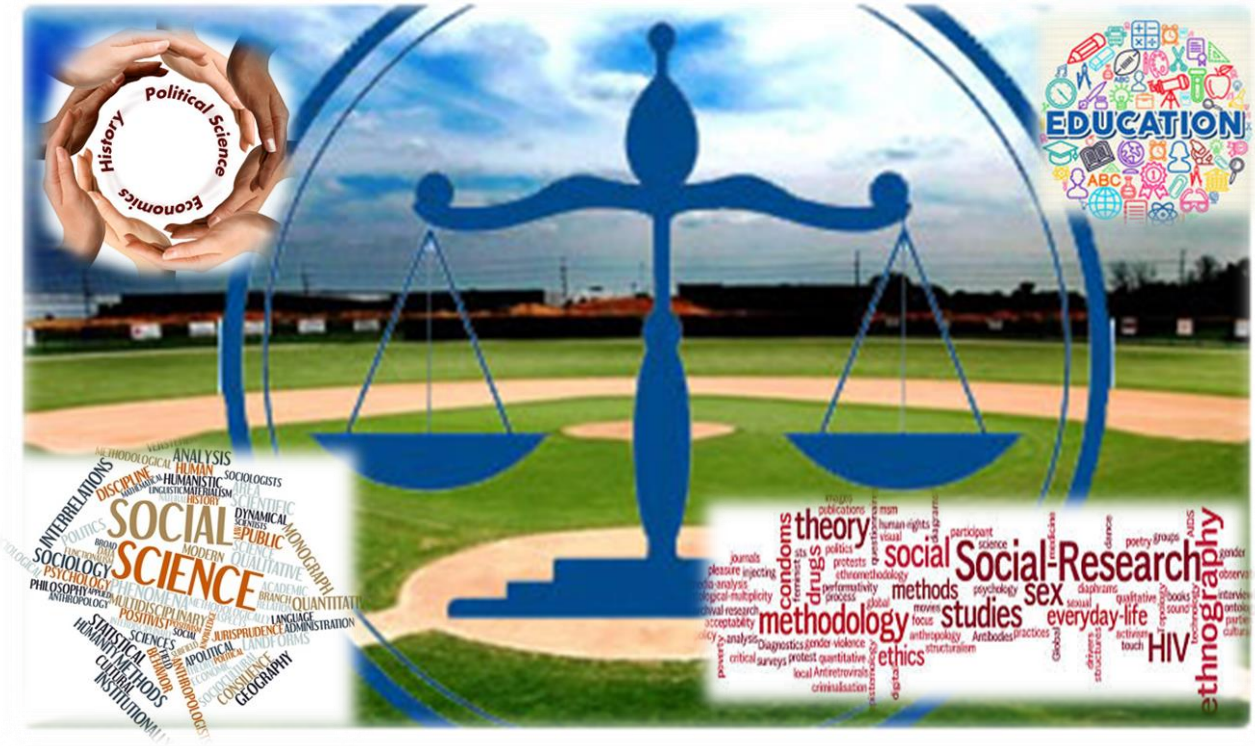

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Research Article

INCORPORATION OF INTERNATIONAL LAW INTO DOMESTIC LEGAL SYSTEM: A SPECIAL REFERENCE TO THE INDIAN STATE PRACTICE

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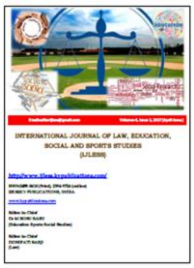

ABSTRACT
Incorporation of international law into domestic legal system is not an easy task and it is more so with respect to Indian state practice. But in case of a legal vacuum judiciary is free to refer international treaties, conventions or customs to fill the gap as long as the reference is not in contravention to the basic structure of the Indian Constitution, sovereignty of the State or express provision of law enacted by Parliament. Indian judiciary has played such active role on sensitive issues like protecting human values or preserving ecology by directly invoking the principles of international law. However, primary focus of the present study is to analyse how for Indian legal system, both legislature and judiciary, is susceptible to the principles of international criminal law.

1. INTRODUCTION

Incorporation is a process through which international treaties and other obligations of international law become part of municipal legal system of a sovereign State. However, it is not an easy task and it is more so with respect to the Indian state practice. In Indian legal system legislature shall enact municipal laws to bring the principles of international law into domestic sphere. Mere being a signatory to an international legal instrument does not bind the nation or its organs to enforce such laws within its territory unless adopted through a ratification process. Ratification is the formal expression of consent by States to be bound by treaty or agreement.[1] Indian Constitution lays down the procedure for expressing such a consent whereby the Parliament is empowered to enact domestic legislations to implement international treaties, agreements or conventions.[2]

However, in case of a legal vacuum or *non-liquet* in the domestic legal system courts and judges are free to refer the principles of international treaties, conventions or customs without any prior approval from the Parliament. But such references shall not be in contravention to the basic structure of the Indian Constitution or sovereignty of the State. Though Indian constitution allocates legislative,

[1] In Indian context ratification occurs either by adoption of municipal legislation domestically and deposit of instrument of ratification internationally; or by exchange of instrument of ratification. Generally, the former is the mode of adoption for law-making treaties and the latter is the mode for adoption of treaty-contracts.

[2] Article 253 provides that, "Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body".

executive and judicial functions on three different organs it does not impose strict absorption of the *doctrine of separation of powers*. The powers and functions of each organ may well overlap with one another. For instance, High Courts and Supreme Court of India exercise administrative functions when they supervise their subordinate courts and frame rules for regulating the practice and procedure of the court.[3] This flexible nature enables Indian judiciary, at times, to act as a quasi-legislative authority in bringing international law into domestic. In many occasions the judiciary has played such an active role to protect human values and promote environmental standards.

In the era conflicting global issues like environment *versus* development, development *versus* human rights, international *versus* domestic, and so on judiciary has to play such a lead role in bringing international cooperation through innovative approaches and judicial activism. Proper functioning of an international treaty framework is not possible in the absence of an effective support and co-operation from domestic judicial systems; similarly, municipal courts cannot ensure justice by mere reference to national laws ignoring the principles of international law. For that reason, authoritative nature of municipal law and dynamic nature of international law must interact with each other for a better future world. However, primary focus of the present study is to analyse how far Indian legal system, both legislature and judiciary, is susceptible to the principles of international criminal law.

2. BRINGING INTERNATIONAL LAW DOMESTIC

In international law treaties may be classified into law-making treaties and treaty contracts. Law-making treaties are those that attract the participation of numerous states establishing rules regulate their international conduct and may produce rules that will bind all. Charter of the United Nations, Vienna Convention on the Law of Treaties, Hague Conventions, etc. are good examples of law-making treaties. The present study primarily focusses on the law-making treaties and not on the treaty contracts that regulates the relation between two or few states with regard to specific and exclusive issues among such states. Actually, treaty-contracts do not directly become a source of international law but they help formation of international customs.

Other than Article 51 and 253 of the Indian Constitution, Article 11 of the Vienna Convention on Law of Treaties, clarify the way of adoption of the treaty or treaties by the State(s). Moreover, international treaties cannot work without the support and co-operation of domestic legal system. Similarly, judiciary cannot bring and maintain clean justice without the reference of international treaty provisions and international law principles in the absence or deficiency of national legal instruments for sensitive issues. Therefore, the subject matter of municipal law generally is limited in nature, while that of international law has always remained dynamic.

In the modern time, international treaties are the most important source of international law. Article 38 of the ICJ statute lists international conventions[4] whether general or particular, establishing rules expressly recognised by the contesting States' as the first source of international law. Usually, law enacted by the parliament of India whenever there is a need to protect the interests of the State. India signed number of international treaties for the sake of international community but it ratified some of the treaties for its convenience to preserve the welfare of the State. In India, accession is important to adopt international treaties or principles become a part of its national law. Because India has dualistic approach to the implementation of international law at domestic level as international

[3] Article 145 of the Indian Constitution authorises the Supreme Court to make rules for regulating the practice and procedure of the court. Similarly, Article 229 authorises the High Courts to make rules with regard to officers and servants and the expenses of the High Courts. In addition, Article 227 confers supervisory power on High Courts over subordinate courts.

[4] The term international convention implies any treaty, convention, protocol or agreements, etc.

agreements must be incorporated through enactment made by Parliament in order to become a part of Indian law.[5]

In most of the time, India ratified the international treaties related with human rights and environment issues. Take for instance, both International Covenant on Economic, Social and Cultural Rights – International Covenant on Civil and Political Rights accession in 1979 (April 10), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979. India signed the Convention on 30 July 1980 and ratified it on 9 July 1993 with certain reservations. Convention on the Rights of the Child accessed as a part of Indian law in 1992 (December 11)[6] and so on. Child rights in India are that "Children have rights as human beings and also need special care and protection" (White Paper on Human Rights 2006).

Similarly, some of the international environmental laws like the Stockholm Conference on the Human Environment, 1972 provisions are evidenced in the Air Act, 1981 and the Environment (Protection) Act, 1986 and the Rio Declaration on Environment and Development, 1992 provisions mentioned in the Public Liability Insurance Act, 1991 and the National Environmental Tribunal Act, 1995. The Convention on Biological Diversity, 1992 enacted as the Biological Diversity Act, 2002 and Convention of International Trade in Endangered Species of Wild Fauna and Flora, 1973 incorporated by the Indian parliament in the Wild Life Protection (Amendment) Act, 2002 and so on.

3. PARLIAMENTARY INCORPORATION

In India, even though article 253 give effect to international agreements but the ratification of such treaties do not mention specifically. But in Union of India v/s. Jain case mentioned in this regard.[7] In 1954, the High Court of Calcutta decided that "Making a treaty is an executive act and not a legislative act.... the President makes a treaty in exercise of his executive power and no court of law in India can question its validity (Paragraph 9)" (Anderson 1998). Parliament has an authority to enact any sort of law but it should not affect the basic structure of the constitution. Part XI of the Indian Constitution provides the power to parliament to make law for the welfare of the State as well as people. Especially, Article 245 of the Constitution speaks the territorial Jurisdiction of the legislative power, confers the power to the parliament to make laws for the whole or any part of the territory of India. Similarly, Article 246 deals with the subject matter of laws, empowers the parliament to have "exclusive" power to make laws with respect to the Union list.

The parliament has sole power to enact on all conceivable international issues which have been enumerated under the Union List. Under this list main entries relating to international issues like, foreign affairs (entry 10), United Nations Organization (entry 12), participation in international conferences, associations and other bodies and implanting of decisions made thereat (entry 13), entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries (entry 14) and so on.

Under Article 253 mentions that the parliament has exclusive power to make any law 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. These provisions propose that the parliament has wide power to legislate on international issues. Nevertheless, this power of the parliament, according to the Supreme Court, cannot overrule the fundamental rights enumerated under Part III of the Indian constitution. Under the scheme of constitution, the union government's executive power is co-extensive to the legislative power of the parliament (Article 73). In Magambhai

[5] Some countries like America has the monistic approach to implement the international law that is after signing the treaty immediately such treaty become a part of domestic law and no need of incorporation or enactment as similar to Indian practice of dualistic approach.

[6] Indian parliament enacted a new law related to child right and protection which is called as Commission for Protection of Child Rights Act, 2005.

[7] *Union of India v/s. Manmull Jain and others* AIR 1954 Cal 615, 59 CWN 107.

Ishwarbhai Patel case, the Supreme Court held that '[the] treaty making is regarded as an executive power rather than legislative activity'.[8]

Other than these, Part IV of the Indian constitution talks about the Directive Principles of State Policy and it is not enforceable by any court of law. But the principles contained therein are fundamental in the governance of the country and it '*shall*' be the duty of the State to apply these principles in making laws (Article 37). Article 51 exclusively deal with the promotion of international peace and security, implies that the international relation. It provides that the 'state shall endeavour to foster respect for international law and treaty obligations.' In *Telephone Tapping Case* the Supreme Court by invoking Article 51 developed that "*right to privacy as a fundamental right under Article 21*".[9] The court took an idea from the privacy proviso of the Covenant on Civil and Political Rights. In environmental issues, it appears, no such use of Article 51 has been done by the courts (Gupta 2009). But it may be recalled that the courts raised in Article 48-A (i.e. the duty of the state to protect environment) to develop a fundamental right to environment as part of the right to life under Article 21.[10]

4. JUDICIAL INCORPORATION

Dualists argue that rules of international law do not automatically apply in municipal sphere unless transformed through municipal legislations. To the contrary, monists argue that international law is superior legal system that automatically forms part of every domestic legal system. In fact, laws are made for human welfare and conflicts should be avoided and, if at all, should be harmonised to meet the common interests of the international community. To attain this object judicial authority of each State holds the key.

The treaty adoption or the application of the international law principles applied by the Indian judiciary without the consent of the parliament but such adoption no way affects the basic structure of the Indian constitution. As already mentioned that most of the time the Indian parliament enacts law to protect and preserve human rights and environment. Similarly, the Indian judiciary is also directly refers international law principles and treaties without the consent of the parliament only in case of necessity mainly the issues relating to protect human values and to preserve the balance between ecology and development.

4.1. Environment and Indian Judiciary

Judiciary plays an eminent role to preserve the ecology without affecting the economic development of the nation. In case of deficiency of legal norms in India, the Supreme Court or the High Courts of India apply the international law principles to protect the interest of the State. Some of the International law principles referred by the Indian Judiciary are as follows; Precautionary Principle, Polluter Pays Principle, Sustainable Development and Public Trust Doctrine. There are some of the landmark cases referred the above said principles to protect the Human health as well as environment is as follows:

Precautionary and Polluter Pays Principles

Vellore Citizens Welfare Forum v/s. Union of India[11]

[8] *Magambhai Ishwarbhai Patel v/s. Union of India* (1970) 3 SCC 400.

[9] *People's Union for Civil Liberties v/s. Union of India* (1997) 1 SCC 301.

[10] In several leading cases the Indian courts have been guided and inspired by Article 48-A and developed a general fundamental right to environment under Article 21. See, *M.C. Mehta* v. *Union of India* (Kanpur Tanneries Matter) AIR 1988 SC 1037 at 1038; *Rural Litigation and Entitlement Kendra* v. *State of U.P.* AIR 1988 SC 2187 at 2199: *Kinkari Devi* v. *State of H.P.* AIR 1988 4 at 8; *Bichhri Village Case* AIR 1996 SC 1446 at 1459, *Sachindanda Pandey,* v. *State of W.B.* AIR 1987 SC 1109 at 1114-1115; *T. Damodar Rao* v. *Municipal Corp., Hyderabad,* AIR 1987 A.P. 171 at 181 etc.

[11] AIR 1996 SC 2715

It was found that a number of tanneries in Tamil Nadu discharged untreated effluents into agricultural fields, roadsides, waterways and open lands. The untreated effluents were finally discharged into the river which was the main source of water supply to the residents. The Supreme Court held that the concept of *sustainable development* was accepted as a part of the customary international law to strike a balance between ecology and development. It was further held that the *precautionary principle* and the *polluter pays principle* constituted essential features of *sustainable development*. Justice Kuldip Singh referred to the environmental principles of the international environmental law and stated that the *precautionary principle*, the *polluter pays principle* and the special concept of onus of proof have merged and governs the law of our country. As is clear from articles 47, 48 and 51A(g) of the constitution and that in fact various environmental statues, such a Water (Prevention and Control of Pollution) Act 1974, Environment (Protection) Act 1986 and other statutes incorporate these concepts impliedly.

In view of the constitutional and statutory provisions the Supreme Court held that the *precautionary principle* and the *polluter pays principle* are a part of environmental law in India. In Supreme Court further held that even otherwise *precautionary principle* and *polluter pays principle* are a part of customary international law and therefore, part of Indian domestic law. In this case, the court not only treated these two principles as a part of the Indian environmental law but also directed Central government to establish an authority under section 3(3) of the Environment (Protection) Act 1986. Therefore, the authority so established by the Central government shall implement the above mentioned principles.

The precautionary principle is a part of Indian environmental law.[12] In some cases, the principle of precautionary principle and sustainable development looked by the Supreme Court in a different manner and it got a different dimension.[13] Similarly, the polluter pays principle become a universally accepted as sound principle.[14]

***M. C. Mehta v/s. Union of India* (Taj Pollution Case)[15]**

The Supreme Court once again followed the path of sustainable development directed that the industries operating in *Taj Trapezium Zone* (TTZ) using coke/coal as industrial fuel must stop

[12] *AP Pollution Control Board (APPCB) v/s. M. V. Nayudu* AIR 1999 SC 812. The case involves that grant of consent by APPCB for setting up an industry by the respondent company for the manufacture of hydrogenated Castrol oil. The company applied to the APPCB seeking clearance to set up the unit under section 25 of the Water (Prevention and Control of Pollution) Act. The Board rejected the application for consent on the ground that the unit was a polluting unit and would in the discharge of solid waste containing nickel, a heavy metal and also result hazardous waste under Hazardous Waste (Management and Handling) Rule 1989. The respondent company appealed under section 28 of the Water Act.

The Appellate Authority decided that the respondent industry was not a polluting industry and directed APPCB to give its consent for the establishment of the respondent industry on such conditions as the Board may deem fit. In a writ petition filed in the High Court the Division Bench of the High Court directed APPCB to grant consent subject to such conditions as might be imposed by the Board. It was against the said judgement of the High Court that the APPCB filed various appeals in the Supreme Court. It expressed approval of the *Vellore Citizen Forum* case judgement and affirmed that the *precautionary principle* as a part of Indian environmental law.

[13] *Narmada Bachao Andolan v/s. Union of India* AIR 2000 SC 3751. In this case, the Supreme Court held that precautionary principle would be inapplicable in the present case and the project would neither violate the mandate of article 21 of the Constitution nor sustainable development.

[14] *Indian Council for Enviro-Legal Action v/s. Union of India* AIR 1996 SC 1446. In this case, PIL filed by the environmental organization against chemical manufacturing companies in Rajasthan. The toxic sludge was thrown in the open and percolated deep into the bowels of earth, polluting the sub-terranean supply of water and the land polluted rendering it unfit for cultivation. The Supreme Court observed that the *polluter pays principle* was universally accepted as sound principle and held that the chemical manufacturing companies liable to bear the financial costs of preventing and remedying the damage caused by pollution. But it did not direct the issue of compensation to the victims of pollution and focused on ecological remediation measures alone.

[15] (1997) 2 SCC 353

functioning and they could relocate to the alternate site provided under the Agra Master Plan. In this case also the Supreme Court specified the rights and benefits to which the workmen of such industries were entitled and thus, protected their right to livelihood and followed the guiding principle of sustainable development.

The various decisions of the Supreme Court it is evident that development is not antithetical to environment. However, thoughtless development can cause avoidable harm to the environment as well as it can deprive the people of their right to livelihood. In most of the *M. C. Mehta Cases* like *Ganga Water Pollution Case*[16], *NCR Pollution Case*[17], *CNG Litigation Case*[18] and so on.

Public Trust Doctrine

M. C. Mehta v/s. Kamalnath[19]

Kamalnath case is a landmark judgement of the Supreme Court and it got an excellent exposition of the Doctrine of Public Trust. A new item appeared in Indian Express stating that a private company named Span Motels in which the family of Kamal Nath (a former Minister for Environment and Forests) had direct link, had built a club at the bank of River Beas by encroaching land including substantial forest land which was later regularised and leased out to the company when Kamal Nath was the Minister. It was stated that the Motel was to create a new channel by diverting the river-flow. According to the news item three private companies were engaged to reclaim huge tracts of land around the motel.

[16] *M. C. Mehta v/s. Union of India* AIR 1988 SC 1115, a PIL was initiated to prevent the nuisance caused by the pollution of river Ganga due to non-performance of duties by the Central Government, Pollution Control Boards and the Municipalities. None took any action to prevent the pollution of water; these bodies do not discharge their duties. The introduction of the river Ganga notwithstanding the duties, imposed on the Central and the State Boards under environmental law for the prevention and control of pollution of modern water carriage systems transferred the sewage disposal from the streets and the surroundings of townships to neighbouring streams and rivers. It is ironic that the man from the earliest times, has tended to dispose of his wastes in the very streams and river from which most of his drinking water is drawn.

The problem of pollution of natural water is reaching alarming proportions with the rapid urbanization and industrialisation. Cities and industries discharge their untreated or only partially treated sewage and industrial wastes into neighbouring streams. By doing so, they create intense pollution in streams and river and expose the downstream riparian population to dangerously unhygienic conditions. The Supreme Court has upheld the right of the petitioner to have a clean and healthy environment envisaged under article 21 of the constitution.

[17] *M. C. Mehta v/s. Union of India* (1996) 4 SCC 750, a PIL was filed to protect the National Capital Region (NCR) Delhi from the environmental pollution caused by hazardous and large industries operating in Delhi. The court held that such industries are liable to be shifted or relocated to other towns from the NCR as provided under the Master Plan for Delhi Perspective 2001. The court directed 168 industries, which were identified as such to stop functioning in the city of Delhi and they could shift themselves to any other industrial estate in NCR. In this case, the Supreme Court protected the right to livelihood of the workmen and tried to balance the industrial development and environment protection.

[18] *M.C. Mehta v/s. Union of India* AIR 2002 SC 1996. In popular CNG litigation entitled the Supreme Court was faced with the problem of vehicular pollution and regretted inaction of the Union of India and other governmental authorities to phase out non-CNG buses and setting up facilities to ensure adequate supply of CNG. The report of the Bhure Lal Committee was accepted by the Supreme Court and orders were passed on 28 July 1988 fixing the time limit within the switchover to CNG was to take place.

The Supreme Court stated that one of the principles underlying environmental law is that of *sustainable development* the principle requires such development to take place which is ecologically sustainable. The two essential features of *sustainable development* are the precautionary principle and the polluter pays principle. The *precautionary principle* has been enunciated by the Supreme Court, inter alia, as follows: i. The State Government and the statutory authorities must anticipate, prevent and attack the causes of environmental degradation. ii. Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. iii. The onus of proof is on the actor or the developer to show that his action is environmentally benign.

[19] (1997) 7 SCC 388

The main allegation in the news item was that the course of the river was being diverted to save the Motel from future floods. The Supreme Court took notice of the news item because the facts disclosed therein, if true, were be a serious act of environmental degradation on the part of the Motel. In this case the Supreme Court applied the Doctrine of Public Trust for protection of the environment. Justice Kuldip Singh has exhaustively gathered information on this Public Trust Doctrine from various juristic writings and decisions of the American Courts.

Other than these, for the first time our former Prime Minister Mrs. Indira Gandhi while speaking at the Stockholm Conference had said: '*Of all the pollutants we face, the worst is poverty. We want more development*'. The Rio Declaration has taken cognizance of the fact that in order to achieve sustainable development eradication of poverty is indispensable and thus developmental process and environmental protection must go on simultaneously. The *precautionary principle and polluter pays principle* has been incorporated in Principle 15 and 16 of the Rio Declaration. This declaration brought mainly based upon the Environment and Development, that is, sustainable development and the concept of sustainable development defined in Brundtland Commission. But the *precautionary principle* is existed in the Stockholm Conference on Human Environment itself mentioned under principle 18.

In most of the time, India has been giving much importance to adopt the international treaties to protect human rights as well as environmental development. But some time, it is not ready to sign or ratify because of some valid reason. Take for instance, India, China and Malaysia refused to sign the Montreal Protocol which is popularly known as Ozone Treaty. Because of three major discriminatory clauses in the Protocol namely:

1. **Per Capita Consumption of CFCs:** The United States accounts for 37 percent of the whole consumption of CFCs, while poorer countries of Asia and Africa only 5 percent. So, rate of elimination should be faster in developed countries but the Protocol for a uniform rate.
2. **Patterns of consumption of CFCs:** In India, CFCs mainly used for essential purposes like food processing, vaccines, space research, etc. while in US, a lot of CFCs used for luxury consumption e.g., car air-conditioning.
3. **Massive Switch Over Costs:** Very high costs needed for developing CFCs substitutes, but in Protocol a little amount specified for developing nations.

4.2. Human Rights and Indian Judiciary

Hygienic environment is an integral facet of healthy life. Right to live with human dignity becomes illusory in the absence of humane and healthy environment. The Supreme Court of India and the High Courts have consistently held that right to live in a clean and healthy environment is a fundamental right guaranteed by Article 21 and remedies provided under Article 32 and 226 of the Indian Constitution. Indian judiciary has been playing a vital role to protect human rights along with the healthy environment. For the first time, the Indian Constitution views that the right to livelihood as right to life under Article 21 was recognised the Supreme Court in *Olga Tellis Case*.[20] Right to livelihood includes protection of tribal villagers' traditional rights and preservation of ecology.[21] The

[20] *Olga Tellis v/s. Bombay Municipal Corporation (BMC)*, AIR 1986 SC 180, the Supreme Court directed the BMC authority to provide alternative accommodation with basic amnesties like latrines, water, roads before some slum dwellers and pavement dwellers were evicted. Further, such alternative accommodation must be situated within the reasonable distance of their original sites. Eradicating poverty is the greatest global challenge facing the world today and an indispensable requirement for sustainable development, particularly for developing countries.

Modern equipment like heavy machines, construction activities, automobiles, trains, aeroplanes and loud speakers cause noise pollution. Nosie pollution affects the health of the human beings physically and mentally. Due to this, living organisms like plants and animals are also disturbs physically in the name of development but such development should not affect the ecology.

[21] *Animal and Environmental Legal Defence Fund v/s. Union of India* (1997) 3 SCC 549, is a case where the Supreme Court protected the right to livelihood of the tribal villagers and at the same time showed its concern for the protection of the

concept of sustainable development includes the right to livelihood of the tribals on the one hand and the protection of the ecology on the other.[22]

Rural Litigation and Entitlement Kendra v/s. State of Uttar Pradesh[23]

The first indication of recognising the right to live in a healthy environment as a part of Article 21 and this was the first case the letter to be treated as writ petition under 32 of the Indian Constitution. In this case, the Rural Litigation and Entitlement Kendra, Dehradun and a group of citizens wrote to the Supreme Court against the progressive mining which denuded the Mussoorie Hills of trees and forest cover and accelerated soil erosion resulting in landslides and blockage of underground water channels which fed many rivers and springs in the valley. Initially the court appointed an expert committee and it submitted the report that the disturbance of ecology and pollution of water, air and environment by reason of quarrying operation definitely affects the life of the person and thus involves the violation of right to life and personal liberty under article 21 of the constitution.

The court ordered that the workmen of the stone quarries thrown out of the employment as a consequence of the order be provided employment in the afforestation and soil conservation programmes to be taken up in the said area. However, the court directed the government to start reclamation of the areas forming part of limestone quarries, afforestation and soil conservation programmes. The right of people to live in a healthy environment with minimal disturbance to ecological shall be safeguarded. Even though the Supreme Court evolved a new right in the case of environment right of people to live in a healthy environment it did not mention about the source of the right.

Indian judiciary has been playing a crucial role to protect the environment without affecting the process of development and even Article 21 day by widening its vision. Take for instance, right to life includes right to live in pollution free environment.[24] Clean and healthy environment is an unremunerated right under Article 21 of the constitution.[25] Gain profit at the cost of public health will

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environment. In this case, the petitioner, an association of lawyers and other persons who were concerned with the protection of environment filed a public interest litigation challenging the order of the Chief Wildlife Warden. Forest Department, granting 395 fishing permits to tribal formerly residing within the National Park area for fishing in the reservoir situated in the heart of the National Park.

The Supreme Court once again showed its concern for the right to livelihood of the tribal villagers and while balancing this traditional right of the tribal-villagers with the need for development and preservation of ecology held that the while every attempt must be made to preserve the fragile ecology of the forest area, the right of the tribals formerly living in the area to keep their body and soul together must also receive proper consideration. Undoubtedly, every effort should be made to ensure that the tribals, when resettled, are in a position to earn their livelihood. In this case, the Supreme Court also observed that it could have been more desirable, has the tribals been provided with suitable fishing areas outside National Park or if land had been given to them for cultivation.

[22] *Pradeep Kishen v/s. Union of India* (1996) 8 SCC 599, the Madhya Pradesh Government issued an order permitting collection of tendu leaves from sanctuaries and national parks by villagers/tribals living around the boundaries thereof with the object of maintenance of their traditional rights including the right to livelihood. But this order was challenged by way of PIL for the protection of ecology (includes environment and wildlife) in sanctuaries and national parks.

The Supreme Court in the circumstances of this case refused to quash the order. In this case, the court on the one hand to protected the right to livelihood of the tribals and on the other hand showed its concern for the protection of the ecology. This approach of the court is in consonance with the concept of sustainable development.

[23] AIR 1985 SC 652

[24] *M. C. Mehta v/s. Union of India* 1987 SC 1086, this case is popularly known as *Oleum Gas Leakage Case*. The Supreme Court held that leakage of Oleum gas was dangerous to the human health and it ordered that to close the unit. It once again impliedly treated the right to live in pollution free environment. The court once again impliedly treated the right to live in pollution free environment as a part of fundamental right to life under article 21 of the Indian Constitution.

[25] *M. C. Mehta v/s. Union of India* AIR 1988 SC 1115, the case was filed against the failure of the Kanpur Nagar Mahapalika to fulfil its statutory duties which caused the water in the river Ganga at Kanpur becoming so much polluted that is can no

not be allowed by the law anymore.[26] In another case, maintenance of public health is of paramount consideration and further, the court held that Article 21 prevail over Article 19(1) (g) of the Indian Constitution.[27] Shifting of business to a safer place to avoid air and environmental pollution is not a violation of article 19(1) (g). Article 19 always subject to limit as may be imposed by the State in the interests of public welfare and health.[28]

The judicial syntax of interpretation has made the right to live in healthy environment as the *sanctum sanctorum* of human rights. Therefore, the talk of fundamental rights and in particular, right to life would become meaningless if there is no healthy environment in a sustainable manner. Article 21 is the heart of fundamental rights and has received expanded meaning from time to time and there is no justification as to why right to live in a healthy environment cannot be interpreted in it.

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longer be used by the people either for drinking or for bathing. The court directed the Mahapalika to get the dairies shifted to a place outside the city, to lay sewerage line where the same is not constructed as also to increase the size of the existing sewers in labour colonies, to construct public latrines and urinals for use of poor people free of charge, to ensure with the help of police that dead bodies or half-burnt bodies are not thrown into the Ganga and to take action against the industries are responsible for the pollution. This direction extended to all other municipalities which have jurisdiction in the areas through which the river Ganga flows.

The Supreme Court in none of the cases declared explicitly that the right to a clean and healthy environment is contained in the compendium of unremunerated rights under Article 21. However, since the Court issued direction in all the above cases under Article 32 of the Constitution. It is evident that the court has used Article 32, which is a provision to enforce fundamental rights for the purpose of protecting the lives of the people, their health and ecology.

[26] *Abhilash Textiles v/s. Rajkot Municipal Corporation* AIR 1988 Guj. 57, the petitioner who were carrying on the business of dyeing and printing works and had challenged the notice issued by respondent-municipal commissioner, which called upon the petitioners to stop the discharge of dirty water on the road and drainage within a certain time or face closure in case of non-compliance with the notice. The petitioners contended that they had been carrying on the business for the last 20 to 25 years and the industry provided employment to 20 to 30 thousand families. The petitioners contended that the notice violated their fundamental right to carry trade or business is enshrined in article 19(1) (g) of the Constitution.

The Gujarat High Court held that "if the petitioners wish to carry on the business, they may have to incur expenditure and they must provide the purification plant before discharging the effluent water on the public road or the drainage system. The petitioners cannot be allowed to reap profit at the cost of public health. Further, no polluting industry can be permitted to run under the garb of development if it results in public nuisance and imbalance of the ecosystem. This is the mandate of law; therefore, unregulated and unrestricted development cannot be permitted. Restrictions can be imposed on the development activities in the interest larger of public. This is the mandate of sustainable development.

[27] *Obayya Pujari v/s. KSPCB, Bangalore* AIR 1999 KA. 157, it was submitted that the issuance of directions involving closure of the polluting stone crushing unit would contravene fundamental right of carrying on business under article 19(1) (g) of the Constitution. But the Karnataka High Court rejected the submission of the petitioner on the ground that the fundamental right under article 19(1) (g) admitted reasonable restrictions in larger public interest. Even though a person has a right to carry on any business of his choice, there is no right to carry on any business inherently dangerous to the society.

Here, the maintenance of public health is of paramount consideration for both judiciary as well as the government. The interest of the society is to be balanced with the interest of the citizens to carry on business. The court directed the State government to immediately formulate a policy regulating carrying on stone crushing business. State was also directed to identify safer zone. The existing stone crushers which did not fall in safer zones were ordered to be closed down.

[28] *AP Gunnies Merchants Association, Hyderabad v/s. Government of Andhra Pradesh (AP)* AIR 2001 AP 453, the petitioner were carrying on the business of cleaning and trading of used gunny bags in a densely populated place which resulted in traffic congestion and air pollution. The orders were issued by the appropriate authority for shifting of the business to a safer place to avoid air and environmental pollution. It was submitted that the orders would violate article 19(1) (g) of the Indian Constitution. The AP High Court held that the right to carry business in old gunny bags was not absolute and restrictions could be imposed to avoid environmental pollution.

The business carried on by the petitioners was endangering the lives of the people living in the area, more particularly the traders and the public in general, who visited the market day in and day out, as also the workers engaged therein. The court, therefore did not find any fault with the impugned order which directed shifting of the business of the petitioners from thickly populated area to a safer place to avoid environmental pollution.

Therefore, the healthy existence and preservation of the essential ingredients of life '*stable ecological balance*' is required.

4.3. Women Empowerment and Role of Judiciary

Women empowerment is nothing but women come out from the suppression and oppression against the ancient form of patriarchal society. The twenty-first century is seems that the golden age of women empowerment and to become an equal competitor with male dominated society. But still there is an inequality and imbalance among the male and female community. Even though there is the sufficient International law as well as Indian laws to protect and preserve the women empowerment on the one hand, mushroom growth of human trafficking, sexual harassment includes molestation, rape and murder on the other.

Therefore, India still lacking in women empowerment and it far behind the powerful countries like USA. Due to this, India is worse than the earlier in sexual violence issues against women especially, National Capital Region (NCR – Delhi) is much worst that the other metropolitan cities in India as well as the globe. Sometimes the Indian judiciary refers some guidelines from the international treaties, take for instance, the Supreme Court of India referred CEDAW[29] principles to protect women from sexual harassment at work place. But India needs a strong enactment of laws to protect women and preserve their rights to combat against sexual violence.

***Vishaka v/s. State of Rajasthan*[30]**

The litigation filed by the social organization name Vishaka and others, due to a brutal gang rape of a publicly employed social worker in a village at Rajasthan during the course of her employment. The petitioners bringing the action were various social activists and non-governmental organisations. The primary basis of bringing such an action to the Supreme Court in India was to find suitable methods for the realisation of the true concept of "gender equality" in the workplace for women. In turn, the prevention of sexual harassment of women would be addressed by applying the judicial process. Under Article 32 of the Indian Constitution, an action was filed in order to establish the enforcement of the fundamental rights relating to the women in the workplace. In particular it sought to establish the enforcement of Articles 14, 15, 19(1) (g) and 21 of the Constitution of India and Articles 11 and 24 of the Convention on the Elimination of All Forms of Discrimination against Women.

In disposing of the writ petition with directions, it was held that:

> The fundamental right to carry on any occupation, trade or profession depends on the availability of a 'safe' working environment. The right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, belongs to the legislature and the executive. When, however, instances of sexual harassment resulting in violations of Arts 14, 19 and 21 are brought under Art 32, effective redress requires that some guidelines for the protection of these rights should be laid down to fill the legislative vacuum.

In light of these deliberations, the Court outlined guidelines which were to be observed in order to enforce the rights of gender equality and to prevent discrimination for women in the workplace. These guidelines included the responsibility upon the employer to prevent or deter the commission of acts of sexual harassment and to apply the appropriate settlement and resolutions and a definition of sexual harassment which includes unwelcome sexually determined behaviour (whether directly or by implication) such as:

- physical contact and advances;
- a demand or request for sexual favours;
- sexually-coloured remarks;

[29] *Convention on the Elimination of All Forms of Discrimination Against Women, 1984.*

[30] AIR 1997 SC 3011

- showing pornography;
- any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.

Furthermore the guidelines set out that persons in charge of a workplace in the public or private sector would be responsible for taking the appropriate steps to prevent sexual harassment by taking the appropriate steps, including:

- The prohibition of sexual harassment should be published in the appropriate ways and providing the appropriate penalties against the offender;
- For private employees, the guidelines should be included in the relevant employment guidelines;
- Appropriate working conditions in order to provide environments for women that are not hostile in order to establish reasonable grounds for discrimination;
- The employer should ensure the protection of potential petitioners against victimisation or discrimination during potential proceedings;
- An appropriate complaints mechanism should be established in the workplace with the appropriate redress mechanism;
- Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person-in-charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

Finally, the court stated that the guidelines are to be treated as a declaration of law in accordance with Article 141 of the Constitution until the enactment of appropriate legislation and that the guidelines do not prejudice any rights available under the Protection of Human Rights Act 1993. There are various provisions under the Indian Constitution exclusively provide preferences for women empowerment in various fields, like education, employment and so on. Some of the provisions specifically discuss about the women empowerment as follows:

- Equality before law for **women (Article 14)**
- The State not to discriminate against any citizen on grounds only of religion, race, caste, **sex**, place of birth or any of them **(Article 15(i))**
- The State to make any special provision in favour of **women** and children **(Article 15(3))**
- Equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State **(Article 16)**
- The State to direct its policy towards securing for men and **women** equally the right to an adequate means of livelihood **(Article 39(a));** and equal pay for equal work for both men and **women (Article 39(d))**
- To promote justice, on a basis of equal opportunity and to provide free legal aid by suitable legislation or scheme or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities **(Article 39 A)**
- The State to make provision for securing just and humane conditions of work and for maternity relief **(Article 42)**
- The State to promote with special care the educational and economic interests of the weaker sections of the people and to protect them from social injustice and all forms of exploitation **(Article 46)**
- The State to raise the level of nutrition and the standard of living of its people **(Article 47)**
- To promote harmony and the spirit of common brotherhood amongst all the people of India and to renounce practices derogatory to the dignity of **women (Article 51(A) (e))**
- Not less than one-third (including the number of seats reserved for **women** belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every **Panchayat** to be reserved for women and such seats to be allotted by rotation to different constituencies in a **Panchayat (Article 243 D(3))**
- Not less than one- third of the total number of offices of Chairpersons in the **Panchayats** at

each level to be reserved for **women (Article 243 D (4))**

- Not less than one-third (including the number of seats reserved for **women** belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every **Municipality** to be reserved for **women** and such seats to be allotted by rotation to different constituencies in a **Municipality (Article 243 T (3))**
- Reservation of offices of Chairpersons in **Municipalities** for the Scheduled Castes, the Scheduled Tribes and **women** in such manner as the legislature of a State may by law provide **(Article 243 T (4))**

Other than these, other Indian laws[31] like Indian Penal Code, 1860 are also gives special preferences for women empowerment. Some of the IPC provisions related to protect women rights as follows; Rape (Sec. 376), Kidnapping & Abduction for different purposes (Sec. 363-373), Homicide for Dowry, Dowry Deaths or their attempts (Sec. 302 and 304-B), Torture – both mental and physical (Sec. 498-A), Molestation (Sec. 354), Sexual Harassment (Sec. 509) and so on. Though all laws are not gender specific but some acts and some specific provisions are to preserve women rights and protect their interests. The provisions of law affecting women significantly have been revised periodically and modifications carried out to keep pace with the emerging necessities.

5. CONCLUSION

It is not that India has only borrowed principles from international law, but also contributed much to the development of international law. For instance, the principle of '*absolute liability*', an improvised form of strict liability with no exceptions, is an Indian gift to the world. This principle evolved out of the *Bhopal Gas Leakage Case*.[32] Even the epics *Mahabharata* and *Ramayana* provide evidence of Indian contribution for international law, like the war should not conduct at night but only during day time, no combatant should attack at the time of wounded or surrender, etc. – have become part of the Geneva Conventions. Similarly, there were proper principles of diplomatic relations followed when Lord Ram sent Hanuman as a diplomat to Lanka Puri.

Preamble of the United Nations Charter starts from *we the people of United Nations*…. implies that the relations among the States which includes the concept of boundary less and the globe as a single family. This concept was already exists in 192 poem of the *Purananuru*, an ancient Tamil poem written by Kaniyan Poonkundranar as early as first to fifth century BCE. The Poem rightly points out that – *yathum oore!! yavarum keleer!!* which literally means "*To us all towns are one, all men our kin*" or "*whole globe as my family and all of them are my kith and kin*". Even the *code of Manu Dharma* and Kautilya's *Arthasastra* also contributed for the development of international law. Therefore, India not only the receiver of international law principles and treaties but also the equal contributor or the great donor

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[31] *The Employees State Insurance Act, 1948, The Plantation Labour Act, 1951, The Family Courts Act, 1954, The Special Marriage Act, 1954, The Hindu Marriage Act, 1955, The Hindu Succession Act, 1956 with amendment in 2005, Immoral Traffic (Prevention) Act, 1956, The Maternity Benefit Act, 1961 (Amended in 1995), Dowry Prohibition Act, 1961, The Medical Termination of Pregnancy Act, 1971, The Contract Labour (Regulation and Abolition) Act, 1976, The Equal Remuneration Act, 1976, The Prohibition of Child Marriage Act, 2006, The Criminal Law (Amendment) Act, 1983 (Amended in 2013), The Factories (Amendment) Act, 1986, Indecent Representation of Women (Prohibition) Act, 1986, Commission of Sati (Prevention) Act, 1987 and The Protection of Women from Domestic Violence Act, 2005*. Recently, *the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013* enacted based on the *Vishaka Case* and the continuing number of sexual violence against women especially in the National Capital Region. Other than these, some of the special initiatives taken by the State as well as Central Government take for instance; ***National Commission for Women 1992, Reservation for Women in Local Self-Government (amended in 73rd Amendment of the Constitution), The National Plan of Action for the Girl Child (1991-2000), National Policy for the Empowerment of Women, 2001*** **and so on.**

[32] *Union Carbide Corporation v/s. Union of India* AIR 1990 SC 248, the leakage of Methyl Iso Cynide (MIC) gas in the Union Carbide plant was observed to be an inherently dangerous and hazardous activity and in this case the law relating to the development of environmental law, quantum of compensation, '*no-fault liability*', '*absolute liability*' were discussed and propounded at great length.

to contribute some well-known international law doctrines for the growth of international community and for the welfare of the nations.

Not only law changes society, even it is true vice-versa. Considering the development internationally India must also be open for necessary changes in its legal system. For instance, India did not permit homosexual relationship but now it is legally recognised by Indian Judiciary and it is no more a crime under section 377 of the Indian Penal Code, 1860. Similarly, Wildlife Act and other environmental protection acts shall be amend because it compensation and punishment provisions are very weak which lead to increase the crime rate in India. Hence, India needs an amendment and it is the easy solution to make India better in a near future. However, Article 53 *Vienna Convention on Law of Treaty* provides: "a treaty is void if at the time of its conclusion, it conflict with a peremptory norm of general international law". Similarly, international law norms or treaty principles become invalid if at the time of adoption into India by way of enactment or any other way, it affects the basic structure of the Indian Constitution. The interrelation between international law and Indian laws is an essential prerequisite for development and sustainable growth.

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