CHAPTER VII

CONCLUSIONS AND SUGGESTIONS
One can safely conclude that it is not feasible for any State to remain insulated from the effects of the developments unfolding around the world. This is more so in the case of developments in the area of human rights, as these rights are solemn and inherently benign. The winds of change have swept across the international community so as to prod them to set standards for individual countries to follow. Though initially it was only mass denigrations of rights that attracted attention of the world community, it was realised pretty early in the last century that mass violation of human rights are a compounding finale of individual violations. The community understood that unless and until it was ensured that an individual’s rights are protected within the respective systems where he lives, it would not be possible to totally ensure non repetition of the catastrophes witnessed in the first half of the last century.

It is this realisation that prompted the world community to set up organs like the League of Nations and later the United Nations. The immediate object of these supranational bodies was to initiate steps to identify, recognise and declare the inviolable rights of a human being. And lo, when it came to implementation, the hitherto experienced theoretical predicaments came to the fore.

Characteristically, the States either refused to recognise the possibility of a world order or stuck to the theory of dualism on the strength of the concept of sovereignty. Hardly any State adhered to the principle of monism, and if at all they did, as in the case of United States when it formulated its Constitution, was due to historical necessities. Of course, in those days world order was not even worth the name and, therefore, it could easily be accommodated for their nationalist gains. Dualism or monism, it is a fact that cannot be ignored that there is an international community and there is an earnest effort to set up a world order. The concept of sovereignty has become diffuse from the times democracy took over as the form of government in many States. As a necessary corollary, the standing of an individual within the international community has
also undergone a sea change. Earlier, when the concept of sovereignty was reigning supreme, only a State and its sovereign were considered as subjects proper of the international relations. One might even say that it is these individual rights that have got predominance now and the recognition of States is relatable to protection of such rights.

Historically, the empowerment of a sovereign during the development of a society can be seen as a centralisation of authority. Over a period of time, the sovereign was bestowed with the authority to enact laws to bind members of a given society, imputably by way of social contract. Within some of the modern States, we can see a similar centralisation of some of the powers in a federalist structure. Having this in mind, if we look at the world as a society today, we can find a definite centralisation of a ‘quasi authoritative’ power on certain bodies to lay down norms for the States to follow. This can be termed as the initial developments towards setting up of a world order.

This work has referred to international norms rather than international law in its strict sense. International law, as we have seen, does not have a single dimension. The employment of the term ‘norms’ can safely accommodate all its dimensions. Moreover, the concept of norms is more acceptable being less intrusive to the municipal law. As noted in the study, the international norms can take the shape of conventions, declarations, protocols, resolutions, principles, codes, covenants, guidelines, standards and the like. These may be generated by the recognised international bodies or even by the other organisations. Of course, the sanctity attached to each may differ depending upon the source and/or the response of the States and even upon the subject matter.

In the recent past, human rights norms have been generated at a brisk pace. This is one area that affects sovereignty to the core. It imposes positive obligations on the States to protect individuals and negative obligation by prohibiting violation of human rights by the State organs.
We have seen that the creation of norms is not confined to treaties. Treaties, of course, are the major mode of such creation, since they impose direct contractual obligation. If it is a multilateral treaty, the obligations are undertaken by acceding to the treaty and its ratification. Norms created otherwise than by a treaty are the first steps towards the formal acceptance of the same by the world community, possibly at a later date. However, merely because the form or the source of norms is not the traditionally recognised one does not mean that such norms do not have sanctity. In fact, many States, as we learnt, prefer to show ready adherence to this soft law since its obligations are not burdensome as that of treaties and it facilitates a smooth transition from the existing to the expected standards.

Customary practices of States have also been a source of norms. This was initially thought to be confined to the relations among States. However, there cannot be any theoretical objection to extension of the same to areas like human rights. They can be seen in the response of States to adherence to the reporting procedures to organisations like the United Nations or the Committees under them. Similarly, it is also argued by some that certain human rights protection has become part of customary practices and, therefore, irrespective of whether a State adheres to a treaty or not, it is bound to oblige to such norms.

When it comes to implementation, probably because of the diverse points of view prevalent among States, the international community has not yet been able to evolve any specific procedure for the same. The problem of varying characteristics of the norms, as mentioned earlier, is the major hindrance to any such attempt. Wisely for now, the community has left it to the States to decide the question till a pan world acceptable procedure can be agreed upon. In a sense, this has pushed back the theory to that supremacy of sovereign. But, of course, as mentioned earlier, the sovereign, whichever form it be, is considerably influenced by the developments around it. The approaches of individual countries had to be deciphered from the system prevalent in each State.
To begin with, as we understood the common law position as followed in the United Kingdom and most of its erstwhile colonies are that sovereign is supreme and it is left to decide the question of implementation of obligations at the international level. When the question comes to the courts, it developed the principle that the sovereign is presumed not to intend to violate such obligations. Thereby the courts take the freedom to choose an interpretation of domestic law provision that is in consonance with such international obligations. But, if the sovereign has categorically refused to comply with the same, the courts have held that there must necessarily be adherence only to domestic law. In the United Kingdom itself, however, the passing of the Human Rights Act 1998 has ensured that the legislature ensures compliance with the standards set by the European Convention on Human Rights. By virtue of the Act, though it is only the superior courts that have been conferred with the power to declare incompatibility of a given provision with a Convention right, interpretations have given a larger role to lower courts also in implementation.

The socialist viewpoint has always been that international norms are just a reflection of the municipal law and that municipal law, as ideally envisaged by the socialist, would not require a refinement through international obligations mechanism.

The immediate past has witnessed, in relation to supranational bodies, a tremendous development in the continent of Europe as a follow up of the European Conventions on Human Rights. It is interesting to observe that within the comparatively small continent a variety of systems are prevalent and what is being attempted is uniformity among this diversity. But then, it is realised that each system takes a different route to reach the ultimate goal, which is common, protection of the basic rights of man. The recognition of this truth has enabled these countries to subscribe to the ECHR and compliance with its standards.

Unlike others, countries with written constitutions have something to refer to initially. Their approach is to be understood by looking at the constitutional provisions and the sanctity they attach to international obligations.
In the study relating to provisions in constitutions referring to international dimensions of law, all possible permutations could be seen. Some countries, especially in the European continent, have given a complete supremacy to the principles laid down by the ECHR even in the process making the domestic law subservient to the same. Countries like Croatia, Cyprus, Czech Republic, Greece, Portugal and Russian Federation consider the international norms to have direct application with precedence over domestic law. While some like Belgium and Spain recognise that some constitutional provisions may hinder implementation of international standards. The latter, therefore, require their national legislative bodies to amend their national law so as to facilitate consonance with international standards. Almost all countries give predominance to international norms that have been set by respective international bodies dealing with human rights. There are exceptions like that of Israel and Italy who have made little attempt to bind themselves to anything at all.

The US position, as we understand, has been taking a reverse direction to that of the dominant set of countries. The US purports to play a global policing role in the matter of human rights, directly linking economic and commercial activities of the needy states to their human rights record. However, when it comes to their own backyard, it is a paradox. The constitution makers had given predominance to treaty obligations in the peculiar circumstances that existed at the time of its adoption. While reserving residuary powers to the states, it had empowered the federal government to implement laws in tune with international obligations without any hindrance from federalist demarcations. As our study reveals, this has led to a constant tussle between different interest groups in the US ultimately resulting in a situation where most of the international documents are acceded to with a set of reservations, understandings, and declarations. These prohibit implementation of norms effectively so much so that ratification of any document with these is as good as no ratification at all. Of course, the present international institutional structures do not provide any scope for
countries with lower share of contribution to the budget of these international bodies to make constructive criticism of the powerful.

The Indian scenario is more comfortable due to the strong empowerment of the centre vis-à-vis the states. But, though enabling provisions are there, there is no action to follow it up. We do not have the complications of the US in terms of confrontation between the centre and the states. However, except for a handful of legislation, not much has been enacted for the specific purpose of implementation of international norms on human rights. There are quite a few that have been necessitated in the area of trade law where, due to international pressure we have fallen in line. On criminal justice administration aspects, probably only juvenile justice and probation stand out as having a conspicuous link to developments at the international level. Even if any other human rights aspects have any relevance, the legislature refuses to recognise its significance. There is, therefore, not much to link any enactment as a direct consequence of implementation of international norms.

Be it India or elsewhere, the law in action can be understood only by the judgment of the courts. The courts in the United States have swung between different views on recognition of international norms depending upon the mood of the administration of the day. While in the initial days of the Constitution, it gave interpretations taking note of the international developments through its constitutional provisions, lately it has also been giving undue credence to the reservations attached to by the executive or the legislature. It has managed adherence to such standards to a large extent by interpreting the provisions of the Constitution, and more particularly the amendments thereto, which have conferred similar rights upon the people. As we have seen, there is also an allegation that the US Supreme Court is harsh when it comes to federal interference in state matters whereas while the same is done at the instance of an international obligation, they are unduly lenient in recognising its constitutionality, which is a cause of worry for those favouring strong states.
The constitution makers of South Africa recently considered it more appropriate to leave certain matters to the courts while charting out the rights under their constitution. They went to the extent of getting the approval of courts to the document before adopting the same. As a special mention on criminal justice administration, it left the important question of the abolition of death penalty for the courts to decide and immediately the highest court of the land did declare death penalty to be unconstitutional.

Again a definite role for the courts, both municipal and supranational, can be seen in the context of the European Convention on Human Rights. The European Court of Justice has been in the forefront of rapping municipal law to bring them in tune with the obligations under the ECHR. The Court has recognised the principles of supremacy and direct effect of the European Convention rights thereby to a great extent bypassing the municipal laws. The national courts within the Community also have been following suit, though in some systems they did so reluctantly to begin with. Some of the municipal courts have recognised the principle that granting of legislative powers to supranational bodies is not a transfer of sovereignty to such bodies, but, in a sense, delegation of such power to such bodies by exercise of sovereign authority. A leaf can be taken out from this to bring about recognition of international organs, and acceptability of norms generated at this level, by the municipal systems around the world.

In India, the courts followed the British policy of incorporation and interpretation favouring adherence to international norms where not specifically denounced. Lately, however, the Supreme Court has been vibrant in accepting that international norms can be recognised on their own standing in tune with the protection envisaged under the Constitution. Earlier, due to the fact that our Constitution drafters were working in the light of international developments culminating in the Universal Declaration of Human Rights of 1948, the courts felt that, for us, the constitutional provisions takes care of what is sought to be protected by the international norms. It being true, as seen from the debates in
the Constituent Assembly. It shows us as to how we understood the various provisions, especially the fundamental rights, as adopted by our Constitution. Later, however the courts have been more forthright in drawing inspiration and strength from the international norms directly rather than looking at them through the glasses of the various articles in the Constitution. This has been magnanimously done in the context of recognition of violation of human rights in the post Maneka scenario. The major chunk of them has been in the area of criminal justice administration to which the study is confined.

In the light of the international norms, the courts in India have held that the human rights are available to all people. The initial rub for an individual alleged to have violated the criminal law comes at the stage of arrest and detention. This is one area that has caught the attention of the courts due to the instances of flagrant violations by the law enforcement authorities. Irrespective of the culpability of the persons or availability of evidence, it was customary for such authorities to pick up a person in the name of interrogation. The definite purposes for which arrest could be made have been repeatedly reiterated by the Supreme Court lately. It was necessitated for the reason that custodial violence reached its peak. The worsening situation of the law and order problem in the country had ensured that public opinion against such excesses by authorities was muted in the name of security and safety of citizens. The problem of terrorism and the damage they caused had to a certain extent justified the actions of the law enforcement authorities at least in areas infested with such violators of law. However, experience has shown that, along with the so called dreaded terrorists, the innocent were also at times at the receiving end. This has prompted the courts to step in and ensure that sense prevails in dealing with such situations. It is interesting to note that the international norms laid for the protection of those facing detention have been totally accepted and reinforced by the Supreme Court in the area. Almost all the rights protected under the international norms have been referred to by the Apex Court as forming part of Article 21 of the Constitution of India. The fact that preventive detention ought to be resorted to
for the specific cases covered under the provisions and the protection extended under the Constitution and the statutes have been required to be scrupulously guarded. Though specific legislation to deal with some of the grave offences affecting the public like terrorism have made some deviations from the normal course expected, the courts have for now considered them to be a necessary power. However, it may be safely noted that as and when the situation would so require the courts would come to the rescue of those oppressed by such laws. Probably, the other organs of the state being more privy to the requirements of the situation, the courts have for now refused to strike down some of the provisions on the ground that a mere possibility of abuse cannot be taken as a justification for striking down of such provisions. In the process, we have also seen that, within the legislative framework, the courts have been requiring safety measures to ensure that the grasp of law does not violate the human rights of persons. It ought to be said that the courts have been trying to strike a delicate balance between the rights of the individual and the collective rights of the citizens as protected by the State.

In the other areas like investigation, the general law, in tune with the adversarial traditions, have always taken the pro accused stand. The study makes reference to the deviation from the general law in the special enactments. The same have been upheld for the reasons similar to stated above. However, it may be worthwhile to consider whether we fail in ensuring full compliance with the international obligations when it comes to such laws. It is true that there are built in safeguards in the statute as well as courts to oversee any violations, it would be necessary that these safeguards are embedded in the system itself to guarantee such rights without requiring a declaration from the court to that effect. A case in point is the situation of enforced disappearances during this stage. Whenever such an event is brought to the notice of the courts, which may not be the case always, the courts have been ordering compensation to be paid. Primarily, it would be duty of the State that, in accordance with the international norms, steps are taken to ensure that these criminal acts are not resorted to by the
law enforcement agencies and where a violation is seen exemplary punishment is ensured after a proper investigation and fixing of responsibility.

On the question of self incrimination, we have always taken the position that this constitutional right does not extend to the incidental areas of being asked to give evidence and also in quasi criminal liabilities. It would require us to see if this would be a deviation from the accepted principles in the international norms. But the trend supposed to be shown by the Malimath Committee is in the entirely opposite direction. It is doubtful if such a drastic change would be in tune with the international norms, as we have seen.

We have always considered extra judicial confession to have the potential for abuse and have treated them to be unacceptable. The provisions in the relevant statutes have also clearly defined certain obligations on the judicial officers to ensure that the mode and content of such confessions do not give scope for these getting vitiated. It is only in the recent special legislations that we find a departure from the general provision. The paucity of evidence in such matters has driven the legislature to lay down such law and it has been recognised by the Apex Court to be again a necessity of the circumstances. The court has given certain safeguards to ensure that such powers may not be abused. However, it may require a couple of years experience to see if they have the desired effect. The provisions are, however, not exactly in tune with the requirements of international norms.

On the matters like search, bail and handcuffing, being resorted in the pretrial stage, the courts, especially the Supreme Court has been very harsh on coming down upon the authorities. It has laid down guidelines to be followed which are more in tune with the international norms. Right to counsel has been read into Article 21 prompting even an amendment to declare it as a constitutional right. The right to counsel would have to be made meaningful and complete by ensuring it in all cases including grave offences, even at the expense of the State, for the standards of international norms to be achieved. This is one
area that should not be allowed to be compromised with since, on it hinges the basic rights of a human being.

On the aspect of trial, in the recent past due to the intense pressure on the prosecuting agencies, the principles of burden of proof and presumption of innocence have been alleged to be a nemesis for them in ensuring convictions. In the light of the same, an argument is doing the rounds, as evidenced in the Malimath Committee recommendations, that these cardinal principles should be revisited and seen if they have to be standardised in accordance with the purported needs of the society that the guilty ought to be punished. It has to be pointed out that this would be a drastic deviation from the rights recognised by the international norms and protected under the Constitution of India. The concept of mens rea itself has been attempted to be strained beyond a certain limit and the courts have found it necessary to interfere to set things in course.

The international norms expect the judiciary and the participants in the criminal justice administration to play a constructive role in the area. The independence of the judiciary has been ensured by the constitutional and statutory provisions. In the light of the same, it may not require an overhauling of this area for the purpose of compliance with the international norms. However, it may become necessary that the judiciary and the other players are properly told of the roles expected of them.

On the principles of ex post facto laws and double jeopardy, being recognised as constitutional protection, we are on the right side of international norms. Our experiments with juvenile justice administration have borne fruit. It is encouraging to find that the process of refinement continues. Similarly, speedy trial, after being recognised as a facet of Article 21, has also attained an important status. We need to consolidate on the same and take necessary procedural corrections to ensure that they become meaningful. The relaxation of concept of locus standi in criminal justice administration has to a large extent ensured that the voices of the poor and downtrodden have been taken to the highest courts of the land.
We are similarly on track with the international norms on another facet of proper administration of criminal justice with the idea of witness protection gaining attention. As seen, even the Law Commission has come out with a consultation paper as a first step towards the integration of the same to the law of the land. The objections raised hitherto of the administrative hindrances would soon lose their relevance if the matter is pursued in right earnest as is being done now. We are sure that we would be in a position to strike a balance between the interests to be protected here with that of the interest of the accused. The trial stage has by and large ensured that the present position is largely in consonance with the requirements with the international norms.

It is in the post trial stage that some of the major corrections have taken place. Though this has not always been referred to the right under the international norms, lately there has been a conscious attempt to fortify the same with benefit from such norms. Though we cannot boast of any sentencing policy, the courts have been formulating a definite practice on its own. The legislative requirement of pre sentence hearing and the recognition of its importance by the courts have ensured that the international opinions on criminal reformation and rehabilitation have been given a new meaning. But, as we have seen in the area of propriety of death penalty, the debates continue. As we have observed, there is a conscious attempt to strike a balance to ensure that the right of human beings are given their due recognition. The rights of prisoners have been the subject of some serious inspection by the Supreme Court in the post Maneka era. Their human rights are assuredly under a better protection now what with the courts’ brooding omnipresence in supervising the executive’s exercise of power.

There is, however, a lot to be done in the area of developing non custodial measure that are recognised by the international community as alternatives to conventional punishment favouring a smooth reintegration of a deviant to the society. Though some of them were attempted the last time a comprehensive re-
enactment of the Penal Code was attempted, it requires a fresh look now in the light of the recommendations in the international norms.

Recently, the Malimath Committee has given a great attention to the aspect of justice to victims. It may be worthwhile to examine necessity of institutional structures to ensure the same as observed therein. At present, the system lacks a policy in the matter and it is left to the individual cases to be decided by the courts.

In the light of the above study some humble suggestions in the area of criminal justice administration may not be out of place:

At the international level -

- The international community should ensure greater participation of States in the formulation of norms that take care of the individual needs of respective countries, maintaining uniformity in diversity;
- The international community should strive to ensure acceptability of the international norms by educating the States of the values it tries to inculcate;
- For the purpose, it should give greater space for participation and opinion creation by the States with their individual concerns being addressed to and not being trodden over;
- The manner of creation of internationally acceptable norms, and the sources, should be identified with the participation and consent of the States;
- Once it is done, the acceptability of the same should be ensured by requiring a framework to be worked out for its implementation;
- Regional standardisation should be attempted first since it would be easier to gain acceptance of the norms created therein;
- A supranational court, probably with compulsory advisory jurisdiction, should be attempted as a beginning;
The courts, both supranational and municipal, should be recognised as major centres for implementation of such norms as they are concerned with the law in action;

The international norms should be considered at par, if not superior, and must be given direct effect without waiting for any legislation by the municipal legislature;

The complaint procedure, at the international level, ought to be recognised to ensure that the States comply with these norms;

A comprehensive review should be had of the existing structures.

At the national level –

The country should have a policy evidencing its attitude towards the international norms;

The fact as to whether the country has accepted most of the norms either directly or indirectly in its constitution, which should be clarified in such a policy;

The participation of the country in such international bodies for the purpose of norms creation should be prefaced with necessary consultations at the national and regional levels;

Rather than leaving it for the courts to go for piecemeal implementation of the norms on a case by case basis, there must be comprehensive attempt to delineate the rights and protections recognised by us;

The authorities must be educated about the values of human rights norms and their importance for the State;

In the light of the decisions of the courts, it must be considered as to whether legislation would be required in such areas to specifically codify the rights that have been identified;
The rules and regulations to be followed by the law enforcement agencies ought to be codified and any violations should be dealt with seriously by prescribing severe penalties for the same;

Rules of practice should be formulated by the State for the authorities to refer to and follow;

The inherent laches in the system should be adequately addressed by remedial measures;

A policy of witness protection ought to be formulated and it must be ensured that the law is concerned about proper criminal justice administration from the other side of the spectrum lest the society should lose its faith in the system;

A thorough overhauling of the codes in the area of criminal law ought to be made to reflect the changing position as far as accused's rights and the rights of others involved in the process are concerned;

A sentencing policy and the guidelines for the same ought to be formulated with just desserts reflecting the gravity of the crime;

Non custodial measures ought to be given due importance and statutorily recognised as a measure of reformation and rehabilitation of offenders;

There must be a policy on compensation as a remedy, as recognised by the courts rather than leave it for piecemeal considerations; it should reflect various aspects including the gravity of the offence, the position of the accused, the state of the victim or his/her family and the failure of the State in protecting his/her rights;

As suggested already, a fund should be created to take care of the needs of the victims so that it does not depend upon the paying capacity of the convict;

All in all a thorough reconsideration of the legal position would have to be made to ensure compliance with the international norms.