



Email: editorijless@gmail.com

Volume: 4, Issue 3, 2017 (July-Sept)

INTERNATIONAL JOURNAL OF LAW, EDUCATION, SOCIAL AND SPORTS STUDIES (IJLESS)

<http://www.ijless.kypublications.com/>

ISSN:2455-0418 (Print), 2394-9724 (online)

2013©KY PUBLICATIONS, INDIA

www.kypublications.com

Editor-in-Chief

Dr M BOSU BABU

(Education-Sports-Social Studies)

Editor-in-Chief

DONIPATI BABJI

(Law)

©KY PUBLICATIONS



THE ROLE OF INTERNATIONAL CONVENTIONS, COVENANTS AND TREATIES UNDER THE INDIAN CONSTITUTION

RAKESH CHANDRA

Research Scholar

Lucknow University, Dept. of law, new campus, Jankipuram, Lucknow



RAKESH CHANDRA

ABSTRACT

Respect for International law and Treaty obligations is the hallmark of Indian Polity. Since time immemorial, this practice is being followed by the rulers consistently. After Independence, India got its new constitution. Article 51 (C) of the Constitutions specifically stipulates that the state shall endeavor to foster respect for international law and treaty obligations in the dealings of organized peoples with one another. Further, it has been held that Courts are under an obligation to give due regard to international conventions and norms for constructing domestic laws more so when there is no inconsistency between them and there is a void in the domestic law. This Article 51 (C) has been relied upon to introduce and implement various international instruments, particularly the Universal Declaration of Human Rights and the two covenants on political and civil Rights and the Economic, Social and Cultural Rights in the interpretation of fundamental rights. The Courts have held that by virtue of this Article, international instruments, particularly those of which India is a party, become part of Indian law so long as they are not inconsistent with it. This provision thus embodies the guiding principle on which the Indian foreign policy is founded, Present paper explores the various dimensions of this important constitutional provision.

Key Words: International Conventions, Covenants, Treaties, Article 51(C) of the Constitution.

Introduction

One of the Directive Principles in the Constitution of India is Article 51 (c) which says:

“51. The State shall *endeavour* to-

(c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another.....”

This means that though a treaty does not *ipso facto* become part of the municipal law in the absence of the implementing legislation, and though municipal courts are bound to apply the municipal law where there is an unavoidable conflict with international law, but out of respect for international law and comity of nations, the municipal courts would so interpret rules of the municipal law that they would, if possible, not be inconsistent with those of the international law.¹ If the terms of a legislation are not clear, however, and are reasonably capable of more than one meaning, the treaty itself becomes relevant, for, there is a *prima facie* presumption that the Parliament does not intend to act in breach of the international law, including therein specific treaty obligation, and if one of the

meanings which can reasonably be ascribed to the legislation is consistent with treaty obligation and another or others are not, the meaning which is consistent is to be preferred.² It has been held that courts are under an obligation to give due regard to international conventions and norms for construing domestic laws more so when there is no inconsistency between them and there is a void in the domestic law.³ This article has been relied upon to introduce and implement various international instruments, particularly the Universal Declaration of Human Rights and the two Covenants on the Political and Civil Rights and the Economic, Social and Cultural Rights in the interpretation of fundamental rights. The Courts have held that by virtue of this article international instruments, particularly those of which India is a party, become part of Indian law so long as they are not inconsistent with it. Therefore, they can be very well relied upon and enforced.⁴ This constitutional provision (Article 51) thus embodies the principle which the Indian foreign policy is to follow.⁵

Historical Perspective: In a sense international law existed to regulate the relations between independent States prior to modern international laws. The ancient civilization of Egypt, Greece, India and Rome had practices akin to the rules of modern international law. Laws and usages concerning conduct of war, making of treaties and institution of envoys were in vogue in Ancient India. These are depicted in *Mahabharata* and *Ramayana*. In the *Arthashastra*, *Chanakya* had written all the practical aspects of dealing with other kings or organization. One can enter into a treaty when needed and break away from it when one is strong enough. Treaties must be always for gain this way or that way.⁶

Kautilya or *Chanakya* has distinguished in the Chapter (7:101-102:3) on treaty, one type of treaty with another and named more than a dozen treaties, namely, (i) *Amisha Sandhi* (ii) *Purushantar Sandhi* (iii) *Adrishta Purusha Sandhi*, (iv) *Danda Upanat Sandhi*, (v) *Parikraya Sandhi*, (vi) *Kanyadana Sandhi*, (vii) *Kapala Sandhi*, (viii) *Koshopanat Sandhi*, (ix) *Adishta Sandhi*, (x) *Uchchhinna Sandhi*, (xi) *Apakraya Sandhi*, (xii) *Para Dushan Sandhi*.

During the Mughal period, the episode of meeting of Sir Thomas Roe, as an envoy, with Emperor Jehangir is a well-known historical fact. In fact, throughout the history of our country, one can easily explore the practice of treaty making by the Rulers of different dynasties not among the neighbourly states but with foreign States also. Expanding trade relation was also a strong motive in this regard.⁷

Making of Article 51: The Constituent Assembly Debates:

*"In His Holiness Keshavanand Bharati Sripadagalvaru etc. Vs. State of Kerala and Anr. etc., it was held that Constituent Assembly Debates although not conclusive, yet show the intention of the framers of the Constitution in enacting provisions of the Constitution and the Constituent Assembly Debates can throw light in ascertaining the intention behind such provisions."*⁸

During the Constituent Assembly Debates on Article-40 (now Article 51), the honourable Members mainly stressed upon the cultural ethos of this great nation. Emphasis was laid repeatedly, on the principles of Truth, Non-violence and Arbitration for settlement of disputes, so well articulated by Mahatma Gandhi during his discourses and in his writings. They were quite disillusioned with the League of Nations and the Security Council for their failure to check the race for disarmament and the negative role played by the Super Powers in maintaining peace and security in the world. They also wished to see all people in the world be released from the domination of other people and reiterated the Gandhian philosophy of arbitration as a sole mean of settling international disputes. They hoped that India will become a strong country in order to achieve her laudable objective of "world peace." After conclusion of the debate, the then Article was accepted with five amendments proposed by three honourable members and the amended Article 40 came into existence without much ado.⁹

A Comparative Position:

1. U.S.A.

A special feature of American Constitutional Law is that it places treaties entered into by the U.S.A. at par with the Constitution itself. Article 6, Clause (2) of the Constitution says:

“.....all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”

This provision places a treaty in a distinctive position under the American Constitution in several important respects:

(a) It makes a treaty a self-executory law of the land like any law made by the legislature, so that where rights or obligations are created by treaty itself, an individual may rely on it before the municipal courts to enforce his rights.¹⁰

(b) It being a duty of the Congress to implement a treaty as the supreme law of the land, a law of Congress is to be interpreted in consonance with a relevant treaty until, of course, the treaty is duly repealed by an Act of Congress.¹¹

(2) **United Kingdom(U.K.):** Even in the U.K., where a treaty or international convention is not a part of the municipal law, it has been held that when they are implemented by legislation, the treaty or convention is available as an aid to the construction of the statute or to discover the intention of the legislature.¹²

(3) **The French Constitution:** Art. 53: Peace Treaties, Trade agreements, treaties or agreements relating to international organization, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory, may be ratified or approved only by an Act of Parliament.

Art. 55: Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party. ¹³

(4) Federal Republic of Germany

Art. 25: Primacy of International Law: The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.¹⁴

(5) Japan:

Art. 98(2): The treaties concluded by Japan and established laws of nations shall be faithfully observed.¹⁵

(6) Russian Federation:

Art. 15 (4): The universally-recognized norms of international law and international treaties and agreement of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied. ¹⁶

(7) South Africa:

Art.231: International Agreements-(2)An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in sub-section (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by

national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.¹⁷

(8) India

In *Keshavanand Bharati Vs. State of Kerala*, it is observed that:

“Only in cases of doubt or ambiguity the courts would interpret a statute so as not to make it inconsistent with the comity of nations or established rules of International law, but if the language of the statute is clear, it must be followed notwithstanding the conflict between municipal law and International law.”

In the same case, taking into consideration Article 51 of the Constitution, it was observed the court must interpret the language of the Constitution in the light of the United Nations Charter and the solemn declaration subscribed to by India [per Sikri C.J.]¹⁸

Constitution must necessarily be understood in the context of the present day scenario and having regard to international treaties and conventions. Courts are not hesitant in referring to international law in finding new rights in the context of the Constitution.¹⁹ For interpreting the provisions of Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act, 1995, The Proclamation on the Full Participation and Equality of People with Disabilities in the region to which, India is a signatory and adopted in 1992, at a meeting held in Beijing by the Economic and Social Commission of Asian and Pacific Region was made use of by the Supreme Court and directed the Indian Airlines to grant to persons suffering from loco-motor disability to the extent of 80% the same concession which the Airlines was giving to those suffering from blindness.²⁰

In his minority opinion in *A.D.M. Jabalpur Vs. S. Shukla, Khanna, J.* observed:

“Equally well established is the rule of construction that if there be a conflict between the municipal law on one side and the international law or the provisions of any treaty obligations on the other, the Courts would give effect to municipal law. If however, two constructions of the municipal law are possible, the Courts should lean in favour of adopting such construction as would make the provisions of the municipal law to be in harmony with the international law on treaty obligation. Every statute, according to this rule is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations on the established rules of International law, and the Court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language.”²¹

(a) **Legal Effect of a Treaty:** So far as the legal effect of a treaty entered into by India with a foreign country is concerned, reference is to be made to Article 253 and the relevant entries in List I.

Article 253: Legislation for giving effect to international agreements- *“Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.”*

In *West Bengal Vs. Kesoram Industries Ltd.* It was said that as Article 253 contains a non obstante clause, it operates notwithstanding anything contained in Article 245 and Article 246. Article 246 confers power on Parliament to enact laws with respect to matters enumerated in List I of the Seventh Schedule to the Constitution. Entries 10 to 21 of List I of the seventh schedule pertain to international law. In making any law under any of these entries, Parliament is required to keep Article 51 in mind.²²

(b) **Article 51 (c) and the Fundamental Rights:** The Universal Declaration of Human Rights is used by the Supreme Court in various cases to interpret fundamental rights especially Article 21 of the Constitution.²³ Declaration on “Right to Development” was applied in *Madhu Kishwar Vs.*

State of Bihar.²⁴

In *Chairman, Railway Board Vs. Chandrima Das*,²⁵ the Supreme Court said: “The applicability of the Universal Declaration of Human Rights and Principles thereof may have to be read if need be, into the domestic jurisprudence.”

(c) Article 51 and the Enforcement or Implementation of Treaties:

Article 51 (c) does not deal with the enforcement or implementation of treaties. Unless municipal law is changed, an international covenant does not bind. It is only the municipal law which binds the Court²⁶. However, the Supreme Court has referred to several international covenants while interpreting several Fundamental Rights. For example, in *People’s Union for Civil Liberties Vs. Union of India*,²⁷ the Court referred to Art. 17 of the International Covenant on Civil and Political Rights, 1966 and Art. 12 of the Universal Declaration of Human Rights, 1948, so as to derive from Article 21 a right to privacy in India. The Court observed in this connection:²⁸

“International law today is not confined to regulating the relation between the States. Scope continues to extend. Today matters of social concerns, such as, health, education and economics apart from human rights fall within the ambit of International Regulations. International law is more than ever aimed at individuals. It is almost accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law.”

(d) Article 51 (c) and the Response of the Courts in India, with special reference to the Supreme Court:

The Supreme Court has accepted and incorporated provisions of International Conventions ratified by India in a growing number of situations where domestic law was silent or ambiguous.²⁹ While discussing constitutional requirements, court and counsel must never forget the core principle embodied in the international conventions and instruments and as far as possible, give effect to the principles contained in those international instruments. The Courts are under an obligation to give due regard to international conventions and norms for construing domestic laws, more so, when there is no inconsistency between them and there is a void in the domestic law.³⁰

In *Liverpool Borough Bank Vs. Turner, Campbell* L.J. said: “No universal rule can be laid-down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered.”³¹

The Supreme Court further stated: “The question as to whether a statute is mandatory or directly depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it the one way or the other.”³²

Though the Supreme Court has decided a large number of cases on this Article, yet a bird’s eye-view of some landmark cases is being presented as follows:

1. **Charu Khurana & others Vs. Union of India & Others:**³³ (On Gender Inequality prevailing in the film Industry)

This is a case against the stubbornness of the respondent, Cine Costume Make-Up Artists and Hair Dressers Association of Mumbai who refused to allow qualified make-up artists to become members of the Association on two grounds, namely, they are women and have not remained in the State of Maharashtra for a span of five years.

While adjudicating upon the case, the Supreme Court took cognizance of various International Conventions and Treaties on gender equality, stating that the Covenant on the Elimination of All

Forms of Discrimination Against Women (CEDAW), 1979, is the United Nations' landmark treaty marking the struggle for women's right. It is regarded as the Bill of Rights for women.

5. At one point, the UN Secretary General, Kofi Annan, had stated "Gender equality is more than a goal in itself. It is a precondition for meeting the challenge of reducing poverty, promoting sustainable development and building good governance."

7. At this juncture, we may refer to some international conventions and treaties on gender equality. The Covenant on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, is the United Nations' landmark treaty marking the struggle for women's right. It is regarded as the Bill of Rights for women. It graphically puts what constitutes discrimination against women and spells out tools so that women's rights are not violated and they are conferred the same rights.

8. The equality principles were reaffirmed in the Second World Conference on Human Rights at Vienna in June 1993 and in the Fourth World Conference on Women held in Beijing in 1995. India was a party to this convention and other declarations and is committed to actualize them. In 1993 Conference, gender-based violence and all categories of sexual harassment and exploitation were condemned. A part of the Resolution reads thus:

"The human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights.

... The World Conference on Human Rights urges governments, institutions, inter-governmental and non-governmental organisations to intensify their efforts for the protection and promotion of human rights of women and the girl child."

9. The other relevant international instruments on women are: (i) Universal Declaration of Human Rights (1948),

(ii) Convention on the Political Rights of Women (1952),

(iii) International Covenant on Civil and Political Rights (1966), (iv) International Covenant on Economic, Social and Cultural Rights (1966), (v) Declaration on the Elimination of All Forms of Discrimination against Women (1967), (vi) Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974), (vii) Inter-American Convention for the Prevention, Punishment and Elimination of Violence against Women (1995), (viii) Universal Declaration on Democracy (1997), and (ix) Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999).

2. Valsamma Paul (Mrs.) Vs. Cochin University:³⁴

In this case, the two Judge Bench of the Supreme Court observed thus:

26. *Human rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedoms have been reiterated in the Universal Declaration of Human Rights. 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, integral and an indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth – cultural, social and economical. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights. Convention for Elimination of all forms of Discrimination Against Women (for short, "CEDAW") was ratified by the UNO on 18-12-1979 and the Government of India had ratified as an active participant on 19-6-1993 acceded to CEDAW and reiterated that discrimination against women violates the principles of equality of rights and respect for human dignity and it is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country; it hampers the growth of the personality from society and family, making more difficult for the full development of potentialities of women in the service of the respective countries and of humanity.*

27. *Parliament has enacted the Protection of Human Rights Act, 1993. Section 2(d) defines "human*

rights" to mean "the rights 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".

Thereby, the principles embodied in CEDAW and the concomitant right to development became an integral part of the Constitution of India and the Human Rights Act and became enforceable. Section 12 of the Protection of Human Rights Act charges the commission with duty for proper implementation as well as prevention of violation of the human rights and fundamental freedoms.

3. *ABC Vs. State (NCT of Delhi)*:³⁵

In this case, the Supreme Court, while adjudicating upon the question whether an unwed mother can pray for appointment as of her child's guardian without specifically notifying the putative father of the child, went through the International Conventions and held as such:

17. *Implicit in the notion and width of welfare of the child, as one of its primary concomitants, is the right of the child to know the identity of his or her parents. This right has now found unquestionable recognition in the Convention on the Rights of the Child, which India has acceded to on 11th November, 1992. This Convention pointedly makes mention, inter alia, to the Universal Declaration of Human Rights.*

4. *Jolly George Varghese and Another Vs. The Bank of Cochin*:³⁶

Dealing with the arrest and detention in civil prison, the Supreme Court held that "where the Judgment-debtor if once hold the means to pay the debt but subsequently after the date of decree has no such means or he had money on which there are other pressing claims; it is violative of Art.11 of the International Covenant on Civil and Political Rights to arrest and confine him in jail so as to coerce him into payment. Sec. 51 of Civil Procedure Code embodies the same principle as that which is embodied in Art. 11 of the Covenant."

5. *Municipal Corporation of Delhi Vs. Female Workers (Muster Roll) and another*:³⁷

Faced with the question whether the Maternity Benefit Act (53 of 1961) can be extended to muster roll women employees of Municipal Corporation, the Supreme Court opined as such:

34. *Delhi is the capital of India. No other City or Corporation would be more conscious than the City of Delhi that India is a signatory to various International covenants and treaties. The Universal Declaration of Human Rights, adopted by the United Nations on 10th of December, 1948, set in motion the universal thinking that human rights are supreme and ought to be preserved at all costs. This was followed by a series of Conventions. On 18th of December, 1979, the United Nations adopted the "Convention on the Elimination of all forms of discrimination against women". Article 11 of this Convention provides as under:-*

"Article 11

1. *States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular;*

- (a) *The right to work as an inalienable right of all human beings;*
- (b) *The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;*
- (c) *The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;*
- (d) *The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;*
- (e) *The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave.*
- (f) *The right to protection of health and to satisfying working conditions, including the safe guarding of the function of reproduction.*

2. *In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:*

- (a) *To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;*
- (b) *To introduce maternity leave with pay or with comparable social benefits without loss of former*

employment, seniority or social allowances;

- (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
- (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.”.

35. These principles which are contained in Article 11, reproduced above, have to be read into the contract of service between Municipal Corporation of Delhi and the women employees (muster roll); and so read these employees immediately become entitled to all the benefits conceived under the Maternity Benefit Act, 1961. We conclude our discussion by providing that the direction issued by the Industrial Tribunal shall be complied with by the Municipal Corporation of Delhi by approaching the State Government as also the Central Government for issuing necessary Notification under the Proviso to Sub-section (1) of Section 2 of the Maternity Benefit Act, 1961, if it has not already been issued. In the meantime, the benefits under the Act shall be provided to the women (muster roll) employees of the Corporation who have been working with them on daily wages.

6. M.H. Hoskot Vs. State of Maharashtra:³⁸ “One Component of fair procedure is natural justice. Generally speaking and subject to just exceptions, at least a single right of appeal on facts, where criminal conviction is fraught with long loss of liberty, is basic to civilized Jurisprudence..... Pertinent to the point are two requirements (i) service of a copy of the judgment to the prisoner in time to file an appeal and (ii) provision of free legal services to a prisoner who is indigent or otherwise disabled from securing legal assistance where the ends of justice call for such service. Both these are state responsibilities under Act.21.”

The Court further observed:

18. The widespread insistence on free legal assistance, where liberty is in jeopardy, is obvious from the Universal Declaration of Human Rights:

Art. 8 Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the Constitution or by law.

Article 14 (3) of the International Covenant on Civil and Political Rights guarantees to everyone:

“the right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him in any case where the interests of justice shall require, and without payment by him in any such case if he does not have sufficient means to pay for it.”

Many high-level Indian Committees and Commissions have emphasised the free legal service desideratum as integral to processual fair-play for prisoners. For example, one such committee has stated(5):(5). Processual Justice to the People, May, 1973, P.34.

93. Prisoners, men and women, regardless of means, are a peculiarly handicapped class. The morbid cell which confines them walls them off from the world outside. Legal remedies, civil and criminal, are often beyond their physical and even financial reach unless legal aid is available within the prison as is provided in some States in Indian and in other countries. Without legal aid, petitions of appeal, applications for commutation or parole, bail motions and claims for administrative benefits would be well-nigh impossible. There is a case for systematised and extensive assistance through legal aid lawyers to our prison population.

8. Ms. Gita Hariharan and another Vs. Reserve Bank of India and another:⁴⁰

The Supreme Court observed in this case that “In all situations where the father is not in actual charge of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor.” The Court further opined as such:

14. The message of international instruments - Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (“CEDAW”) and the Beijing Declaration, which directs all State parties to take appropriate measures to prevent discrimination of all forms against women is quite clear. India is a signatory to CEDAW having accepted and ratified it in June, 1993. The interpretation that we have placed on Section 6(a) (supra) gives effect to the principles contained in these instruments. The domestic courts are under an

obligation to give due regard to International Conventions and Norms for construing domestic laws when there is no inconsistency between them. (See with advantage - Apparel Export Promotion Council v. A.K. Chopra, Civil Appeal Nos. 226-227 of 1999 decided on January 20, 1999 (reported in 1999 AIR SCW 274.)

22. BANJERJEE, J : - Though nobility and self-denial coupled with tolerance mark the greatest features of Indian womanhood in the past and the cry for equality and equal status being at a very low ebb, but with the passage of time and change of social structure the same is however no longer dormant but presently quite loud. This cry is not restrictive to any particular country but world over with variation in degree only. Article 2 of the Universal Declaration of Human Rights (as adopted and proclaimed by the General Assembly in its resolution No. 217A (III) provided that everybody is entitled to all rights and freedom without distinction of any kind whatsoever such as race, sex or religion and the ratification of the convention for elimination of all forms of discrimination against women (for short CEDAW) by the United Nations Organisation in 1979 and subsequent acceptance and ratification by India in June 1993 also amply demonstrate the same.

9. **Smt. Nilabati Behera Vs. State of Orissa & Others**:⁴¹ Where the question of Claim for monetary compensation in contravention of human rights and fundamental freedoms by State and its agencies is involved, the Supreme Court has observed thus: "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 acknowledged remedy for enforcement and protection of such rights

We may also refer to Art. 9(5) of the International Covenant on Civil and Political Rights, 1966 which indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right. Art. 9 (5) reads as under:-

"Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

10. **Visakha and others Vs. State of Rajasthan & Others**⁴²

In this case related to sexual harassment of working woman, the Supreme Court held that, "It is now an accepted rule of judicial constructions 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. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of International convention and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Arts 14, 15, 19 (1) (g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the Constitutional guarantees. This is implicit from Art.51 (c) and the enabling power of the parliament to enact laws for implementing the International conventions and norms by virtue of Art 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution." The Court further observed thus:

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

12. Some provisions in the 'Convention on the Elimination of All Forms of Discrimination against Women', of significance in the present context are:

Article 11

"1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

xxxxxxxxx

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction. xxxxxxxx" Article 24 :

“States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognised in the present Convention.”

13. The general recommendations of CEDAW in this context in respect of Art. 11 are: “*Violence and equality in employment* :

12. Apparel Export Promotion Council Vs. A.K. Chopra:⁴⁴

In the instant case of sexual harassment of a lady employee by a superior officer, the Supreme Court has observed thus:

27. *There is no gainsaying that each incident of sexual harassment, at the place of work, results in violation of the Fundamental Right to Gender Equality and the Right to Life and Liberty - the two most precious Fundamental Rights guaranteed by the Constitution of India. As early as in 1993 at the ILO Seminar held at Manila, it was recognized that sexual harassment of woman at the work place was a form of ‘gender discrimination against woman.’ In our opinion, the contents of the fundamental rights guaranteed in our Constitution are of sufficient amplitude to encompass all facets of gender equality, including prevention of sexual harassment and abuse and the Courts are under a constitutional obligation to protect and preserve those fundamental rights. That sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admits of no debate. The message of international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (“CEDAW”) and the Beijing Declaration which directs all State parties to take appropriate measures to prevent discrimination of all forms against women besides taking steps to protect the honour and dignity of women is loud and clear. The International Covenant on Economic, Social and Cultural Rights contains several provisions particularly important for women. Article 7 recognises her right to fair conditions of work and reflects that women shall not be subjected to sexual harassment at the place of work which may vitiate working environment. These international instruments cast an obligation on the Indian State to gender sensitise its laws and the Courts are under an obligation to see that the message of the international instruments is not allowed to be drowned. This Court has in numerous cases emphasized that while discussing constitutional requirements, Court and counsel must never forget the core principle embodied in the International Conventions and Instruments and as far as possible give effect to the principles contained in those international instruments. The Courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law. (See with advantage – Prem Sankar v. Delhi Administration, AIR 1980SC1535; Mackinnon Mackenzie and Co. v. Audrey D Costa, (1987)2SCC469,(1987)2JT(SC)34:(AIR1987SC1281), Sheela Barsev. Secretary, Children’s Aid Society, (1987) 3 SCC 50 at P.54: (AIR 1987 SC 656 at Pp. 658-659), Vishaka v. State of Rajasthan (1997) 7JT (SC) 384: (1997AIR SCW 3043), People’s Union, for Civil Liberties v. Union of India, (1997) 2 JT (SC) 311: (1997 AIR SCW 1234) and D.K.Basu v. State of West Bengal, (1997)1SCC416atP.438:(1997AIRSCW233atPp.248-249)*

28. *In cases involving violation of human rights, the Courts must forever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field. In the instant case, the High Court appears to have totally ignored the intent and content of the International Conventions and Norms while dealing with the case.*

13. Gramophone Company of India Ltd. Vs. Birendra Bahadur Pandey and Others:⁴⁶

In Conflict between International law and Municipal law, Court must follow Municipal law. The Supreme Court observed thus:

5. *There can be no question that nations must march with the international community and the Municipal law must respect rules of International law even as nations respect international opinion. The comity of Nations requires that Rules of International law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognises the position that the*

rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of nations or no, Municipal Law must prevail in case of conflict. National Courts cannot say "yes" if Parliament has said no to a principle of international law. National Courts will endorse international law but not if it conflicts with national law. National courts being organs of the National State and not organs of international law must perforce apply national law if international law conflicts with it. But the Courts are under an obligation within legitimate limits, to so interpret the Municipal Statutes to avoid confrontation with the comity of Nations or the well established principles of International law. But if conflict is inevitable, the latter must yield.

15. Sheela Barse Vs. The Secretary, Children Aid Society and others: 47

In this case, the Supreme Court issued directions for proper running of Remand Home and Observation Homes. The Court observed thus:

5. Children are the citizens of the future era. On the proper bringing up of children and giving them the proper training to turn out to be good citizens depends the future of the country. In recent years, this position has been well realised. In 1959, the Declaration of all the rights of the child adopted by the General Assembly of the United Nations and in Art. 24 of the International Covenant on Civil and Political Rights. 1966, the importance of the child has been appropriately recognised. India as a party to these International Charters having rectified the Declarations, it is an obligation of the Government of India as also the State machinery to implement the same in the proper way. The Children Act, 1948 has made elaborate provisions to cover this and if these provisions are properly translated into action and the authorities created under the Act become cognizant of their role, duties and obligation in the performance of the statutory mechanism created under the Act and they are properly motivated to meet the situations that arise in handling the problems, the situation would certainly be very much eased.

17. **Pratap Singh Vs. State of Jharkhand and Another: 49** Discussing the provisions of Juvenile Justice (Care and Protection of Children) Act (56 of 2000), The Supreme Court observed as follows:

63. The legislation relating to juvenile justice should be construed as a step for resolution of the problem of the juvenile justice which was one of tragic human interest which cuts across national boundaries. The said Act has not only to be read in terms of the Rules but also the Universal Declaration of Human Rights and the United Nations Standard Minimum Rules for the protection of juveniles.

International Law :

64. The Juvenile Justice Act specially refers to international law. The relevant provisions of the Rules are incorporated therein. The international treaties, covenants and conventional though may not be a part of our municipal law, the same can be referred to and followed by the Courts having regard to the fact that India is a party to the said treaties. A right to a speedy trial is not a new right. It is embedded in our Constitution in terms of Articles 14 and 21 thereof. The international treaties recognize the same. It is now trite that any violation of human rights would be looked down upon. Some provisions of the international law although may not be a part of our municipal law but the Courts are not hesitant in referring thereto so as to find new rights in the context of the Constitution. Constitution of India and other ongoing statutes have been read consistently with the rules of international law. Constitution is a source of and not an exercise of, legislative power. The principles of International Law whenever applicable operate as a statutory implication but the Legislature in the instant case held itself bound thereby and, thus, did not legislate in disregard of the constitutional provisions or the international law as also in the context of Arts. 20 and 21 of the Constitution of India. The law has to be understood, therefore, in accordance with the international law, Part III of our Constitution protects substantive as well as procedural rights. Implications which arise therefrom must effectively be protected by the judiciary. A contextual meaning to the statute is required to be assigned having regard to the constitutional as well as International Law operating in the field.

67. Constitution of India and the Juvenile Justice legislations must necessarily be understood in the context of present day scenario and having regard to the international treaties and conventions. Our Constitution takes note of the institutions of the world community which had been created. Some legal instruments that have declared the human rights and fundamental freedoms of human it had been adopted but over the time even new rights had been found in several countries, as for example, South Africa (S. v. Makwanyane, 1995 (3) SA 391),

Canada (Reference Re: Public Service Employee Relations Act (Alberta) (1987) 1 SCR 313 at 348), Germany (Presumption of Innocence and the European Convention on Human Rights (1987) Bverf GE 74, 358), New Zealand (Tavita v. Minister of Immigration (1994) 2 NZLR 257 at 266), United Kingdom (Pratt v. Attorney-General for Jamaica (1994) 2 AC 1) and United States (Atkins v. Virginia (2002) 536 US 304 and Lawrence v. Texas (2003) 539 US 558). New ideas had occupied the human mind as regard protection of Human Rights. (See Hamdi v. Rumsfeld (2004) 72 USLW 4607; Russel v. Bush (2004) 72 USLW 4596 and Rumsfeld v. Padila (2004) 72 USLW 4584).

69. The legal instruments that have declared legal rights and fundamental freedoms, founded in the nations of human dignity and charter of United Nations were not known earlier which is manifest today. (Charter of the United Nations, signed at San Fransisco on 26-6-1945, Preamble). Political, social and economic development can throw light on the meaning of Constitution.

18. D.K. Basu Vs. State of West Bengal: 50

In this Case, the Supreme Court deliberated upon the subject of custodial deaths. The Court opined thus:

13. "Custodial violence" and abuse of police power is not only peculiar to this country, but it is widespread. It has been concern of international community because the problem is universal and the challenge is almost global. The Universal Declaration of Human Rights in 1948, which marked the emergence of a worldwide trend of protection and guarantee of certain basic human rights, stipulates in Article 5 that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Despite the pious declaration, the crime continues unabated, though every civilised nation shows its concern and takes steps for its eradication.

42A. Article 9(5) of the International Covenant on Civil and Political Rights, 1966 (ICCPR) provides that "anyone who has been the victim of unlawful arrest or detention shall have enforceable right to compensation". Of course, the Government of India at the time of its ratification (of ICCOR) in 1979 had made a specific reservation to the effect that the Indian legal system does not recognise a right to compensation for victims of unlawful arrest or detention and thus did not become a party to Covenant. That reservation, however, has now lost its relevance in view of the law laid down by this Court in a number of cases awarding compensation for the infringement of the fundamental right to life of a citizen. (See with advantage Rudal Shah v. State of Bihar, (1983) 4 SCC 141: (AIR 1983 SC 1086; Sebastian M. Hongrey v. Union of India; Rajendra Singh v. Smt. Usha Rani, (1984) 3 SCC 339: (AIR 1984 SC 956), (1984) 3 SCC 82: (AIR 1984 SC 1026); Bhim Singh v. state of Jammu and Kashmir 1984 (Supp) SCC 504 and (1985) 4 SCC 677 : (AIR 1986 SC 494), Saheli v. Commissioner of Police, Delhi, (1990) 1 SCC 422 : (AIR 1990 SC 513). There is indeed no express provision in the Constitution of India for grant of compensation for violation of a fundamental right to life, nonetheless, this Court has judicially evolved a right to compensation in cases of established unconstitutional deprivation of personal liberty or life.

19. Madhu Kishwar and Others Vs. State of Bihar.⁵¹

Whether a female tribal is entitled to parity with male tribal in intestate succession, was the main issue before the Supreme Court. The Court observed thus:

6. The General Assembly of the United Nations adopted a Declaration of December 4, 1986 on "The Right to Development" to which India played a crusading role for it sad option and ratified the same. Its preamble recognises that all human rights and fundamental freedoms are indivisible and interdependent. All Nation States are concerned at the existence of serious obstacles to development and complete fulfillment of human beings, denial of civil, political, economic, social and cultural rights. In order to promote development, equal attention should be given to the implementation, promotion and protection of civil, political, economic social and political rights.

7. Article 1(1) assures right to development, an inalienable human right, by virtue of which every person and all people are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realised. Article 6 (1) obligates the State to observe all human rights and fundamental freedoms for all without any discrimination as to race, sex, language or religion. Sub-article (2) enjoins that equal attention and urgent consideration should be

given to the implementation, promotion and protection of civil political, economic, social and political rights. Sub-article (3) thereof enjoins that "State should take steps to eliminate obstacle to development resulting from failure to observe civil and political rights as well as economic, social and cultural rights. Article 8 casts duty on the State to undertake,..... all necessary measures for the realisation of right to development and ensure, inter alia, equality of opportunity for all in their access to basic resources and fair distribution of income. Effective measures should be under taken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicate all social injustice.

8. Human Rights are derived from the dignity and worth inherent in the human person. Human Rights and fundamental freedom have been reiterated by the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are inter-dependent and have mutual reinforcement. The human rights for woman, including girl child are, therefore, inalienable, integral and indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth culturally socially and economically. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights. Vienna Convention on the Elimination of all forms of Discrimination Against Women (for short" CEDAW") was ratified by the U.N.O. on December 18,1979.The Government of India who was an active participant to CEDAW ratified it on June 19, 1993 and acceded to CEDAW on August 8, 1993 with reservation on Articles 5 (e), 16 (1), 16 (2) and 29 thereof. The Preamble of CEDAW reiterates that discrimination against women, violates the principles of equality of rights and respect for human dignity; is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country; hampers the growth of personality from society and family and makes it more difficult for the full development of potentialities of women in the service of their countries and of humanity, Poverty of women is a handicap. Establishment of new international economic order based on equality and justice will contribute significantly towards the promotion of equality between men and women etc. Article I defines discrimination against women to mean "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose on impairing or nullifying the recognized enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." Article 2(b) enjoins the State parties while condemning discrimination against women in all its forms, to pursue, by appropriate means, without delay, elimination of discrimination against women by adopting "appropriate legislative and other measures including sanctions where appropriate, prohibiting all discriminations against women" to take all appropriate measures including legislation, to modify, or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Clause (C) enjoins to ensure legal protection of the rights of women on equal basis with men through constituted national tribunals and other public institutions against any act of discrimination to provide effective protection to women. Article 3 enjoins State parties that it shall take, in all fields, in particular, in the political, social, economic and cultural fields, all appropriate measures including legislation to ensure full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men. Article 13 states that "the State parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women." Article 14 lays emphasis to eliminate discrimination on the problems faced by rural women so as to enable them to play " in the economic survival of their families including their work in the non-monetized sectors of the economy and shall take ... all appropriate measures " Participation in and benefit from rural development in particular, shall ensure to such women the right to participate in the development programme to organize self groups and co-operatives to obtain equal access to economic opportunities through employment or self-employment etc. Article 15(2) enjoins to accord to women equality with men before the law, in particular, to administer property..."

9. The Parliament has enacted the Protection of Human Rights Act, 1993. Section 2(b) defines human rights to mean" the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution, embodied in the international Conventions and enforceable by courts in India." There by the

principles embodied in CEDAW and the concomitant Right to Development became integral parts of the Indian Constitution and the Human Rights Act and become enforceable. Section 12 of Protection of Human Rights Act charges the Commission with duty for proper implementation as well as prevention of violation of the human rights and fundamental freedoms.

10. Article 5 (a) of CEDAW to which the Government of India expressed reservation does not stand in its way and in fact Article 2 (f) denudes its effect and enjoins to implement Article 2(f) read with its obligation undertaken under Articles 3, 14 and 15 of the Convention vis-a-vis Articles 1,3, 6 and 8 of the Declaration of Right to Development. Though the directive principles and fundamental rights provide the matrix for development of human personality and elimination of discrimination, these conventions add urgency and teeth for immediate implementation. It is, therefore, imperative for the State to eliminate obstacles, prohibit all gender based discriminations as mandated by Articles 14 and 15 of the Constitution of India. By operation of Article 2(f) and other related articles of CEDAW, the State should by appropriate measures including legislation, modify law and abolish gender based discrimination in the existing laws, regulations, customs and practices which constitute discrimination against women.

20. Chairman, Railway Board and others Vs. Mrs. Chandrima Das & Others:⁵²

While speaking on "Violation of Fundamental Rights" the S.C. observed thus: [C]

19. It was next contended by the learned counsel appearing on behalf of the appellants, that Smt. Hanuffa Khatoon was a foreign national and, therefore, no relief under Public Law could be granted to her as there was no violation of the Fundamental Rights available under the Constitution. It was contended that the Fundamental Rights in Part III of the Constitution are available only to citizens of this country and since Smt. Hanuffa Khatoon was a Bangladeshi national, she cannot complain of the violation of Fundamental Rights and on that basis she cannot be granted any relief. This argument must also fail for two reasons; first, on the ground of Domestic Jurisprudence based on Constitutional provisions and secondly, on the ground of Human Rights Jurisprudence based on the Universal Declaration of Human Rights, 1948, which has the international recognition as the 'Moral Code of Conduct' having been adopted by the General Assembly of the United Nations.

20. Apart from the above, the General Assembly, also while adopting the Declaration on the Elimination of Violence against Women, by its Resolution dated 20th December, 1993, observed in Article 1 that, "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. In Article 2, it was specified that, violence against women shall be understood to encompass, but not be limited to:

(a) Physical, sexual and psychological violence occurring in the family including battering, sexual abuse of female children in the house hold, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs."

21. In Article 3, it was specified that "women are entitled to the equal enjoyment and protection of all human rights, which would include, inter alia

(a) the right to life,

(b) the right to equality, and

(c) the right to liberty and security of person.

22. The International Covenants and Declarations as adopted by the United Nations have to be respected by all signatory States and the meaning given to the above words in those Declarations and Covenants have to be such as would help in effective implementation of those Rights. The applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence.

23. Lord Diplock in *Salomon v. Commissioners of Customs and Excise*, (1996) 3 All ER 871 said

that there is a, prima facie, presumption that Parliament does not intend to act in breach of international law, including specific treaty obligations. So also, **Lords Bridge in Brindv. Secretary of State for the Home Department**, (1991) 1 ALLER 720, observed that it was well settled that, in construing any provision in domestic legislation which was ambiguous in the sense that it was capable of a meaning which either conforms to or conflicts with the International Convention, the Courts would presume that Parliament intended to legislate in conformity with the Convention and not in conflict with it.

24. The domestic application of international human rights and norms was considered by the Judicial Colloquia (Judges and Lawyers) at Bangalore in 1988. It was later affirmed by the Colloquia that it was the vital duty of an independent judiciary to interpret and apply national constitutions in the light of those principles. Further Colloquia were convened in 1994 at Zimbabwe, in 1996 at Hong Kong and in 1997 at Guyana and in all those Colloquia, the question of domestic application of international and regional human rights specially in relation to woman, was considered. The Zimbabwe Declaration 1994, inter alia, stated:

“Judges and lawyers have duty to familiarise themselves with the growing international jurisprudence of human rights and particularly with the expanding material on the protection and promotion of the human rights of women.”

25. But this situation may not really arise in our country.

26. Our Constitution guarantees all the basic and fundamental human rights set out in the Universal Declaration of Human Rights, 1948, to its citizens and other persons. The chapter dealing with the Fundamental Rights is contained in Part III of the Constitution. The purpose of this part is to safeguard the basic human rights from the vicissitudes of political controversy and to place them beyond the reach of the political parties who, by virtue of their majority, may come to form the Govt. at the Centre or in the State.

36. The Rights guaranteed under Part III of the Constitution are not absolute in terms. They are subject to reasonable restrictions and, therefore, in case of non-citizen also, those Rights will be available subject to such restrictions as may be imposed in the interest of the security of the State or other important considerations. Interest of the Nation and security of the State is supreme. Since 1948 when the Universal Declaration was adopted till this day, there have been many changes - political, social and economic while terrorism has disturbed the global scenario. Primacy of the interest of Nation and the security of State will have to be read into the Universal Declaration as also in every Article dealing with Fundamental Rights, including Art. 21 of the Indian Constitution.

26. T. Damodar Rao Vs. S.O. Municipal Corporation, Hyderabad:⁵⁸

Focusing attention on the problem of growing pollution in the urban cities, the Supreme Court held that “the slow poisoning by the polluted atmosphere caused by environmental pollution and spoliation should also be regarded as violation of Art. 21 of the constitution”. It was further held as such:

23. The objective of the environmental law is to preserve and protect the nature’s gifts to man and woman such as air, earth and atmosphere from pollution. Environmental law is based on the realisation of mankind of the dire physical necessity to preserve these invaluable and none too easily replenishable gifts of mother nature to man and his progeny from the reckless wastage and rapacious appropriation that common law permits. It is accepted that pollution “is a slow agent of death and if it is continued the next 30 years as it has been for the last 30, it could become lethal”. (See Krishna Iyer’s Pollution and Law). Stockholm declaration of United Nations on Human Environment evidences this human anxiety:-

“The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystem, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate. Nature conservation including wildlife must therefore receive importance in planning for economic development.”

Similarly, the African Charter on Human and People’s rights declares that “all peoples shall have the right to a general satisfactory environment favourable to their development”. Judicially responding to this situation Justice Douglas has suggested that environmental issues might be litigated in the name of “the inanimate object about to be...deposited” with those who have an “intimate relation” with it recognised as its legitimate spokesmen. Common law being basically blind to the future and working primarily for the alienated good of the individual and operating on the cynical theory that because posterity has proved its utter inadequacy

to achieve the urgent task of preservation and protection of our ecology and environment. Roscoc Pound blamed the common law for its serious social shortfalls. He wrote:-

“Men have changed their views as to the relative importance of the individual and of society; but the common law has not. Indeed, the common law knows individuals only. . . . It tries questions of the highest social import as mere private controversies between John Deo and Richard Deo. And this compels a narrow and one-sided view.”

Rejecting these individualistic legal theories of common law that are found to be incompatible with the basic needs and requirements of the modern collective life environmental laws all over the world lay down rules for the preservation of environment and prevention of pollution of our atmosphere, air, earth and water. Our Parliament has recently enacted the Environment (Protection) Act (Act No. 29 of 1986) for the purpose of protecting and improving our environment. It widely distributed powers on all those who are traditionally classified as not aggrieved persons to take environmental disputes to Courts. This is clearly in harmony with our Constitutional goals which not only mandate the State to protect and improve the environment and to safeguard the forests and wild life of the Country (Art. 48 A); but which also hold it to be the duty of every one of our citizens to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures (Art.51-A (g)).

27. Daya Singh Lahoria Vs. Union of India and Others,⁵⁹

Dealing with the provisions of Extradition Act (34 of 1962), the Supreme Court observed thus:

“.....A number of attempts have been made, to conclude a convention governing extradition requests among nations. The Pan American Conference of 1902 produced a treaty of Extradition signed by twelve States but it was not ratified. In 1933 the seventh Pan American conference concluded an Extradition convention which was ratified by a number of States, including United States of America but the league codification committee had doubted the feasibility of the general convention on extradition.The International Law Association has also considered legal problems relating to extradition in the conference held in Warsaw..... But in the absence of any extradition convention, nations have resorted to bilateral extradition treaties.”

28. Sri Krishna Sharma Vs. The State: 60

The court held that *“Though municipal courts are competent to enquire into matters involving the construction of treaties and other Acts of State, treaty obligations cannot be enforced in municipal courts. The term ‘acts of state’ is sometimes used loosely to express any lawful act done by the executive Government and if it affects the person or property of subjects within its jurisdiction, its legality can be questioned in municipal courts.”*

29. Vellore Citizens Welfare Forum Vs. Union of India: 61 In this case, the Supreme Court dealt with the problem of Water pollution, especially related to discharge from tanneries and observed thus:

10. 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 came 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 “Brundtland Report”. In 1991 the World Conservation Union, United Nations Environment Programme and World Wide Fund for Nature, 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. These conventions were signed by 153 nations. The delegates also approved by consensus three non-binding documents namely, a 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 areas like poverty, population and pollution. During the two decades from Stockholm to Rio “Sustainable Development” has come to be accepted as a viable concept to eradicate poverty and improve the

quality of human life while living within the carrying capacity of the supporting eco-systems. "Sustainable Development" as defined by the Brundtland Report means "Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs". We have no hesitation in holding that "Sustainable Development" as a balancing concept between ecology and development has been accepted as a part of the Customary International law though its salient features have yet to be finalised by the International lawJurists.

32. National Legal Services Authority Vs. Union of India and Others: 64

In this case, the Supreme Court has outlined the role of the United Nations and other Human Rights Bodies on Gender Identity and Sexual orientation by observing as such:

UNITED NATIONS AND OTHER HUMAN RIGHTS BODIES - ONGENDER IDENTITY AND SEXUAL ORIENTATION

21. *United Nations has been instrumental in advocating the protection and promotion of rights of sexual minorities, including transgender persons. Article 6 of the Universal Declaration of Human Rights, 1948 and Article 16 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) recognize that every human being has the inherent right to live and this right shall be protected by law and that no one shall be arbitrarily denied of that right. Everyone shall have a right to recognition, everywhere as a person before the law. Article 17 of the ICCPR states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation and that everyone has the right to protection of law against such interference or attacks. International Commission of Jurists and the International Service for Human Rights on behalf of a coalition of human rights organizations, took a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and sexual identity to bring greater clarity and coherence to State's human rights obligations. A distinguished group of human rights experts has drafted, developed, discussed and reformed the principles in a meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 November, 2006, which is unanimously adopted the Yogyakarta Principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. Yogyakarta Principles address a broad range of human rights standards and their application to issues of sexual orientation gender identity. Reference to few Yogyakarta Principles would be useful.*

23. *UN bodies, Regional Human Rights Bodies, National Courts, Government Commissions and the Commissions for Human Rights, Council of Europe, etc. have endorsed the Yogyakarta Principles and have considered them as an important tool for identifying the obligations of States to respect, protect and fulfill the human rights of all persons, regardless of their gender identity. United Nations Committee on Economic, Social and Cultural Rights in its Report of 2009 speaks of gender orientation and gender identity as follows:-*

"Sexual orientation and gender identity

'Other status' as recognized in article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination, for example, persons who are transgender, transsexual or intersex, often face serious human rights violations, such as harassment in schools or in the workplace."

24. *In this respect, reference may also be made to the General Comment No.2 of the Committee on Torture and Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 2008 and also the General Comment No.20 of the Committee on Elimination of Discrimination against Woman, responsible for the implementation of the Convention on the Elimination of All Forms of Discrimination against Woman, 1979 and 2010 report.*

33. Smt. Selvi and Ors. Vs. State of Karnataka: 66

The Supreme Court, in this case dealt with the question of legality of Polygraph test, Narco-analysis and Brain-mapping Test vis-a-vis Art. 20 (3) of the Constitution and observed thus:

196. *The appellants have also drawn our attention to some international conventions and declarations. For instance in the Universal Declaration of Human Rights [GA Res. 217 A (III) of December 10 1948], Article 5 states that:*

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Article 7 of the International Covenant on Civil and Political Rights (ICCPR) [GA Res. 2200A (XXI), entered into force on March 23, 1976] also touches on the same aspect. It reads as follows:

"...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."

Special emphasis was placed on the definitions of 'torture' as well as 'cruel, inhuman or degrading treatment or punishment' in Articles 1 and 16 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

Article 1

1. For the purposes of this Convention, torture means 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 person has committed or is suspected of having committed, or intimidating or coercing him or a third person, 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.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 16

1. Each State Party shall under take to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion.

197. We were also alerted to the Body of Principles for the Protection of all persons under any form of Detention or Imprisonment [GA Res. 43/173, 76th plenary meeting, 9 December, 1988] which have been adopted by the United Nations General Assembly. Principles 1, 6 and 21 hold relevance for us:

Principle 1

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Principle 6

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment:

The term 'cruel, inhuman or degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

Principle 21

1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

2. No detained person while being interrogated shall be subjected to violence, threats or methods of interrogation which impair his capacity of decision or judgment.

198. It was shown that protections against torture and 'cruel, inhuman or degrading treatment or punishment' are accorded to persons who are arrested or detained in the course of armed conflicts between nations. In the Geneva Convention relative to the Treatment of Prisoners of War (entry into force on 21 October, 1950) the relevant extract reads:

Article 17

... No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind....

36. State of West Bengal and another Vs. Kesoram Industries Ltd. And others: 68

In this case, the Supreme Court, adjudicating upon the constitutional validity of the cess on mineral rights levied by SADA Act, 1986, held that:

Interpretation In The Light Of International Treaties:

499. *It is true that the doctrine of 'Monism' as prevailing in the European countries does not prevail in India. The doctrine of 'Dualism' is applicable. But, where the municipal law does not limit the extent of the statute, even if India is not a signatory to the relevant International Treaty or Covenant, the Supreme Court in a large number of cases interpreted the statutes keeping in view the same.*

500. *A treaty entered in to by India cannot become law of the land and it cannot be implemented unless Parliament passes a law as required under Art.253.*

501. *The executive in India can enter into any Treaty be it bilateral or multilateral with any other country or countries.*

14. *The meaning and content of the fundamental rights guaranteed in the Constitution of India are of 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 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. The High Court of Australia in **Minister for Immigration and Ethnic Affairs v. Teoh** (128 Aus LR 353) has recognised the concept of legitimate expectation of its observance in the absence of a contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia."*

506. *In **Salomon v. Commissioner of Customs and Excise** (1966) 3 All ER 871, it was held that when the statute is in compliance with international conventions then it must be interpreted in conformity therewith.*

38. M/s Earth Builders, Bombay Vs. State of Maharashtra and others: 71

The inviolability conferred by Art. 31 of The Vienna Convention on Consular Relations, 1967 is not absolute immunity as the clause 1 of Art. 31 makes it clear that the consular premises shall be inviolable to the extent provided in that Article. The Supreme Court further held that:

19. *It is undoubtedly true that under Art. 31 of the Convention relating to Consular Relations, the Consular premises are inviolable. But there is a marked difference The inviolability conferred by Article 31 is not absolute immunity as the Clause 1 of Article 31 makes it clear that the Consul's premises shall be inviolable to the extent provided in that Article. Under Clause 4 the consular premises, their furnishings, the property of the consular-post and its means of transport are made immune from any form of requisition for the purpose of national defence or public utility. But the same clause further provides that if expropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions and prompt, adequate and effective compensation shall be paid to the sending State. We are not concerned with the exception based on national defence, but the question which requires determination is whether the acquisition of the property for the purposes of providing an access to the land-locked property and declaring such access as a public street can be said to be a public utility.*

Conclusion

According to Art 51 (c), one of the Directive Principles of State Policy, the state shall endeavour to foster respect for international law and treaty obligations in the dealings of organised peoples with one another. This means that though a treaty does not *ipso facto* become part of the municipal law in the absence of the implementing legislation, yet in case of unavoidable conflict with international law, the municipal courts would so interpret the rules of the municipal law that they would, if possible, not be inconsistent with those of the International Law. Here, it is to be seen that

the municipal courts are bound to apply the municipal law, but out of respect for international law and comity of nations, the municipal courts do it. Perhaps this attitude of the municipal courts reflects the underlying philosophy of world peace and security expressed by the Founding Fathers of the Indian Constitution. This is also in tune with our rich cultural and historical traditions. The Supreme Court has accepted and incorporated provisions of International Conventions ratified by India in a growing number of situations where domestic law was silent or ambiguous. Art 51 (c) does not deal with the enforcement or implementation of treaties. It is only the municipal law which binds the courts. An international covenant does not bind, unless municipal law is changed. However, the Supreme Court has referred to several international covenants while interpreting several fundamental rights. This Article has been relied upon to introduce and implement various international instruments, particularly the Declaration of Human Rights and the two covenants on the Political and Civil Rights and the Economic, Social and Cultural Rights in the interpretation of fundamental rights. The International Instruments to which India is a party become part of Indian law so long as they are not inconsistent with it and are relied upon and enforced. By showing adherence to International Conventions and Treaties, India has undoubtedly expressed her faith and commitment in the universal concepts of peace, justice and human rights.

Bibliography

1. Basu, Durga Das, *Commentary on the Constitution of India*, Vol.1, 9th Edition, Lexis Nexis, Gurgaon, Haryana, (2014)
2. Jain, M.P., *Indian Constitutional Law*, 7th Edition, Lexis Nexis, Gurgaon, Haryana, (2015).
3. Joshi, K.C, *International Law & Human Rights*, Second Edition, Eastern Book Company, Lucknow, 2012.
4. Shukla, V.N., *Constitution of India*, 12th Edition, Eastern Book Company, Lucknow, (2013).
5. Pylee, M.V., *Select Constitutions of the World*, 3rd Economy Edition, Universal Law Publishing Company, New Delhi, 2012.
6. *Constituent Assembly Debates*, Vol VIII, Sixth Reprint, Lok Sabha Secretariat, New Delhi, (2014).
7. Prasoorn, Prof. Shrikanth, "Chanakya, Rules of Governance by the Guru of Governance", V&S Publishers, New Delhi, (2011).

References:

1. Gramophone Co. Vs. Birendra, AIR 1984 SC667 (paras 5-6) cited in Durga Das Basu, "Commentaries on the Constitution of India", 309 Vol. 1, 9th edition, Lexis Nexis, Gurgaon, Haryana, 2014.
2. Kubic Daricoz Vs. Union of India, AIR 1990 SC 605, cited in Durga Das Basu, "Commentary on the Constitution of India", 309 Vol.1.
3. Apparel Export Promotion Council Vs. A.K. Chopra, AIR 1999 SC 625 cited in Durga Das Basu, "The commentary on the Constitution of India", Vol. 1, P. 309.
4. Prem Shankar Shukla Vs. Delhi Administration, AIR 1980 SC 1535 cited in V.N. Shukla's "Constitution of India", p. 385, 12th edition, Eastern Book Company, Lucknow, 2013.
5. M.P. Jain, "Indian Constitutional Law", 1440, 7th edition, Lexis Nexis, Gurgaon, Haryana, 2015.
6. K.C. Joshi, "International Law & Human Rights", 18, Second edition, Eastern Book Company, Lucknow, 2012.
7. Prof. Shrikanth Prasoorn, "Chanakya, Rules of Governance" by the Guru of Governance, 175, 176, V&S Publishers, New Delhi, 2011.
8. In Special Reference Case 1 of 2002, S.C. under 143 (1) of the Constitution.
9. *Constituent Assembly Debates*, Vol. VII, pp. 595 to 606, Sixth Reprint, Lok Sabha Secretariat, New Delhi, 2014.
10. U.S. Vs. Schooner (1801) 1 Cr103; Head Money Cases, (1884) 112 US 580 (598) cited in Durga Das Basu, "Commentary on the Constitution of India" 309, Vol.1, 9th edition, Lexis Nexis, Gurgaon, Haryana, 2014.
11. Ibid

12. Cited in Durga Das Basu, "Commentary on the Constitution of India" 309, Vol.1, 9th edition, Lexis Nexis, Gurgaon, Haryana, 2014.
 13. M.V. Pylee, "Constitutions of the World," 176, 3rd Economy Edition, Universal Law Publishing Company, New Delhi, 2012.
 14. M.V. Pylee, "Select Constitutions of the world", p. 196, 3rd Economy Edition, Universal Law Publishing Company, New Delhi, 2012.
 15. Ibid, p. 244.
 16. Ibid, p.396
 17. M.V.Pylee, "Select Constitutions of the World", 557, 3rd Economy Edition, Universal Law Publishing Company, New Delhi, 2012.
 18. AIR 1973 SC 1461, cited in Durga Das Basu, "Commentary on the Constitution of India", 309-310, Vol. 1, 9th edition, Lexis Nexis, Gurgaon, Haryana, 2014.
 19. Pratap Singh Vs. State of Jharkhand, AIR 2005 SC 2731, Ibid.
 20. Javed Abidi Vs. Union of India, AIR 1999 SC 512, cited in Durga Das Basu, "Commentary on the Constitution of India", 309-310, Vol. 1, 9th edition, Lexis Nexis, Gurgaon, Haryana, 2014.
 21. AIR 1976 SC 1207, cited in M.P. Jain, Indian Constitutional Law, 1440, 7th edition, Lexis Nexis, Gurgaon, Haryana, 2015. AIR 2005 SC 1646, cited in M.P.Jain, Indian Constitutional Law, p.1440.
 22. M.H. Hoskot Vs. State of Maharashtra, AIR 1978 SC 1548 cited in Durga Das Basu, "Commentary on the Constitution of India", 311, Vol. 1, 9th edition, Lexis Nexis, Gurgaon, Haryana, 2014.
 23. AIR 1996 SC 1864, Ibid.
 24. AIR 2000 SC 988, Ibid, p. 310.
 25. Jolly George Varghese Vs. Bank of Cochin, AIR 1980 SC 470, cited in M.P. Jain, Indian Constitutional Law, p. 1440., 7th edition, Lexis Nexis, Gurgaon, Haryana, 2015.
 26. AIR 1997 SC 568, Ibid..
 27. AIR 1997 SC at 575, Ibid, p. 1441.
 28. State of W.B. Vs. Kesoram Industries Ltd. and Ors : Kuldip Nayar vs Union of India AIR 2006 SC 3127 cited in M.P. Jain, Indian Constitutional Law, p. 1440, 7th edition, Lexis Nexis, Gurgaon, Haryana, 2015.
 29. Apparel Export Promotion Council Vs. A.K. Chopra (1999) 1 SCC 759(SCC) 759 cited in Durga Das Basu, Commentary on the Constitution of India, . 311, Vol. I, 9th edition, Lexis Nexis, Gurgaon, Haryana, 2014.
 30. (1861) 30 LJ CH 379, pp. 380, 381, Ibid.
 31. A passage from Crawford: Statutory construction, p. 516 approved in State of U.P. Vs. Manbodhan Lal Srivastava, AIR 1957 SC 912, 918, cited in Durga Das Basu, Commentary on the Constitution of India, Vol. I, p. 311.
 33. 2015 (1)SCC 219
 34. (1996) 3 SCC 545
 35. 2015SCConlineSC609
 36. AIR 1980 SC 470
 37. AIR 2000 S.C. 1274
 38. AIR 1978 S.C. 1548
 39. AIR 2011 S.C. 2649
 40. AIR 1999 SC 1149
 41. AIR 1993 SC 1960
 42. AIR 1997 S.C. 3011
 43. AIR 2003 SC 2902
 44. AIR 1999 SC 625
 45. AIR 1980 SC 1535
 46. AIR 1984 SC 667
 47. AIR 1987 SC 656
 48. AIR 1990 SC 605
 49. AIR 2005 SC 2731
 50. AIR 1997 SC 610
 51. AIR 1996 SC 1864
 52. AIR 2000 S.C. 988
 53. AIR 1999 S.C. 812
 54. AIR 1988 H.P. 4
 55. AIR 1990 S.C. 1480
 56. AIR 1986 Kerala256
 56. AIR 1994 Kerala308
 58. AIR 98Andhra Pradesh 171
 59. AIR 2001 S.C.1716
 60. AIR 1954 Calcutta 591
 61. AIR 1996 SC 2715
 62. (2011)11SCC214
 63. AIR 2004 S.C. 1107
 64. AIR 2014 SC 1863
 65. AIR 1993 S.C. 1014
 66. AIR 2010 S.C. 1974
 67. (2008) 11SCC 439
 68. AIR 2005 SC 1646
 69. (2012) 4 SCC 362
 70. (2005) 2 SCC 436
 71. AIR 1997 Bombay 148
 72. (2009) 9 SCC 551
-