59] More over should be just, fair and reasonable. More over recently law commission has also recommended to change the mode of execution to lethal injection. Hence it is high time to change at least the mode of execution in order to fulfill its international obligation.

III.1.4 Mandatory handcuffing –A form of torture

Many international human rights instruments contain provisions detailing two interrelated rights the right to be free from torture and cruel, inhuman or degrading treatment and the right to be properly detained. These rights are fundamental and closely linked to the concept of human dignity, which is one of the central concepts in international human rights law. It is well established that neither arrest nor detention strips an individual of their right to be treated with dignity. Handcuffing for the purpose of humiliating or intimidating individuals violated numerous international conventions, elaborate model standards and resolutions and one of the precepts underlying international human rights law that the dignity and worth of every individual must be respected. The right to be free from torture and cruel, inhuman or degrading treatment is documented in Article5 of the Universal Declaration of Human Rights[60], Article 7 of the International Covenant on Civil and Political Rights[61], and also forms the basis for the convention Against Torture (CAT). These international

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58. Section 354(5) of the CrPC. which prescribed hanging as mode of execution lays down fair, just and reasonable procedure within the meaning of Article 21 and hence is unconstitutional. The court took the view that neither electrocuting nor whether gas, nor even shooting had "any distinct advantage" over the system of hanging by rope.

59. *Maneka Gandhi, R.C. Cooper* cases.

60 Art. 5 of UDHR reads as, "No one Shall be subjected tocruel, inhuman or degrading treatment or punishment. "

61 Art. 7 of ICCPR reads as,
"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. in particular, no one shall be subjected without his free consent to medical or scientific experimentation. "

instruments are binding on India. The UDHR has become a part of customary international law and India has ratified ICCPR[62]and also signed the CAT[63].

III.1.4.1 Indian Position

Indian executive authorities rarely follow these provisions. Added to that, Unfortunately, there has recently been tremendous pressure by the police to make mandatory handcuffing the law[64]. Of course, it is not disputed that, handcuffing is sometimes necessary for legitimate security reasons as some accused persons are desperate and violent. But in India this is highly misused to settle meager personal scores. Thus in Nadiad[65] case a Chief Judicial Magistrate was harassed and handcuffed by the police to settle their personal vendetta, the supreme Court, exercising its power under Art129, sent five police officials including an IPS officer to jail for committing criminal contempt of the chief Judicial Magistrate's Court of Nadiad in the state of Gujarat. Similarly in a recent incident in Punjab, Justice A. S. Bains, a former Haryana High Court Judge, was arrested by the police and repeatedly placed in restraints even though there was no danger that he would escape. Justice Bains brought a court case and was awarded Rs. 50000 as compensation. The court held that this handcuffing and illegal detention was "definitely a violation of fundamental rights".

The Supreme Court has repeatedly condemned unnecessary use of handcuffing and declared in many instances that this amounts to violation of Article 21 of the Indian Constitution. In *Prem Shankar shukla* v. *Delhi Administration*[66] the court declared some of the provisions of Punjab police rules as unconstitutional, which made mandatory handcuffing a necessary during arrest. While delivering the judgment Justice Krishna Iyer drew attention to Art 5 of the Universal Declaration Of Human Rights forbidding torture or cruel, inhuman or degrading treatment or punishment and Article 10 of CP Covenant protecting the dignity and worth of a person and guaranteeing him humane treatment. He held that handcuffing of a

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62 India ratified ICCPR on 10 April 1979

63 India signed the CAT on 14 October 1997

64 On 10 July 2002, the Bureau of Police Research and Development (BPR&D), in collaboration with the Institute of Social Sciences, organized a seminar titled "Use of Handcuffing: A Rational Approach. "The seminar, attended mostly by police representatives from across India, provided an opportunity for the participants to discuss the guidelines for handcuffing. An overwhelming majority of them advocated legal reform to make handcuffing mandatory.

65 1991 4 SCC 406

66 AIR 1980 SC

prisoner was unconstitutional if there was another reasonable way of preventing the escape of the prisoner.

In *State of Maharashtra* v. *Ravikant*[67] the court directed the state government to pay Rs 10000 to a victim who was handcuffed and paraded in streets in a procession by police. The court held that this amounts to violation of Art 21 of the Constitution.

In Prem Shankar and other leading cases, the Supreme Court has laid down strict procedural guidelines specifying both when and how the use of handcuffs is appropriate. According to the court, handcuffing is legal only the arrestee is (a) involved in serious non-bail able offences; and (b) previously convicted of a crime, of desperate character, likely to commit suicide, or likely to attempt to escape. The use of handcuffs and the reasons for their use must be recorded. It is illegal to walk fettered political prisoners through the streets. Furthermore, the police must gain judicial permission before they use restrains during an arrest or on a detainee. In Sunil Batra v. Delhi Administration[68], the court observed, "To fetter prisoners in irons is an inhumanity unjustified, save where safe custody is impossible. The routine resort to handcuffs and irons bespeaks barbarity hostile to our goal of human dignity and social justice. "[69]Despite these clear, specific and unambiguous judgments from the Supreme Court, the abuse of handcuffs continues. Even then the activity of the Supreme court in this direction is highly appreciable as it has taken the initiative in implementing human rights at the ground level.

III.1.5 Gaps in the Implementation of Prisoner's Rights

The above discussion reveals that, there are wide ranging provisions in Indian Constitution and other national laws to implement the basic human rights treaty obligations. But there are many gaps too, which are discussed following.

Even though, Indian Constitution contains wide range of 'Fundamental rights' in Part III, their scope is inherently limited.[70] These limitations have enabled successive governments to enact laws that violate India's obligations as a party to the

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67 (1991) 2 SCC 373

68 A.I.R. 1978 SC 1675

69 Ibid.

70 Every fundamental right enshrined in part III of the Constitution is subjected to reasonable restriction such as public order, decency, morality, in the interest of the state etc.

International Covenant on Civil and Political Rights (ICCPR), for example in the acceptance of preventive detention implicit in Article 22 of the Constitution. Also, many criminal laws contain provisions that contravene international human rights standards. Some of these laws, like the Indian penal code and Indian Evidence Act, were enacted in the colonial period, while others such as the Code of Criminal Procedure were introduced or re-enacted after independence. Jurists in India have for many years maintained that certain laws need to be updated and amended. However, the lengthy process of introducing new legislation or amendments has not been extensively undertaken for the criminal law. An example is the Code of Criminal Procedure (Amendment) Bill which has been pending before the Loksabha in its present form since 1994.

There is no doubt that protection for detainees is extensively provided for in Indian law. Sections 46-58 of the Code of Criminal Procedure provide for arrest and detention procedures, including that the arrested person shall be informed of the grounds of the arrest and that a medical examination, if requested by the police or the arrested person, can be held. Section 56[71] and 167 of the Code of Criminal Procedure state that a person arrested is not to be detained for more than 24 hours before being brought before a magistrate, who can then order detention for up to 60 or 90 days. Also section 167 mandates the authorities to release the accused person on bail on the expiry of the said period of ninety days, or sixty days as the case may be.

However, these measures do not provide adequate safeguard against human rights violations. For example, police will not inform relatives promptly of an arrest. The absence of this simple procedure facilitates "disappearances". Similarly, the absence of mandatory procedures to ensure that all detainees are given a prompt medical examination following arrest facilitates death in custody.

Special statutes like Prevention of Terrorism Act, 2002[72], provides for the admissibility of custodial confession before a court of law in contradiction to the

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71 Section 56 of Cr.p.c reads as, " A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions contained therein as to bail, take or send person arrested before a magistrate having jurisdiction in the case, or before the officer in charge of a police station".

72 Sec. 32 of POTA, 2002 reads as, "Notwithstanding any thing in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provision of this section, a confession made by a person before a police officer not lower the rank of Superintendent of police and recorded by such police officer either in writing or on any mechanical or electronic device like Cassettes, tapes or sound tracks from out of which sound or images can be reproduced, shall be admissible in the trial of such person for an offence under this Act".

principle embodied in ICCPR. This paves for the infliction of torture on accused in order to obtain a favourable confession.

Also, the basic principle of Criminal Justice is

" an accused is presumed to be innocent till he is convicted", which is also reiterated in Article 14(2) of ICCPR which declares,

" Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law".

But Section.53 of POTA[73] goes against this cardinal principle thus putting life of accused in peril.

Thus the police are given wide powers under the criminal law, which allows them to arrest, detain and investigate. One such provision is section 41 of Code of Criminal Procedure[74], which gives sweeping powers to police to arrest a person

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[73] Section 53 of POTA reads as, " (1) In a prosecution for an offence sub-section (1) of section 3, if it is proved-

(a) that the arms or explosives or any other substances specified in section 4 were recovered from possession of the accused and there is reason to believe that such arms or explosives or other substances of a similar nature, were used in the commission of such offence; or

(b) that the finger prints of the accused were found at the site of the offence or on anything including arms and vehicles used in connection with the commission of such offence,

the special court shall draw adverse inference against the accused.

(2) In a prosecution for an offence under sub-section (3) of section 3, if it is proved that the accused rendered any financial assistance to a person, having knowledge that such person is accused of, or reasonably suspected of, an offence under that section, the special Court shall draw adverse inference against the accused.

[74] Section 41 of CrPC reads as, " (1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person-

(a) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or

(b) who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking; or

(c) who has been proclaimed as an offender either under this Code or by order of the State Government; or

(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who reasonably be suspected of having committed an offence with reference to such thing; or

(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

(f) who is reasonably suspected of being deserter from any of the Armed Forces of the Union; or

(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

without a warrant. This is one of the provisions of criminal law that is widely misused to settle personal scores. Detainees can be kept in police custody for long periods, particularly under legislation permitting detention, during which they are at risk of torture and ill treatment. In violation of Indian Law and procedure, the practice of unrecorded police detention is common and there is little doubt that it facilitates police abuses such a beatings and other forms of ill treatment or torture, such as rape. Moreover, lawyers and relatives are routinely denied access by police to people held in custody. Most torture and ill treatment in India occurs during the first stage of detention in police custody, when access to outsiders is routinely denied. Indian law is virtually silent on the procedures for questioning suspects in police custody, and no provisions exist dealing safeguards in the Code of Criminal Procedure.

III.2 Rights of Women and Children

Women were considered by the male-dominated society as the property of men, which was at his will, and pleasure. Women constitute the better half of the humanity. However, often they are turnout to be the bitter half, that half of human race, which is traditionally considered as disadvantaged and is suffering scores of atrocities at the hands of the other half. Violence against women is found throughout in the historical records of any civilization.

Similarly, the other important but most weaker section of the society is children. Children of today are the investment of the nation to guide it in the future. A child should have a healthy, mental and physical nurturing in order to contribute positively to the society when he grows up. The question is whether the state is rising to the occasion to impart the necessary living standards for the proper growth of a child. In present scenario we can observe that there is wide spread misuse and exploitation of children by the society.

(h) who, being a released convict, commits a breach of any rule made under sub-section (5) of section 356; or

(i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears there from that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

(2) Any officer in charge of a police station may, in like manner, arrest or cause to be arrested any person, belonging to one or more of the categories of persons specified in Section 109 or Section 110.

Several national and international instruments came up as part of the attempt to protect the rights of the women and children. UDHR and such other international instruments influence the creation of several legislations and norms at international level. Indian legal system is also influenced by these principles and contains several provisions exclusively for the protection of the rights of the women and children. Indian judiciary has also played a crucial role in interpreting the constitutional provisions in line with the principles laid down in international instruments. The forthcoming discussion deals about, how the international instruments are implemented in Indian laws either directly or indirectly. The implementation of women's right is discussed first.

III.2.1 Implementation of Women's Rights.

"Pitha Rakshathi kaumaare
Bharthroe Rakshathi youvanae
Puthroe Rakshathi Vaardhakye
Na sthri Swathanthrya marhathi."[75]

This verse reveals the fact that ever since the Vedic days women are portrayed as dependents of men. The status of women, according to Manu, the premier exponent of law in written from was definitely unfortunate. There is also another interpretation to this provision differing from the commonly believed position that it is detrimental to the freedom of women. But it can easily be argued that Manu was an exponent of the need for protective discrimination of women. Moreover, in the latter period those who interpreted the provision were misusing it to the protection of the patriarchal society. We can see that provisions were always in the best interest of the protection of the suppressed flock but the interpretations and implementations were not up to the expectations and in many ways were misused for those in the protection of some vested interests.

But the fact is that no society can be free, fair and just until its women enjoys freedom, justice and opportunity to realise their full potential. One, who is glancing through the pages of history, will not be able to find a positive effort in the recognition of women's right until the first half of 20th century. It can be observed,

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75 Manu ix:3, as quoted in Anjanikant, *Women and law*, (Rajath Publication New Delhi, 1997) at p.32

that a sudden change in the approach towards women was achieved by giving of voting rights to women in Britain. As per the UN Report 1980, "Women Constitute half the world population, perform nearly two-thirds of work hours, receive one-tenth of the world's income, and own less than one-hundredth percent of world's property"[76]. The Indian women is still unfree, exploited, sold as commodity, liquidated without the law and held hostage by an explosive combination. [77]

Concerning the equality of stain and personal freedom of women the *vedic* period was a golden era for women. They were the real partners in that era. In *smrithik* era position of women gradually deteriorated. The gradual evolution of patriarchal society further accelerated the deterioration of status of women in the society. The development of women rights concept and the international instruments dealing with their rights is going to be discussed here.

III.2.1.1 International Instruments Creating Women Rights

Several international documents discussed the topic of women rights. The League of Nations in 1935 commissioned a report on the aspect of status of women. The UN Charter advocated equal rights of all human beings and emphasized the principle of equal pay for equal work, which gives right to get equal remuneration for both men and women. The UN Commission on the status of Women was set up in 1946 as a permanent body of the ECOSOC. The most important aim of the commission was to give full equality of all civil rights pertaining to marriage, guardianship, and legal capacity and dominates and opposes the subordinate status of married women in the family. For this various documents were prepared and are adopted by UN General Assembly. [78]

In 1948, ECOSOC adopted resolution- requesting members to grant women equal educational rights with man and to ensure that they are afforded genuine educational opportunities. The Universal Declaration of Human Rights created norms related to several human rights which also recognized women rights as the basic human rights in 1948, and these rights were more concretized in ICCPR and International Convention for the Elimination of all forms of Discrimination Against

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76 *Madhu Kishwar* v. *state of Bihar* , (1996) 5 SCC 125

77 Krishna Iyer. J. *Human Rights and The Law* (Vedpal Law House, Indore 1984), p.31

78 Asima sahu, *Women's Liberation and Human Rights* (Pointer Publishers, Jaipur, 2000), p. 35.

women in 1979 which made Several Provisions for the protection of women that recognized as women rights.

Equality is worthless without equal access to justice. The UN has come out with a new protocol to the CEDAW. The protocol with 21 articles enables women, for the first time, to submit sexual discrimination complaints directly to the UN as well as protest against other CEDAW violations.

Specific declarations such as the Fourth world conference on women (1995) in Beijing unanimously declared the principles of non-discrimination and affirmed faith in the equal rights of men and women. For Improving the pathetic situation of women several NGOs working in this field, created norms at international level and pressurized both UN and domestic mechanisms to make laws for ensuring that rights for the welfare of women.

The Human Right Committee has got a significant role in moving beyond its male defined norms in order to respond to the brutal and systematic violation of women rights globally. Due to these norms created in international level national legislation was influenced.

III.2.1.2 Constitution and other National Laws

Indian Constitution contains several provisions relating to women and children. However equality and freedom has always been neglected in the name of custom, honour, family welfare and social prestige. Equality that is guaranteed in the constitution of India is a dynamic one. While hoping for the ideal of equality, it does not recognise the realities of inequalities. Article 14 of the Constitution recognises equality before law for all citizens without any discrimination. Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth. Article 15 (3) says about protective discrimination to women and children and Article 21 says about the protection of life and liberty to all.

The Constitution also ensures protection against traffic in human beings and forced labour. Art 42 says about provisions for just and humane conditions of work and maternity relief. The protection for women in the work place is given in factories Act 1948. It includes several welfare regulations and protective measures for women and children in working places, section 125 of criminal procedure code 1973 provides

maintenance to women. Indian penal code Sections 509,[79] 294[80] and 354[81] deals with Eve-teasing and sexual Harassment. The Indecent Representation Of women (protection) Act, 1986 for preventing the depiction of a woman in a manner which is derogating or denigrating to women, or which is likely to corrupt public morality through advertisement. Publications, writings, paintings, figures, or in any other manner. Sec 312 IPC encroaches on the right to abort. 'Whoever' voluntarily causes women with child to miscarry, and then she can be punished. This war later removed by Medical Termination of Pregnancy Act 1971. Sec. 8 of this Act provides protection of action taken in good faith and it allows medical termination of pregnancy for the best interest of the women carrying the child. Suppression of Immoral Traffic Act (SITA) prohibits the trafficking of women for prostitution and selling like commodities.

The Commission of Sati (Prevention) Act, 1987, The maternity Benefit Act 1961 and Equal Remuneration Act 1976 are the other examples of welfare legislations to curb violations against women. Indian Family laws make gross discrimination between gender in cases of inheritance and especially in cases of divorcing grounds for women

The National Commission for Women was setup under the National Commission for Women Act, 1990. In one of the South Indian states, Kerala, The Kerala Women's Commission Act 1995 was passed which created a commission for women.

III.2.1.3 Judiciary and Women Rights

It is well settled that, just because a Convention or International Instrument is adopted, it does not become automatically a part of Country's legal system. It is not directly enforceable also. Therefore, though there are Conventions protecting

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79 Section.509 IPC reads as follows, whoever, intending to insult the modesty of woman, utters any word, makes any sign of gesture, or object shall be seen, by such women or intrudes upon the privacy of such woman, shall be punishable with simple imprisonment for a term which may extend to one year or with fine or with both.

80 Section. 294 reads," who ever, to the annoyance of others does any obscene act in any public place, or (b) sings, recites or utter any obscene song, ballad or words, in or near any public place, shall be punishable with imprisonment or either description for a term which may extend to 3 months or with fine or with both.

81 Section. 354 reads, " who ever, assaults or uses criminal force to any women, intending to outrage or knowing it to be likely that he will there by outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to 2 years or with fine or with both.

women's rights unless they get transformed into a national law. Their implementation is practically impossible. But the Indian Judiciary has been incorporating various provisions of the International Human rights documents into Indian Legal system, without them being legislated. In other words, it is a situation where an international document is indirectly implemented in the national legal system.

There is a general view that when there is no National Law on a particular matter, and if there is an International Law in that area, the later can be adopted in the national Legal system. The same is the case where there is no contradiction between the national Law and International Law. The contributions of Indian judiciary in protecting the women's rights by relying on International Instruments is analysed followingly.

In *Madhu Kishwar* v. *State of Bihar* [82] The petitioner challenged certain provisions of Chottanagpur Tenancy Act, 1908, which provides for male succession to property in male line. The court held that these provisions are discriminatory and unfair to women, and therefore, Ultravires the equality clause in the constitution. While discussing whether provisions of the Act are violative of Article 14, Court Ordered to Constitute a committee and asked to file a report. The committee report says that, "The tribal society is dominated by males... a female member in a tribal family has a right of usufruct in the property owned by her father till she is unmarried and the same is the property of her husband after the marriage, however she does not have any right to transfer her share to anybody by any means whatsoever,' while deciding the case Justice Punchhi and J. Kuldip Singh Observed,

> "Scheduled tribe people are as much citizens as other and they are entitled to the benefit of guarantees of the Constitution. It may be that the law can provide reasonable regulation in the matter of succession to property with a view to maintaining cohesiveness in regard to scheduled Tribes and their properties. But exclusion from inheritance would not be appropriate"

While trying to establish equal right of women with men court emphasized it by the binding force at the International instruments on par with Constitutional Provisions. The court further observed.

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[82] (1996) 5 SCC 125

"The General Assembly of the UN adopted a Declaration on 4-12-1996 on the "The Right to Development" in which India played a crusading role for its adoption and ratified the same. It's preamble cognizes that all human rights and fundamental freedoms are indivisible and interdependent. Articles 1(1), 6(1), (2), (3), Article 8 assures right to development and obliges state to observe these without discrimination, the implementation, promotion and protection and eliminate the obstacles and ensures equality of opportunity for access. Effective measures should be undertaken to ensure that women have an active role in the development process Appropriate economic and social reforms should be undertaken to eradicate the said injustice".

The Court further observed, "Human rights and fundamental freedoms have been reiterated by the UDHR. Democracy, Development and respect for human rights and fundamental freedoms are interdependent and have mutual reinforcement. The human rights for women, including girl child are, therefore, inalienable, integrated integral and indivisible part of Universal Human Rights. All forms of discrimination on grounds of gender are violative of fundamental freedoms and human rights. UN adopted Vienna Convention on the Elimination of all forms of discrimination against women on 18-12-1979. India, which has participated in the Conference has ratified it on 08-08-1993 with reservation on Articles 5 (e), 16 (1) 16 (2) and 29 there of. The preamble of CEDAW reiterates that discrimination against woman violates the principle of equality of rights and respect for human dignity and the establishment of New International economic order based on equality and justice contributes significantly lower the promotion of equality between men and women etc. Article 1 deals with discrimination against women and Article 2 (b) enjoins the state parties by appropriate means without delay by adopting appropriate means like legislation and sanctions to abolish discrimination.

Art. 15(2) enjoin "to accord women equality with men before the law, in particular to administer property". Thus the court made no hesitation to adopt the principles laid down in international conventions to interpret the provisions of domestic law thus protecting the basic right of equality of women.

III.2.1.4 Molestation and Sexual Harassment.

Sexual Harassment at the workplace remains a key point of discrimination. International instruments such as the International covenant on Economic, Social and

Cultural rights, the CEDAW and Beijing Declaration have made the point that sexual Harassment at the workplace is a form of gender discrimination. This discrimination needs to be addressed by providing a state of working environment for every women. The Indian Penal Code also contains many effective provisions to deal with molestation and sexual harassment[83].

In *Ropan Deol Bajaj* v.*Kanwar Pal Singh Gill*[84], One senior lady IAS officer in the rank of secretary lodged a complaint with the Inspector General Of Police, Chandigarh,Union Territory alleging sexual harassment and molestation by Mr.K.P.S.Gill, an eminent police officer of Punjab. On the basis of the said complaint, a criminal case was registered and the investigation was taken up. A Private complaint was also filed in the court of Chief Judicial Magistrate, Chandigarh on the same allegation on 22.11.88. Subsequently, both the FIR and the private complaint were quashed by the Punjab and Haryana High Court. Ultimately the matter came up before the Supreme Court, which set aside the order of quashing the complaint and FIR by the Punjab and Haryana High Court. The Supreme Court has laid down in unambiguous terms that the sequence of events culminating in slapping on the posterior of a woman in a public function disclosed in the FIR amounted to *prima facie* offense under section 354, IPC. This case was remanded to the trial court for adjudication on merit.

In *State of U.P.* v. *Boden Sundara Rao*[85] the Apex Court came down heavily on the High Court of Andhra Pradesh for awarding grossly inadequate sentence in the following words:

> "Crimes against women are on the rise. Imposition of grossly inadequate sentence and particularly against the mandate of the legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general, but also at times encourages a criminal. The courts must not only keep in view the rights of the

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83 As per Section.509 IPC, any person using any word or picture or gesture or act or sound with intention to insult the modesty of any women can be punished with imprisonment up to one year. Similarly, as per s.354 IPC, any person using criminal force on a woman with an intention to outrage the modesty is liable for an offence punishable with imprisonment up to two years. Both the offences of molestation and sexual harassment are cognizable and the police are empowered to investigate the cases without any permission from the magistrate.

84 1995 SCC (Cr) 1059.

85 1995 (6) SCC 230.

criminal but also the rights of the victim of a crime and the society at large while considering importance of appropriate punishment"[86].

In *Vishaka* v. *State of Rajasthan.*[87] The Vishaka, an Organization working for the welfare of the women, moved to SC when a social worker was gangraped in Rajasthan. While deciding the case the Supreme Court brought the international conventions in Indian Law. How they are trying to incorporate it is very well understood from the words.

> "Some Provisions in the CEDAW-Arts 11 and 24[88] as also general recommendations of CEDAW in this context-articles 11,22, 23, 24[89] as ratified in the present context are of significant"

According to the Supreme Court, "Sexual harassment" includes such unwelcome behaviour (whether directly or by implication) as: (i) physical contact or advances: (ii) a demand to request for sexual favours; (iii) sexually coloured remarks; (iv) showing pornography; (v) any other unwelcome physical, verbal or non-verbal conduct of sexual behaviour. At the 4th World Conference on Women in Beijing the Government of India has also made an official commitment, interalia, to formulate and operationalize a national policy on woman which will continuously guide and inform action at every level and in every sector to set up a commission for women's rights to act as a public defender of the same in order to institutionalize a national level mechanism to monitor the implementation of the platform for action. Therefore, reliance can be placed on the above for the purpose of construing the nature and ambit of constitutional guarantee of gender equality in our constitution.

The court issued certain guidelines to be observed to prevent sexual harassment in working places and held that,

> "The meaning and content of the fundamental rights guaranteed in this Constitution are sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read

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86 Ibid.

87 AIR 1997 SC 3011

88 CEDAW Art. 24 reads, "State parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present convention".

89 Article 22 reads, " The specialised agencies shall be entitled to be represented at the consideration of the implementation of such provision of the present convention as it fall with in the scope of their activities."

into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law"[90].

The Court concluded in this way that,

"the absence of enacted law to provide for the effective enforcement of the basic human rights of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at workplaces, we lay down the guidelines and norms specified hereinafter for due observance at all workplaces or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power of enforcement of fundamental rights and it is further emphasized that this would be treated as the law delayed by this court under Art 141 of the Constitution."[91]

The SC in its landmark decision in Apparel Export promotion Council A.K. Chopra[92]held that every incident of sexual harassment at the place of work is a violation of the fundamental right to gender justice and the right to life and liberty. If sexual harassment is discrimination, equality can be guaranteed only by safe working environment.

The facts of the case disclose that the defendant was removed from the post of private Secretary to the Chairman of the Apparel Export Promotion Council on the basis of an enquiring report regarding allegation of sexual harassment. The report contained the finding that the allegation that the respondent "tried to molest" a female employee at the place of work is proved. The respondent challenged the decision before the High Court through a writ petition. The HC took the view that the petitioner had not actually molested the woman but had only tried to molest her. Therefore, the court directed the appellants to reinstate the respondent.

On appeal, the SC took a different approach, stating that the issue of gender equality is involved in the case. It observed, In our opinion the contents of the fundamental rights guaranteed in our constitution are of sufficient amplitude to encompass all facts of gender equality, including prevention of sexual harassment of a

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90 See n 85 p 3015

91 Ibid.

92 (1999) 1 SCC 759

female at the place of work is incompatible with the dignity and honour of female and needs to be eliminated and that these can be no compromise with such violations, admits of no debate. The message of international instruments, which directs all state. Parties to take appropriate measures to prevent discrimination of all forms against woman besides taking steps to protect the honour and dignity is loud and clear. Art.7 [93] of ICESCR recognizes her right to fair conditions of work and reflects that woman shall not be subjected sexual harassment at the place of work, which may irritate working environment. These international instruments cast an obligation on the Indian state to gendersensitize its laws and the courts are under an obligation to see that the message of the in instruments is not allowed to be drawn."

In *Gita Hariharan* v. *Reserve Bank of India.* [94]Court discussed the matter regarding the constitutionality of Sec 6(a) of Hindu minority and Guardianship Act, 1956. Whether it violates Arts 14 and 15 of the constitution in as much the mother of a minor is relegated to an inter position on ground of sex alone since her right as a natural guardian is made cognizable 'after' the father in the said provision. Court further says that the `message of international instruments CEDAW and Beijing Declaration, which directs all state parties to take appropriate measures to prevent discrimination of all forms against women is quite clear". In this case also court imported international norms in to Indian legal system.

In *Chairman Railway Board* v. *Chandrimadas*[95]. SC extended the Fundamental right to life to the dignity to the non-citizens and awarded compensation for gangrape of a foreign lady by railway employees. Here also Supreme Court tried to protect the women rights and tried to implement the obligations of India under international instruments such as CEDAW, Conventions of civil and political rights and socio-economic rights.

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93 Article 7 (a) of the ICESCR reads as follows, "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: Remuneration which provides all workers, as a minimum, with: Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work".

94 (1999) 2 SCC 228

95 (2000) 2 SCC 465

III.2.2 Children

Children are the wealth of a nation. They are the citizens of future era. Children of today are the investment of the nation to guide it in the future. There is a common saying that, "Child is the father of the man"[96]. A child should have a healthy, mental and physical nurturing in order to contribute positively to the society when he grew up. The future of the country depends upon the proper bringing up of children and giving them the proper training to turnout to be good citizens of the country[97].

Unfortunately, a vast number of children of today are in a great crisis due to poverty. Children and youth are subjected to many visible and invisible sufferings and disabilities particularly in health, intellectual and social deprivation[98]. Child labour, child prostitution, child sex abuses, children illiteracy, infant mortality, female children discrimination, social isolation and other related social problems hit the child's basic rights. Our constitution makers knew that India of their vision would not be a reality if the children of the country are not nurtured and educated[99]. Added to that several international instruments are made with a view to enhance and protect children's rights. India is a party to most of these instruments. But in almost all cases she has failed to implement these instruments at the domestic level by enacting suitable enabling legislation as in the case of other human rights treaties too. Apart from this aspect, the Indian Judiciary has made significant contribution by interpreting the provisions of the constitution in line with the international instruments relating to children. The forthcoming discussion is on the children's rights that are protected in various international instruments and in the Indian Constitution and other laws and judiciary's contribution in this field.

III.2.2.1 International instruments regarding children's rights

International instruments regarding children's rights, essentially tries to protect and promote sets of Civil, political, social, economic and cultural rights of every child. These rights can be classified as,

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96 *M.C.Mehta* v. *Union of India* (1996) 6 SCC 756

97 *Sheela Barse* v. *Secretary of children's Aid Society* (1987) 3 SCC 50

98 *M.C.Mehta* v. *State of Tamilnadu* AIR 1991 SC 417

99 Ibid p.423

(1) The right to survival[100].

(2) The right to protection[101]

(3) The right to development[102]

(4) The right to participation.[103]

Since its foundation in 1919,the International labour Organisation has been actively concerned with the problems of child labour[104], by adopting international labour standards in the form of conventions and recommendations. The League of Nations had adopted the Geneva Declaration in1924 for the rights of the children. It had asked the states to take measures against the social evil of slavery, child labour, traffic and prostitution of minors. Then after the formation of United Nations, it made several declarations and conventions for the protection and rights of the child. On December 1946 UNICEF was established which have remained the primary organization for the cause of International assistance to children. Then the UDHR[105], ICCPR[106] and ICESCR also recognised that the rights of the child ought to be protected.

On 20th November 1959 United Nations adopted a declaration on the rights of the child, which enunciated general principles for the care, and protection of the children. Twenty years after UN declared the year 1979 as the International year of the children. On 1989 the General Assembly of United Nation adopted Convention on

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100 Article 6 of The Convention on the Rights of the Child 1989 reads, "(1) States Parties recognise that every child has the inherent right to life. (2) States Parties shall ensure to the maximum extent possible the survival and development of the child".

101 Article 3 (2) of The Convention on the Rights of the Child 1989 reads, " States parties undertake to ensure the child protection and care as is necessary for his or her well being, taking into account the rights and duties of his parents, legalguardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures".

102 Article 6 (2) of The Convention on the Rights of the Child 1989 reads, "States Parties shall ensure to the maximum extent possible the survival and development of the child".

103 Article 23 of The Convention on the Rights of the Child 1989 reads, "States parties recognise that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community"

104 P.L.Joshi, "Rights of childhood" in B.S.Waghmore ed., *Human Rights: Problems and Prospectus*, (Kalinga Publications, Delhi, 2001) p 87.

105 Article 25(2) of UDHR reads as, "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection".

106 Article 24 of ICCPR reads as follows, " (1) Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property of birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state. (2) Every child shall be registered immediately after birth and shall have a name. (3) Every child has the right to acquire a nationality."

the rights of the child, which made substantial rights at international level for the children. The world summit on children was organized in September 1990 in New York to make their firm commitments for reaching out children of the world. A time bound plan of action was formulated and the committee on the rights of the child for considering the reports to be submitted by the state parties to the convention came into existence. These international instruments made it obligatory on the part of the state parties to extend the rights of the children including the right to life.

III.2.2.2 Constitutional and other national laws

As already mentioned India faces a major problem, in protecting children's right not because of any lack of provisions in law in this regard but because of the poverty and other socio-economic problems and the lacunae in the legislation. The constitution contains several provisions for the protection and welfare of the children in Constitution. The preamble, an integral part of the Constitution, pledges to secure "Socio-economic justice" to all its citizens with stated liberties" "equality of status and of opportunity", assuring fraternity and "dignity" in a united and integrated Bharat[107].

Art. 15(3) provides for protection and positive reservation to the women and children. This makes the legislatures to make protective discrimination laws for the welfare of women and children.

Art 23 (1)[108], Art 24[109] Art 39 (e) [110], Art. 45[111] also ensure protection for women and children. In 1933, children (Pledging of Labour) Act was passed, which can be said to be the first statutory enactment dealing with child labour. The Indian Constitution in its chapters on Fundamental Rights and Directive Principles as well as through various Central and state statutes has accepted these rights of the central and

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107 J.Ramaswamy, in *Gaurav Jain* v. *Union of India* (1997) 8 SCC 114

108 Article 23 (1) reads as, "Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law"

109 Article 24 reads as, "No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment"

110 Article 39(e) reads as, "The state shall, in particular, direct its policy towards securing – that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength".

111 Article 45 reads as, "The state shall endeavor to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until the age of fourteen years".

state statutes has accepted these rights of the Children in a better way. Indian Parliament has enacted the Children's Act of 1960, to safeguard the young Prisoners against abuse and exploitation. The national policy for children in 1974 affirmed that it should be the policy of the state to provide adequate services for children, both before and after birth and throughout the period of growth to ensure their full physical, mental and social development Judiciary also contributes several other rights through widening the of scope of Art 21 and directive principles of state policy. The Juvenile Justice Act, 1986 was enacted with an intention to protect children from burdened criminals. Juvenile Justice Act, 2000, further enriched this aim. The Child Marriage Restraint Act has fixed minimum age for marriage. The National policy of education 1986 gave direction to state policy on the educational needs of children. Much legislation regulated employment of Children.

The Convention on the Rights of the child, 1989 was ratified by the Government of India one 20-11-1989 recognises the rights of the child for full and harmonious development, in an atmosphere of happiness, lave and understanding. Certain welfare programmes like mid-day meals in the schools, provision for nutritious food for the needy and health care also introduced by the Government. Because of unwillingness to continue or implement these measures, India is still facing violation of children's rights as a big problem. Children in the street live without motherhood, love, affection, food and education. The discrimination toward girl child continues even after 54th anniversary of our independence. They are widely used for antisocial activities like prostitution, struggling for food and sales of narcotics, and as beggars. Most of the others are doing hazardous jobs in several industrial sectors like explosive units, workshops etc. Indian Courts are trying to enhance the provisions of child welfare measures through the interpretation of laws. That interpretation in several cases cuts across the territories of India and tries to interpret the international norms also in the domestic laws. Here the references of cases that contextually invoked international norms and the effect they have had on domestic laws are discussed.

III.2.2.3 Judicial interpretation of children's rights in India

As in the case of protection of women's and prisoners right, the judiciary has played a significant role in protecting children's right also. The court has relied upon international instruments to widen the scope of Art.21 of the Constitution. As far as

child exploitation is concerned, an array of judicial decisions shows that it is giving active lead in protecting the child from exploitation. Justice Subba Rao rightly observed, " Social justice must begin with children, unless the tender plant is properly nourished, it has little chance of growing into a strong useful tree. So first priority in social justice should be given to children"[112]. The Court has strongly held that employment of children under the age of fourteen years must be prohibited in every type of construction work. This is a Constitutional prohibition, which even if not followed by appropriate legislation, must operate *proprio vigore*[113].

In *Sheela Barse* v. *Union of India*[114], the Supreme Court with a view to protecting children from exploitation in jails pointed out that, "it is an elementary requirement of any civilized society and it has been so provided in various statutes concerning children that they should not be confined to jail because incarceration in jails has a dehumanizing effect and it is harmful to the growth and development of children[115]. In *Sheela Barse* v. *Secretary, Children Aid Society and others*[116], the petitioner complained about the state of affairs in an observation home for children. There had been delay in restoring children to their parents despite orders of the juvenile court, a non-application of mind in taking children into custody and producing them before the court and continued detention of children without justification, led to their harassment. The Court further held,

> "If there be no proper growth of children of today, the future of the country will be dark. It is the obligation of every generation to bring up children who will be citizens of tomorrow in a proper way. Today's children will be leaders of tomorrow who will hold the country's banner high and maintain prestige of the nation"

The Court further observed,

> "India as a party to the international covenants, it is an obligation of the government of India as also the state machinery to implement the same in proper way"

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112 P.L. Mehta and Sunil Deshai, "Judicial Response to child-labour in India", *Cochin University Law Review*, Vol XX, March-June, 1996 p.187.

113 People's Union for Democratic Rights v. Union of India, AIR 1982 SC 1480: *M.C.Mehta* v. *State of Tamilnadu* AIR 1991 SC 417

114 AIR 1986 SC 1773

115 Ibid. p.1774

116 (1987) 3 SCC 50 at p55

In *Laksmi Kant Pande* v. *Union of India*[117], an advocate wrote a letter to the judges of the Supreme Court complaining about the malpractices by some social organizations and other voluntary agencies engaged in offering Indian children in adoption to foreign parents. The Supreme Court treated this letter as a writ petition in the nature of public interest litigation. There was no uniform law governing inter country adoption. Only futile attempts were adopted by the parliament in 1972 and 1980 to enact uniform law on adoption. After observing the absence of legal framework in the area of inter country adoption and failure of the parliament to enact law in this regard, the Supreme Court formulated the guidelines and norms which must be observed in permitting inter country adoption. The guidelines, and norms for preventing the moral and material abandonment of children by going into the wrong hands, were framed by the Supreme Court with such meticulous details which even a consummate draftsman would have, perhaps, missed. The anxiety of the detailed norms and guidelines was to protect and safeguard the interest and welfare of the children of the country and protect their human rights, which is the eloquent aim of the various constitutional provisions[118]. Thus the Supreme Court filled the vacuum created by the absence of any parliamentary legislation in regard to the Uniform adoption law[119]

Similarly in *Union Carbide Corpn* v. *Union of India*[120] the Supreme Court took serious cognizance of the possible impact of Bhopal gas leak disaster on persons and children born to exposed mothers who may become symptomatic in future. The Court directed Union Of India to obtain appropriate medical group insurance cover to take care of compensation for such prospective victims. The Court also ordered the premium to be paid from settlement fund.

These glaring decisions are ample proof that Judiciary has shown a deep concern about the protection and welfare of the rights of the children thus indirectly implementing the rights enumerated in international instruments relating to child.

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117 A.I.R 1984 S.C. 469. See also A.I.R 1986 S.C. 272; A.I.R 1987 S.C.232

118 Articles 15(3), 21,24, 39(e) and (f)

119 See P.S.Jaswal, "*Lakshmi Kant Pande* v. *Union Of India* (A.I.R 1984 S.C. 469)Whether An Instance of Excessive Judicial Legislation or an Apt Formulation Inaptly Applied", A.I.R 1986 *(Journal)*,p. 89-93

120 A.I.R 1992 S.C.248 p.311

III.2.3 Gaps in the implementation

Even though, a plethora of laws are there to ensure the rights of women, there exist explicit gaps too. One such example is the enactment of Muslim Women (Protection of Rights on Divorce) Act 1986, which effectively took away from Muslim women in India what they had gained in security through the Indian Supreme Court's decision a year earlier in what had come to be known as " Shah Bano case"[121].

Shah Bano, daughter of a head constable, was married at the age of 16 to her cousin, Mohammed Khan. By the time the couple settled in Indore where Khan established legal practice, Shah Bano had given birth to three children of him. After 43 years of coalesced life and two more children, Khan threw Shah Bano out of his house and took a second wife. For two years he paid her Rs.200 per month as maintenance, then stopped, though his income at that time was reputed to be in excess of Rs.5000 per month. In 1978, Shah Bano sought relief in a local court under the Prevention of Vagrancy and Destitution Law and asked for the maximum monthly allowance of Rs.500. The case was still outstanding when Khan divorced Shah Bano, after depositing with the court Rs.3000 that he owed her as her mehr. He then claimed that he was no longer obliged to pay her anything. The magistrate, however, ruled that Khan should pay Shah Bano Rs.25 per month. On appeal by Shah Bano, that amount was raised by the Madhya Pradesh High Court to Rs.179 per month. Khan then appealed to Supreme Court. He claimed that as a Muslim he was governed solely by his religious law, the *Shari'ah*, under which he was required to pay Shah Bano her maintenance during the period designated as '*idda*' (3 months), and that he had already done. It was in consideration of this appeal that the Supreme Court of India gave its momentous judgement, ruling that, regardless of any consideration of the religion of the parties involved, Section 125 of the CrPC required a former husband to provide for his divorced wife if she had no means of supporting herself.

A storm broke loose when the judgement was announced. Except for a small number of committed individuals and organisations, all major Muslim parties, organisations and " leaders" came together in intense fury to protest against the ruling, which they viewed as a violation of their sacrosanct *Shari'ah*. There were strikes and

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[121] Mohd.Ahmed Khan v. Shah Bano Begum A.I.R 1985 SC 945

demonstrations in the streets of all major cities, often turning violent. There were protest meetings everywhere, and uproar in the Parliament where several Muslim MPs demanded that the Parliament should amend the law in order to render null and void the decision of the Supreme Court. Rajiv Gandhi, then Prime Minister, at first stood by the Supreme Court ruling, and Arif Mohammed Khan, an important Muslim member of his cabinet, powerfully defended it in the Lok Sabha. But as the protest became more vociferous and violent, Mr. Gandhi did an about-face, and allowed another Muslim minister Ziaur Rahman Ansari, to attack the judgement and take on the leading role in appeasing the Muslims. The latter task took on great urgency as the Congress Party saw its power eroding before the approaching bye-elections in 1985. Eventually, in May 1986, the government introduced and got passed the Muslim Women (Protection of Rights on Divorce) Bill, which effectively closed to Muslim women the option of obtaining relief under Section 125 of CrPC. Whereas the Supreme Court had found a way to help a helpless individual in straitened circumstances, the Indian Parliament proceeded first to enclose her within a monolithic group identity, then raised that group identity so as to make it the sole determinant of the issue in her case. The Indian lawmakers did so in the name of protecting the group rights of a religious minority, the Muslims. Now the position is any Indian women can seek redress through sec 125 of Cr.p.c, while a Muslim woman cannot.

III.3 Right to Environment –Right to Life

The earth has sufficient to provide for everyone's need but not for everyone's greed.

-Mahatma Gandhi.

The word environment originated from the French word "environner" which means to "surround" or something that surrends.' It includes all the conditions, circumstances and influences surrounding and affecting an organism or group of organism. Anything exists, anything external to an organism in the region Surroundings or circumstances. It is the house created on earth for living beings. It is the aggregate of all external conditions, which influence the life of an organism. India,

one of the ancient civilisations, advised us to preserve the purity of three-life supporting systems air, water and earth.[122]

Earlier, when man relied on nature, he was considering it as his God. When man started thinking himself as superior he reviewed the cordial relation between man and nature. Unquenchable thirst for resources and the ever-growing desire for conquering the nature led to the exploitations of nature's wealth indiscriminately. Human beings are not self complacent in acquiring wealth, power and pleasure as the cost of nature. By inventing and employing, technology and using many chemicals, human beings are daily endangering nature seriously by causing ecological imbalance.[123] This in turn reduced nature's capacity of self-stabilisation. The standards of self- stabilisation advises not to cut down trees faster than they grow back. Do not farm land at levels, or in a manner that reduces the land's regenerative capacity. Do not pollute water at levels that exceed its natural purification capacity'.[124]

III.3.1 The Right to Environment as a Basic Human Right

Man's body is part of the nature – the environment. Corresponding to the exchanges in the nature, there used to take place some changes in the body of man too. For e.g. during new moon day. Asthma patients get their disease increased. No right is cent percent detachable from the systems surrounding it. When we are speaking about human rights, it is necessarily linked with surroundings of human beings. A proper physical surrounding is necessary for the proper protection of human rights. Human rights envisage proper minimum living conditions for the proper protection of the same. Therefore, unless there is a healthy environment, all human rights will be in vain.

Man depends on nature for everything. Unless the environment is protected properly, there is no point in protecting other human rights. The natural living conditions need to be protected for the proper appreciation of human rights. As far as man's life is concerned. His mother earth requires a high degree of protection and

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122 Manusmrithi, Yajnavalkya smrithi and Vedas like Rig Veda etc.

123 C. Basavaraju, "Environmental Protection- A Constitutional Mandate" 28 *Indian Bar Review* (2001), p.12

124 Shyam Divan, "Environmental Law and policy in India", *Oxford University Press* (New Delhi ,1999) at p.585.

respect for the proper protection of his inalienable rights. Any activity by a human agency that is in a way detrimental to the natural setting of earth and atmosphere is an infringement of human rights. Even before the evolution of the so-called major societal theories,[125] there were certain necessary conditions, which were not considered as rights in those times. These conditions were necessary for the protection of human life. The quest for human rights starts from the deep-rooted sentiments towards the world as a whole. Man, even though an unavoidable part of the ecology considers himself to be the supreme living creation. The human rights and the ecology try to prevent unnecessary encroachments on each other, as its existence is based on mutual dependence. From this premise the protection of environment evolves as a human right. Man being a rational animal was able to find out this basic premise, which prevented him from unnecessary encroachment upon nature.

As is evident, right to healthy environment is right to life itself. Without this right man has no existence at all. The first generation, second generations or third generation rights will be of no meaning without a healthy environment. Naturally, what follows is that the entire international documents, which deal with the protection of environment, are the most important and fundamental human rights document.

The development of human race is the saga of his fight with the adverse natural settings for survival. During this period the idea of man was that environment could be exploited to any extend for his development. This stage of his development is heavily indebted to the nature. The nature was exploited to the maximum even though it resulted in an unprecedented growth in the industrial sector. Later because of this extreme exploitation of nature the impacts could be seen on the very existence of the nature itself.[126] At this juncture, the social thinkers and jurists went on the other extreme saying that the environment should not be disturbed at all. This theory is known as doctrine of no growth. Because of this theory, economic development of the society came to a dead end.

Both these extreme views violate the rights of human being. No development ignoring the nature can sustain for long period. So the concept of maximum development of either the society or the individual is finally to be yielded to the

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125 Theories like social contract of like, the Principles of Democracy and all other theories of welfare state

126 Acid rain, Ozone depletion, Contamination of air, and Water, and Heavy droughts, floods, etc.

nature. The first view violate the right of clean environment such as light of pollution free air, water etc. The second view violates the right of society to attain economical and industrial development. Here the application of the theory of social engineering gets its relevance.[127] Thinkers tired to reach a point of compromise between these two views. They suggested the theory of sustainable development. It says that the environment can be exploited only to a minimum extend which satisfied the need of human development. It can be defined as "development that meets the needs of the present without compromising the ability of the future generations to meet their own needs"[128]

Attaining a sustainable development means attentions is given to the rights of both the sides. What is sustainable development is a matter of debates. That the standard of human rights protection is hence equated with the sustainable development. Man is finally recognising this aspect. The modern human right thinkers are trying to harmonise man's developmental aspirations and the nature. Many of the legal battles on the 20th century seem to be closely connected either with the nature or for the protection of it. The growing conscience among the individuals towards the nature is playing an important role in this era. Perhaps it is now a well-settled right of a human being to have a clean and untidy environment.

Environmental law is a synthesis of principles, concepts and norms generated by other laws like civil liability and from the tort.[129] In *A. P. Pollution Control Board* v. *M.V. Nayudu*[130] the Supreme Court Observed. "Environmental concerns arising in this court under Article 32 or under article 136 or under Article 226 in the High Court are, in our view, of equal importance as human rights concerns. In fact, both are if be traced to Article 21, which deals with fundamental right to life and liberty. While environmental aspects, concerns life, human rights aspects concern 'liberty'. In our view in the context of emerging jurisprudence relating to environmental matters as it is the case in matters relating is human rights, it is the duty of this court to render justice by taking all aspects into consideration."[131] Here the court is trying to reach a

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127 Theory of Social Engineering of Roscopound which mean to build as efficient of structure of society as possible, which requires the satisfaction of the maximum of wants with the minimum of friction and waste. Roscoe pound, "Interpretations of Legal History", Publishers. p.156

128 "Sustainable Development" as defined by the Brundland Report.

129 P. leelakrishnan, *Environmental Law in India* (Butterworths,New Delhi, 1999), p.4

130 AIR 1999 SC 825

131 Ibid.

consensus of sustainable development, which shall be discussed in the later part of this chapter. Before that, it is worthwhile to look into the environmental standards at the international level and the constitutional mandates.

III.3.2 Environmental Protection at International Level

There were a lot of initiatives in international level to protect the environment from the indiscriminate misuse.[132] These initiations create norms or general legal principles that are widely accepted. This acceptance is evident in a number of ways, such as international agreements, national legislation, domestic and international judicial decisions and scholarly writings. In 1968, the UN General Assembly passed a resolution calling the need for intensified action at the national, regional, and International level in order to prevent the degradation of human environment. In 1972, the UN Conference on Human environment accepted the principle that man has the fundamental right to freedom, equality and adequate conditions of life. The world charter for nature, recognising man as a part of nature declared that his life depends on the undisturbed functioning of natural system. The world commission on environment and development concluded that all human beings have the right to a healthy environment. These international developments made changes in the concept of life. The leading norms in the field of international environmental law are,

(a) Principle 21[133] of the 1972 Stockholm declaration on the Human Environment.

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132 The Antarctica Treaty (Washington,1959) entered into force on 23 June 1961 which India ratified with reservations on 19 August 1983;Conventions on wetland of International importance(Ramsar,1971);Convention concerning the protection if world culture and natural heritage(Paris1972);Convention on International Trade in Endangered Species of wild fauna and for a (Washington,1973);Protocol of 1978 relating to the international Convention on the prevention of pollution from ships,1973(MARPOL London 1978);Convention on the conservation of migratory species of wild animals (Bonn,1979);Convention on the conservation of Antarctic marine living Resources 1982;United nations convention on the law of the sea; Convention on the protection of ozone layer(Vienna 1985);Protocol on substances that deplete ozone layer; Amendments to the Montreal Protect on Substance that deplete the Ozone Layer; Convention on the Control of transboundary Movements Of hazardous water and their disposal; United Nations framework Convention on climate charge; convention on Biological Diversity (Rio de Janeiro, 1992); Convention to combat desertification in those countries experiencing serious Drought and or desertification particularly in Africa; International Tropical Timber Agreement; Protocol on environmental protection to Antartica Treaty.

133 Principle 21 maintains that "state have, in accordance with the charter of the united Nations and the Principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of natural jurisdiction".

(b) The duty of a state to notify and consult with other states when it undertakes an operations thus is likely to harm the environment of the neighbouring countries such as the construction of a power plant, which may impair air or water quality in downwind or downstream states.

(c) States are expected to monitor and assess specific environmental conditions domestically and disclose these conditions in a report to an international agency or international executive body created by an international agreement, and authorised by the parties to the agreement to collect and publicize information's. All citizens have a right to a decent and healthy environment.

The first conference of the parties to the 1989 Basel convention on the control of the transboundary movements and disposal of hazardous wastes was organised by United Nations Environment Programme (UNEP) and hosted by Uruguay, from November 30 to 4 October 1992. Most industrialised countries subscribed to the 'Polluter pays Principle,' this principle has been recognised by the Indian Supreme Court as a 'universal rule' to be applied is domestic polluters as well.[134] Another is precautionary principle and the third one is the environmental impact assessment. India has adopted this norm for select projects that are covered under the Environmental Impact Assessment Regulations introduced in January 1994. In October 1982, the United Nations General Assembly adopted the world charter for Nature and principles of sustainable Development. Intergenerational equity [135] is among the newest norms of international environmental law. At the 1982 United Nations Conference on the Law of the Sea (UNCLOS), developing countries, led by India, articulated the norm that certain resources, such as the deep seabed, are part of the common heritage of mankind and must be shared by all nations. The 1992 Rio de Janeiro Earth Summit articulated the norm of 'common but differentiated responsibilities' with regard to global environmental concerns such as global climate change or stratosphere Ozone layer depletions, all nations are better than poorer nations measured necessary to shoulder the responsibility. International chamber of

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134 *Indian Council for Enviro-legal Action* v. *Union of India*, AIR. 1996 S. C. 1996; *Vellore citizens welfare form* v. *Union of India*, A.I.R. 1996 S.C 2715

135 Proponents maintain that the Present Generation has a moral obligation to manage the earth in a manner that will not jeopardise the aesthetic and economics welfare of the generations that follow.

Commerce (ICC) has decided to form World Industry Council for the Environment (WISE) that will be the advocate of business on Environmental Questions.

III.3.3 Constitution and other national laws

The growth of modern human rights jurisprudence was instrumental in giving an impetus to the Indian judicial fraternity both of the High Court and at the Supreme Court in interpreting Constitutional ideologies in a fashion and manner that suits the protection of environment. The constitutional framers never contemplated a situation where these activities of man would result in a situation, where human beings dig their own grave. The last quarter of the 20th century saw the evolution of environmental jurisprudence to which India was also forced to join hands with International Community with the 42nd amendment[136] to the constitution of India. The legislature also made its intentions clear in the matter of environmental protections at least in the provisions. It includes the duty to protect the environment, which is enshrined in Article 47[137], 48-A[138], 51-A[139]. Any law, which is lacking the tool for implementation, is a futility.

Apart from the Constitutional mandate to protect and improve the environment there are plenty of post-independence legislations.[140] The environment protections now forms apart of the protection of the right to life, which is a contribution of the judiciary. The forthcoming discussion is regarding how the international documents for the protection of environment influenced our judiciary to protect Human rights to environment.

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136 The Constitution (Forty-Second Amendment) Act, 1976, which came into force with effect form 3rd January 1977.

137 Art 47 reads as, "The state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of the public health as among its primary duties, and, in particular, the state shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health".

138 Act 48A reads as, "The state shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country".

139 Art 51A (g) reads as follows, "It shall be the duty of every citizen of India—to protect and improve the natural environment including forests, lakes, rivers and wild life, and have compassion for living creatures".

140 The Water (prevention and Control of Pollutions) Act, 1974; The Air Prevention and control of Pollutions) Act, 1981; The environment (Protection) Act, 1986; The wild life (protection) Act 1972: The public liability Insurance Act of 1991; the Mines and minerals (regulation and Development) Act of 1957; The Insecticides Act of 1968; Atomic energy Act 1962; Factories Act, 1948; Chemical weapons Act 2000; The Poisons Act 1919; The Indian forest, Act; The Ancient Movements and Archaeological sites and remains Act 1958; the Indian Builders Act; The Industries (Development and Regulation) Act, 1951; The River Boards Act 1956; The water cess Act, 1977.

III.3.4 The Indian Judiciary-The Protector of the Environment

M.C. Mehta v. *Union of India* [141] is a public interest litigation filed against the polluters of water in Ganga River. While deciding the case court observed the important of and need for protecting our environment as in the provisions of constitutions and also "the proclamations adopted by the United Nations conference on the Human Environment which look place at Stockholm from 5th to 6th of June, 1972 and in which the Indian delegation led by the Prime Minister of India took a leading role. This proclamation says that, Man is both creator and moulder of his environment that gives their physical sustenance and afford him the opportunity for intellectual, moral, social end spiritual growth. The protection and improvement is a major issue, which affects the well being of the peoples... and duty of all governments.... To defend and improve the human environment for present and future generations has become an imperative goal for mankind. To achieve this goal local and Nation Governments will bear the greatest burden for large-scale environmental policy and action within their jurisdictions. International co-operation is also needed in order to reuse resources to support the developing countries carrying out their responsibilities in this field- A growing class of environmental problems, even if they are regional a global in extent or because they affect the common international realm, hence it requires extensive co-operation among nations and action by international organizations in the common interest. The conference calls upon the Governments and peoples to exert common efforts for the preservation and improvement of human environment for the benefit of all the people and for their prosperity.[142;] Court ordered, "for the closure of those tanneries which have failed to take minimum steps required for the primary treatment of industrial effluent"

In *Consumer Education Research Centre* v. *U.O India*[143] while discussing the environmental pollution in respect of asbestos making Court observed, "The membrane filter test to detect asbestos fiber should be adopted by all the factories or establishment on par with Metalliferous mines Regulations, 1961 and Vienna Convention and rules issued thereunder. The review shall be continued after 10 years and also as when the ILO gives directions in this behalf consistent with its recommendations or any conventions".

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141 A.I.R. 1988 S. C. 1037
142 Ibid p.1039
143 (1995) 3 SCC 42

The Supreme Court had an opportunity to import into our domestic legal system the concept of sustainable development in *Vellore Citizen's Welfare forum* v.*U.O India*[144] in this case court observed, " the traditional concept that development and ecology are opposed to each other is no longer acceptable. 'Sustainable Development" is the answer. In the International Sphere, 'Sustainable Development' as a concept comes to be known, for the first time, in the Stockholm Declaration of 1972. Thereafter, in 1987 the concept was given a definite shape by the World Commission on Environment and Development in its report called " Our common Future" The Commission was chaired by the then Prime Minister of Norway,

Ms G.H. Brundtland and as such the report is popularly known as 'Brundland Report". In 1991, World Conservation Union, United Nations Environment Programme and WWF jointly came out with a document called "caring for the Earth" which is a strategy for sustainable living. Finally, came the Earth Summit held in June 1992 at Rio, which saw the largest gathering of world leaders ever in the history-deliberating and chalking out a blue print for the survival of the planet. Among the tangible achievements of the Rio Conference was the signing of two Conventions, one on biological diversity and another on climate change. 153 Nations signed these conventions. The delegates also approved by consensus three non-binding documents namely, statement on forestry principles, a declaration of principles on environmental policy and development initiatives and Agenda 21, a programme of action into the next century in area like poverty, population and pollution. During the two decades from Stockholm to Rio "Sustainable Development" was accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting ecosystems. We have no hesitation in holding that "Sustainable Development" as a balancing concept between ecology and development has been accepted as part of the customary international law though its salient features have yet to be finalised by the international law jurists.

It is interesting to note that the court imported the Polluter pays principle and precautionary principle, in to Indian legal system through deciding the cases related to environmental issues.

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144 (1996) 5 SCC 6

Thus *Indian Council for Enviro-legal Action* v.*Union of India.*[145] a PIL filed against ecological fragility constitution of India Art –32. And 226, 21, 48-A and 51-A. Orders and directions were issued by court for the fundamental right to life of the people. Contentions directed to be raised before respective high courts. While deciding the case the Court observed that, " In our opinion, Instead of agitating these questions before this court, now that the general principles have been laid down and are well- established, it will be more even if they relate to the violation of fundamental rights, should first be raised before the high Court having territorial jurisdiction over the area in question. We are sure and we expect that each high court will deal with such issues urgently. Environmental law has now become a specialized field. In a decision taken at the UN Conference on Environment and development held at Rio de Janeiro in June 1992 in which India had also participated, the states had been called upon to develop national laws regarding liability and compensation for the victims of pollution and other environment damages. [146]

The case *M.C. Mehta* v. *Union of India.*[147] was related to the implementation of the order made by Supreme Court in *M.C. Mehta* v. *Union of India*, (1986) 2. S.C.C 176. While discussing the case court referred in Vellore Citizen's case. In that decision the court elaborately discussed the concept of "Sustainable development" and Court further observed this principle as the law of the land. The court also relied on the "precautionary principles" and "polluter pays principles" which were adopted in the Stockholm declaration, by saying that, "in view of the above-mentioned constitutional and statutory provisions we have no hesitation in holding that the precautionary principle and the polluter pays principle is part of the environmental law of the country".

In *S. Jagannath* v. *Union of India*, [148]while discussing the case about the shrimps and its environmental problem and marine pollution, court observed "Consequential decline in marine resources, serious concern was expressed in the UN conference of Human Environments in Stockholm (1977) attracting global attention towards the urgent need of identifying the critically polluted areas of marine environments. The Conference unanimously resolved that the littoral states should

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145 (1996) 5 SCC. 281
146 Ibid p. 301
147 (1987) 3 SCC 715.
148 A.I.R. 1997 S. C 814

take early action in their national level for assessment and control of marine pollution from all sources and came out systematic monitoring and the Stockholm Conference in view of 1987 convention on the 'law of the sea' defining jurisdiction[149] of territorial waters, a model comprehensive Action plan has but evolved under the UN environment programme (UNEP). Keeping with the international Commitments and in greater national interest, the Government of India and the Governments of Coastal states are under a legal obligation to control marine pollution and protect the coastal environments... and also court observed that, the UN report gives the picture regarding polluted waters and depleted fisheries[150]. Court also observed that the "Environmental (protection) Act, 1986 was enacted as a result of the decisions taken at the UN conference on the Human Environment held at Stockholm in June, 1972, in which India participated[151].

In A.P. Pollution Control Board II v. M.V. Nayudu[152], State Govt. of. A. P. issued its own notification prohibiting the location of industries within 10 km of the two reservoirs. However the respondent company went ahead and approached the board for permission through industries department of state govt. But board rejected companies claims because of it comes under 'Red Category' Appellate authority and High Court not accepted the decision of the board but Supreme Court accepted the board's view. While deciding the case Supreme Court observed, "Drinking water is of primary importance in any country. Infact, India is a party to the resolution of the UN passed during UN's water conference in 1977 as under. "All people, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantum and of a quality equal to their basic needs." Thus, the right to access to drinking water is fundamental to life and there is a duty on the state under Art. 21 to provide clear drinking water to its citizens[153].

Though the court showed much enthusiasm in evolving principles and doctrines, this did not seem to be there while deciding *Narmada Bachao Andolan* v. *Union of India*,[154] the court was more concerned with the rights of the urban people to

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149 (2000) 10 SCC 62
150 Ibid p.842
151 Ibid. p. 844 (emphasis Supplied)
152 (2001) 2 SCC 62
153 Ibid. p.69
154 (2000) 10 SCC 664

get water, than the very right to life of the tribes. The court relied on international norms for protecting the right to water of the urban.

> "Water is the basic need for the Survival of human beings and is part of the right to life and human rights enshrined in Art 21 of the constitution of India and can be served only by providing source of water where there is none. The resolution of UN in 1977 to which India is a signatory during the UN's water conference resolved unanimously inter alia as under"[155].

The precautionary principle replaces the assimilative capacity principle. A basic shift in the approach to environmental protection occurred initially between 1972 and 1982. Earlier the concept was based on the 'assimilative capacity' rule as revealed from principle of the Stockholm declaration of the UN Conference on Human Environment, 1972. Court in A. P. Pollution control Board v. M.V. Nayudu, Observed, "The precautionary principle was recommended by the UNEP governing council (1989). Court also referred the duty to present generation towards prosperity; principle of Inter-generational equity; Rights of the future; and the 1972 Stockholm declaration refers to it in Principles I and II

III.3.5 Conclusion

Though the judiciary has evolved some principles and doctrine by developing the environmental jurisprudence, if the result is analysed, it can be argued that nothing material could be achieved. In a case where the Court has done something towards environment (Narmada Bachao) it remained faithful to the urban folk thereby depriving the Right to life and personal liberty of innocent tribes loosing a chance to come up with a landmark decision. Also, no rehabilitative mechanisms were advocated for the innocent victims who were made homeless, income less and thus affected the very right to life of these innocent people. By doing this it can be easily argued that the Supreme Court has deprived these people of their right to life[156]. But it is to be noted that the Court has made the machinery to move. The right to healthy environment remains as a fundamental right, but in many cases, the violators do not

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155 Ibid p. 767

156 In *Narmadha Bachao Andholan* (2000) 10 SCC 664, the height of Sardar Sarovar dam was proposed to increase, if done would render many particularly the Adhivasis, the most marginalized section of the society homeless. Even the Madhya Pradesh state government said before the court in its affidavit that it has no adequate resources to rehabilitate them. Even after this the Supreme Court has ordered for the increase in height which ultimately led thousands homeless without any alternative, thus violating their right to life.

come under the term state[157]. This paradox clearly shows that this is a right, the isolation of which is not remedied. But the constant criticism by judiciary against environmental pollution, mostly based on international documents, has left its mark on the legal system.

157 *M.C. Mehta* v. *Union of India* (1986) 2. S.C.C 176 The court refused to spend time to answering the question whether Shriram Food Fertiliser is a state or not.

CHAPTER IV

CONCLUSION

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The foregone analysis reveals that India's human rights standards are somewhat contradictory in nature. There are many provisions in India's national laws, which are in conformity with human rights treaties to which it is a party. On the other hand there are some lacunas in these laws, which makes the implementation of human rights treaties a difficult one as these gaps were highly misused by the executive authorities than using the provisions of these laws to protect the human rights of the people. More over special laws like Prevention of Terrorism Act, 2002, National security Act etc., which are commonly called as Black Laws violate the basic human rights principles embodied in these treaties.

The Indian Judiciary has played a fairly good role in implementing these treaties. The trend is that judiciary is used to interpreting the provisions of the constitution in the light of international instruments. Since individuals usually invoke human rights before domestic courts, Courts contribution in this regard is fundamental. But the implementation of the judgments are very difficult and it is impossible for a common man to have access to High courts and Supreme court each and every time his right is violated.

The study has dealt with the adoption of International treaties in the Indian legal system, also the implementation of human rights treaties in three different aspects. viz., Prisoners Rights, Rights of the Women and Children, and Right to environment as a human right.

As far as the adoption of international treaties are concerned, India needs a domestic enabling legislation to implement any treaty, if India's national laws are not in conformity with the provisions of the treaty.

As regards prisoner's rights, this is the area, where there should not be any gaps, for any pitfalls in the legislation will give the executive authorities unbridled powers, ultimately resulting in the violation of human rights of not only the accused but also of the common man. But the criminal laws of India contain sufficient gaps to be misused. Despite the higher judiciary playing a good role, it is not possible for it to implement these basic rights at the ground level, as it is not the higher judiciary, but the lower judiciary, which comprises of Magistrate's court and Sessions courts are the forums for the people at lower strata of the society to claim their human rights. Moreover vast section of the Indian population is illiterate and live below the poverty line. Illiteracy makes a man ignorant of his rights. It is highly necessary to be vigilant and should be able to judge the actions of the state in order to assess whether it is acting in accordance within its mandate or not. Moreover, poverty deprives a person from seeking justice before a forum. Similar is the case with the rights of women and children and right to environment.

The higher judiciary, instead of asking the government to fulfil the international obligations it assumed, have tried to implement these human rights treaty provisions in individual cases, thinking that it might pave the way for the implementation at the ground level. Indeed, this has made the society vigilant, but in the ultimate analysis the implementation of the judgements is far from satisfactory, as it is again the executive to implement the decision. In some cases, the government of India without bridging the gaps have amended the Supreme Court judgements, which tried to implement the basic human rights provisions. One such example is, Muslim Women (Protection of rights on Divorce) Act, 1986, which came in the aftermath of *Shahbano* judgment.

Usually, states reserve any of the provisions of the treaty, which it thinks cannot follow, due to some political, social, or economic factors. Courts should be careful in dealing with the reserved provisions. It shouldn't render any judgment, which in effect nullifies the reservation. India made a reservation to Article 9 of ICCPR, which guarantees a right to compensation on account of unlawful arrest or detention. This reservation seeks to establish that under Indian legal system, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention. The

main reason behind the reservation is the poor condition of the state exchequer. India also made a reservation concerning Article 32 of the CRC, which prohibits child labour. The main motivation behind the reservation is that India has nearly fifteen million child workers; that its realist domestic law does not completely prohibit child labour; that the prevailing socio-economic conditions do not allow the complete abolition of child labour; and that, in this regard, the applicable domestic law is incompatible with international human rights law. If the Judiciary starts going against reservation, finally the executive will lose the discretion of reserving any provision. This is a dangerous trend, as reservation is an attribute of sovereignty and it is the executive, which knows the realties than the judiciary. This activism of judiciary encroaches on the powers and functions of other organs, which makes several difficulties in national level implementation.

The legislature is said to be the body, which represents the people's will, and any norm will become binding upon the people, only if the legislature transforms it into a law. With the emerging trend in the judicial activism it is an experience that the judiciary, apart from interpreting the provisions of the law laid down by the legislature has started to fill the lawless areas with international documents. Even though the court does this with an enthusiasm to render justice, in most of the cases court fails to appreciate its practicability. Administration of justice does not mean administration through any means. The judges should interpret the law only as per the legislative and constitutional scheme. It is not the mission of the judiciary to make legislation out of international norms, which should be transformed into the legal system for adaptation.

This is not to say that judges should wash their hands at problems. The involvement of the people is one of the most important ingredients of law making, whether it is a law made out of a treaty or not. This element is taken away when the judiciary directly imports them.

Indeed, no society, be it developed or developing cannot fully implement its international human rights obligation fully in its national sphere. Only thing is, it can implement it to the maximum extent possible depending upon the prevailing socio-economic and political conditions. Some suggestions could be made to make the implementation to the maximum.

- India should amend its national laws in conformity with international human rights treaties to which it is a party.
- India should immediately ratify the UN Torture Convention and also should enact enabling legislations for all human rights treaties to which it is a party so that implementation can be made more effective.
- India should repeal its special statutes like POTA, NSA, etc., that gives unbridled powers to the police and other executive authorities.
- Any government in India should stop giving unnecessary importance to political pressures, as it gave in the case of enactment of Muslim Women (Protection of rights on Divorce) Act, 1986.
- India should educate its masses and officials. Human rights education should be made compulsory for all law enforcing officials. Recently, the National Human Rights Commission has asked the Union Public Service Commission to include Human Rights in the syllabus of Civil Service Examination.

Effective public campaign should be done in order to make the lowest strata of the society aware of their human rights. More to say, the state should not stop just by amending the existing laws and enacting enabling legislation. It should ensure human rights protection to reach the common man without which implementation will only be a mirage.

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