CHAPTER – III

ROLE OF COURTS IN THE IMPLEMENTATION OF INTERNATIONAL NORMS
Courts of justice are more likely to respect international law than either the legislature or the executive. Consequently, States which authorise their courts to apply customary international law and treaty provisions directly are more likely to meet their international responsibilities promptly than are states whose courts are confined to national codes. This may not be always true since even if the States authorise, the courts may also be reluctant to deviate from the conventions that they have been following.

It is argued that the device of relating international law in general (or some part of it) to municipal law through express wordings in Constitution or other basic documents, by whatever name called, does not relieve tribunals or legislature from the continuing task of determining what the rules of international law are.

At the supranational level, in the European community system, the European Court has been attempting to establish a distinctive identity. The national courts in the European Community are to apply the Treaty under the general supervision of the European Court. Thus, the monistic identity of the community system is asserted at the expense of international law, which is implicitly characterised by some as dualistic.

It is said that the judgments of the Inter American Court of Human Rights in the late 1980s, exposing the heinous practice of disappearances for all world to see, opened the way for the Court and the Inter American Commission on

Prof. Karl Zemanek points out that domestic court may play a role in ‘transferring abrogation convention and other multilateral law making treaties into customary law by applying in non-party states’ - quoted in Quincy Wright, “International Law in its Relation to Constitutional Law”, 17 Am. J. Int’l. L. 234 (1923)


human Rights to play a much more active role in protecting human rights in the Americas.6

The place of international law in municipal court case is said to “lead a quiet and often unnoticed revolution in the nature and content of international law. It means that the strictly dualistic view of relationship between international law and municipal law is becoming less serviceable and the old well-defined boundaries between public international law, private international law and municipal law are no longer boundaries but grey areas.”7

Many international norms are advised to be considered unenforceable by the Courts since they do not set forth sufficiently determinate standards for evaluating the conduct of the parties and their attendant rights and liabilities. But then, though vagueness is relevant to its direct judicial enforceability, it may be considered similar to the vagueness in some of the constitutional and statutory provisions. There may be imprecise treaty provisions that the judicial branch is well suited to enforce directly. For example, the ‘vagueness’ of the Due Process and Equal Protection Clauses of the US Constitution is not thought to render them judicially unenforceable. Or the ambit of Articles 14 and 21 is confined to the literal implication of the same but is wantonly construed in a way and necessarily in a vague manner so as to encompass rights not originally contemplated by the forefathers. Thus, although relevant, the vagueness of a treaty provision is not necessarily dispositive of its direct judicial enforceability.8

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In many states international law is a neglected subject, one practical reason for this fact being that the act of transforming a treaty can often, if not conceal the international origin of a statutory provision, at least reduce the significance of this. A common complaint of all international lawyers is the ignorance, timidity, or even hostility the national courts show towards arguments based on international law, whether it is proving the existence of a rule of custom, interpreting an incorporated treaty or attempting to rely upon a provision of an unincorporated treaty to interpret national law. The domestic laws often miss relevant international law material when they decide cases, or if it is brought to their attention, play down its importance.9

The concept of universal jurisdiction is still far from the imagination of most of the judges. Normally, judges of our legal tradition demand a legislative or established common law foundation for the exercise of jurisdiction over a person whose criminal acts are alleged to have been committed in another country. At the most the notion of universal jurisdiction has constituted a minority opinion10 or commented upon sympathetically.11

It is argued that the Pinochet case12 is a landmark one on the point that it emphasises the role of national courts even for the prosecution of the most serious international crimes.13 The Statute of the International Criminal Court

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10 R v Bow Street Stipендary Magistrate and others; Ex parte Pinochet Ugarte [No. 3], (1999) WLR 827 per Lord Millett
12 Supra n. 10
The jurisdiction of the ICC is not contemplated to be hierarchically superior to the national courts. This is said to reflect a desire to maintain a degree of respect for traditional sovereignty with the ICC playing a residual role serving as a long stop in the event that justice is inadequately dispensed at the national level.

Ironically, the time has come for the development of an International Code of Judicial Conduct that could be adopted as an international standard to promote judicial propriety, to provide transparent rules, to stimulate effective accountability and to uphold a common standard of conduct of judges in all parts of the world.

India

Though powers have been evidently granted to the executive, there is no mention as to how the courts in the country are to treat the international instruments while deciding cases by interpreting various statutes, and in the absence of any particular statutes conferring rights and obligations, by way of Constitutional interpretations. The approaches of the courts have to be ascertained from practice.

While the Constitution envisaged no active role for the courts in implementing the treaties, occasions arose frequently when the courts had to deal with the question of relating the international norms with the municipal laws while interpreting the latter. In the absence of clear guidelines, the courts could not achieve uniformity or rationality in this area. This becomes evident from an analysis of the decisions rendered by our courts during the last decades. It is said that the International Treaties and Covenants have been used by the Courts

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1 The Preamble emphasises that the ICC established under the Statute shall be complimentary to national criminal jurisdiction
2 id., 75
3 Bangalore Principles 2001. The principles include propriety, independence, integrity, impartiality, equality, competence, diligence and accountability
In India - to fill a gap in the law; as a means of interpretation; to justify and fortify a stance taken; to implement international conventions when they are not in conflict with the existing laws; to fulfil the spirit of the Conventions and Treaties; and to interpret the law so as to reflect international changes.¹⁷

In *Birma v. State*,¹⁸ the Rajasthan High Court was considering whether a treaty between the British Government and the princely State of Dholapur, which was not given effect to by means of legislative enactment, could be regarded as part of the municipal law of the then Dholapur State. The Rajasthan High Court held that treaties, which are part of the international law, do not form part of the law of the land unless expressly made so by the legislative authority.

In *Maganbhai Ishwarbhai Patel v. Union of India and another*,¹⁹ Justice Hidayatullah C.J. at the Supreme Court, delivering the judgment on behalf of himself and four others, held that a treaty really concerned the political rather than the judicial wing of the state. He relied on the practice of the British government and gave interpretation of the constitutional provisions accordingly. According to him, in United Kingdom, the concurrence of the Parliament must always be obtained except in a very small number of cases. Although the practice since 1924 is to submit treaties to Parliament, there have been in the past numerous instances of the treaties implemented by the Crown without reference to Parliament. These exemptions were connected with circumstances of convenience and public policy in England. The question is one of domestic as well as international law. The Constitution did not include any clear direction about treaties such as is to be found in the United States of America and the French Constitution. Shah J., in his separate but concurrent opinion, stated thus - our Constitution makes no provision making legislation a condition of the entry into an international treaty in times either of war or peace. The executive power of the Union is vested in the President and is exercisable in accordance

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¹ Justice S. B. Sinha, "A Contextualised Look at the Application of International Law - The Indian Approach", AIR 2004 (J) 33, 37
² AIR 1951 Raj. 127, DB
³ AIR 1969 SC 783
with the Constitution. The executive is *qua* the State competent to represent the State in all matters international and may by agreement, convention or treaties incur obligation which in international law are binding upon the State. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with Parliament under Entries 10 and 14 of List I of the VII Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the laws of the State. If the rights of the citizens or others, which are justiciable, are not affected, no legislative measure is needed to give effect to the agreement or treaty.

As regards the argument that power to make treaty or to implement treaty, agreement or convention with a foreign State can only be exercised under authority of law, according to him, it proceeds on a misreading of Article 253. He added that the effect of Article 253 is that if a treaty, agreement or convention with a foreign State deals with a subject within the competence of State legislature, the Parliament has, notwithstanding Article 246(3), the power to make laws to implement the treaty, agreement or convention or any decision made at any international conference, association or other body. In terms, the Article deals with legislative power: thereby power is conferred upon the Parliament, which it may not otherwise possess but does not seek to circumscribe the extent of the power conferred by Article 73. If, in consequence of the exercise of executive power, rights of the citizens or others are restricted or infringed, or laws are modified, the exercise of power must be supported by legislation: where there is no such restriction, infringement of the right or modification of the laws, the executive is competent to exercise the power.

Probably the position was clarified a little better in *M/s. V/o. Tractorexport, Moscow v. M/s Tarapore and Co. Madras* where it was held

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1 AIR 1971 SC 1
that, in this country, as is the case in England, the treaty or International Protocol or convention does not become effective or operative of its own force as in some of the continental countries unless domestic legislation has been introduced to attain a specified result. Once, the Parliament has legislated, the court must first look at the legislation and construe the language employed in it. If the terms of the legislative enactment do not suffer from any ambiguity or lack of clarity they must be given effect to even if they do not carry out the treaty obligations. But the treaty or the protocol or the convention becomes important if the meaning of the expressions used by the Parliament is not clear and can be construed in more than one way. The reason is that if one of the meanings which can be properly ascribed is in consonance with the treaty obligations and the other meaning is not so consonant, the meaning which is consonant is to be preferred. Even where an Act had been passed to give effect to the convention which was scheduled to it, the words employed in the Act had to be interpreted in the well established sense which they had municipal law. It observed that is aware of no rule of interpretation by which rank ambiguity can be first introduced by giving certain expressions a particular meaning and then an attempt can be made to emerge out of semantic confusion and obscurity by having resort to the presumed intention of the legislature to give effect to international obligations. Once the legislature has expressed its intention in words which have a clear signification and meaning, the courts are precluded from speculating about the reasons for not effectuating the purpose underlying the protocol and the conventions. Speaking in minority, Ramaswami J. held that, as far as practicable, the municipal law must be interpreted by the courts in conformity with international obligations which the law may seek to effectuate. It is well settled that if the language of a section is ambiguous or is capable of more than one meaning the protocol itself becomes relevant for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including specific treaty obligations. He quotes the words of Lord Diplock –
"If the terms of the legislation are clear and unambiguous they must be given effect to whether or not they carry out Her Majesty's treaty obligations for the sovereign power of the Queen in Parliament extends to breaking treaties and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty's own courts. If the terms of the legislation are not clear, however, but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred. Thus, in case of lack of clarity in the words used in the legislation, the terms of the treaty are relevant to enable the court to make its choice between the possible meanings of these words by applying this presumption."21

Ramaswami J. held that the relevant section must be read in consonance with the international obligation and any interpretation of the same, which would restrict the obligation or impose a refinement not warranted by the convention itself, will not be justified. When the object and intention of the Act is to give effect to the convention and when there is ambiguity in the language of the section, it is the duty of the court to adopt that construction which will effectuate the object of the Act and not nullify the intention of the Parliament and make the provision devoid of all meaning.

In Kesavananda Bharati v. State of Kerala,22 it was observed by Sikri J. that while our fundamental rights and directive principles were being fashioned and approved by the Constituent Assembly, on December 10th 1948, the General Assembly of the United Nations adopted a Universal Declaration of

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22. AIR 1973 SC 1461: (1973) 4 SCC 225

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Human Rights. The Declaration may not be a legally binding instrument but it shows how India understood the nature of human rights. To the question whether rights remain inalienable if they can be amended out of existence, the chief Justice observed that the Preamble, Articles 1, 55, 56, 62, 68, and 76 of the United Nations Charter had provided the basis for the elaboration in the Universal Declaration of Human Rights. He held that although there is a sharp conflict of opinion whether respect for human dignity and fundamental human rights is obligatory under the Charter, in view of Article 51 of the Directive Principles, the Apex Court must interpret the language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India. He quotes the observation by Lord Denning in Corocraft v. Pan American Airways:

"It is the duty of these courts to construe our legislation so as to be in conformity with international law and not in conflict with it."

He holds that fundamental rights are inalienable as referred to in the Declaration and, as a matter of fact, India was party to Universal Declaration of rights. Khanna J., speaking in minority, held that the width and scope of the power of amendment of the Constitution would depend on the provisions of the Constitution. If the provisions of the Constitution are clear and unambiguous and contained no limitations on the power of the amendment, the court would not be justified in grafting limitations on the power of amendment because of an apprehension that the amendment might impinge upon human rights contained in the United Nations Charter. It is only in cases of doubt or ambiguity that the courts would interpret a statute 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 not withstanding the conflict between municipal law and international law.

(1969) All ER 82

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Khanna J., in *ADM Jabalpur v. S. Shukla*, again speaking as minority, observed that, well established is the rule of construction that if there be a conflict between the municipal law on the one side and the international law or 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 municipal law to be in harmony with international law or treaty obligations. Every statute, according to this rule, is interpreted, so far as language permits, so as not to be inconsistent with the comity of nations or established rules of international law and the courts will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language. He held that while dealing with the Presidential Order under Article 359 (1) such a construction should be adopted as would, if possible, not bring it in conflict with Articles 8 and 9 of the Universal Declaration of Human Rights. Beg J., however, in a separate but concurring with majority opinion, indicated that neither rights supposed to be recognised by some natural law nor those assumed to exist in some part of Common Law could serve as substitutes for those conferred by Part III of the Constitution. He observed that no lawyer can seriously question the correctness, in Public International Law, of the proposition that the operation and effects of such provisions are matters which are entirely the domestic concern of legally sovereign States and can brook no outside interference. Similarly, Chandrachud J. held that the Rule of Law during an emergency is as one finds it in the provisions contained in Chapter XVIII of the Constitution. There cannot be a smothering and omnipotent rule of law drowning in its effervescence the emergency provisions of the Constitution. Again Bhagwati J. observed that contention of the detenus that *Kesavananda Bharathi’s* case did not negative the existence and enforceability of natural rights is belied by the observation of

AIR 1976 SC 1207: (1976) 2 SCC 521

Supra n. 22

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least 7 judges. He further pointed out that Subba Rao J. also, in Golak Nath,\textsuperscript{26} rejected the theory of natural rights as being independent and apart from fundamental rights in Part III.

The Supreme Court, in Jolly George Varghese and another v. The Bank of Cochin,\textsuperscript{27} had an opportunity to examine the position in the light of constitutional and case laws. Analysing the implication the court held that, even though India is signatory to international instruments, until the municipal law is changed to accommodate the international law, what binds the court is the later, not the former. Quoting from AH Robertson - 'Human Rights - in National and International law', it is pointed out that international conventional law must pass through the process of transformation into the municipal law where the international treaty can become internal law.... From the national point of view the national rules alone count ... With regard to interpretation, however, it is principle generally recognised in national legal system that in the event of doubt, the national rule is to be interpreted in accordance with the state's international obligations. Rejecting the argument that international law is the vanishing point of jurisprudence, the court observes that such an argument itself is vanishing in a world where humanity is moving steadily, though slowly, towards a world order, led by that intensely active, although yet ineffectual body, the UNO. Its resolutions and covenants mirror the conscience of mankind to inculcate, within the member states, progressive legislation, but till last act of actual enactment of law takes place, the citizen in a world of sovereign state, has only inchoate rights in the domestic courts under the international covenants. It further holds that the positive commitment of the State parties fails legislative action at home but does not automatically make the covenants enforceable part of the corpus juris of India.
It was pointed out in *Bachan Singh v. State of Punjab*\(^{28}\) that India, as a member of the International community, was a participating delegate at the national conference that made the Stockholm Declaration on December 11\(^{27}\). That India has also accepted the ICCPR adopted by the General Assembly of the United Nations and so it stands committed to the abolition of death penalty as the impugned limb of section 302 IPC must be considered in the light of the aforesaid Stockholm Declaration and the International Covenants which represent the evolving attitudes and standards of decency in a maturing world. Running these contentions, it was held that the clauses of international instruments are substantially the same as the guarantees or prohibitions contained in Articles 20 and 21 of our Constitution. It was held that India’s commitment, therefore, does not go beyond what is provided in the Constitution, the Indian Penal Code and the Code of Criminal Procedure.\(^{29}\) India’s penal laws, including the impugned provision and their application, are the entirely in accord with its international commitments. In the minority, however, Bhagwati held that the standards or norms set by international organisations and bodies are relevant in determining the constitutional validity of death penalty. He discusses the important developments in the United Nations and observes that the objective of the United Nations has been, and that is the standard set by the world body, that capital punishment should ultimately be abolished in all countries. This norm set by the world body must be taken into account in determining whether death penalty can be regarded as arbitrary, excessive and unreasonable so as to be constitutionally invalid.

It has been held in *Prem Shankar Shukla v. Delhi Administration*\(^{31}\) that the deeper issues of detainee’s rights against custodial cruelty and infliction of indignity must be investigated within the human rights parameters of Part III of

\(^{28}\) *AIR* 1980 SC 898

\(^{29}\) So followed in *P.N. Krishna Lal v. Government of Kerala*, 1995 Supp (2) SCC 187

\(^{31}\) *AIR* 1982 SC 1325

\(^{32}\) *AIR* 1980 SC 1535

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the Constitution, informed by the compassionate international charters and covenants.

In Civil Rights Vigilance Committee, SLSRC College of Law, Bangalore Union of India, the failure of the Government of India to prevent the entry of sportsmen blacklisted by UN for having participated in sports event in South Africa were challenged since Government of India is a party to Gleneagles Accord of 1977, which reaffirmed full support for international campaign against apartheid. The High Court held that Article 51 is not enforceable by any court and if Parliament does not enact any law for implementing the obligations under a treaty, courts cannot compel Parliament to make such law. In the absence of such law, court cannot also enforce obedience of the Government of India to its treaty obligations with foreign countries. Further, in England, while it is possible to regard customary international law as part of English law, a similar principle does not apply to treaties or obligations created thereunder. Hence the contention that a treaty like the Accord could have been a part of municipal law in England and English courts would have enforced such treaties as binding on the UK internally, cannot be accepted as correct.

Chinnappa Reddy J. in Gramophone Company of India Ltd. v. Birendra Bahadur Pandey formulated two questions — whether international law is, of its own force, drawn into the law of the land without the aid of a municipal statute and second, whether, so drawn, it overrides municipal law in case of conflict. After discussing the schools of thought, he observes that 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

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AIR 1983 Kant. 85
Integrity of the Republic and the supremacy of constituted legislatures in making 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 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, enforce apply national law if international law conflicts with it. But the courts are under an obligation within the legitimate results, to so interpret the Municipal Statute as to avoid confrontation with the Comity of Nations or the well-established principles of international law. But if conflict is inevitable, the latter must yield. The Court observed that it may be possible to say, by implication, that the Court, in Tractoroexport, preferred the doctrine of incorporation, as otherwise the question of interpretation would not truly arise.

In Kubic Dariusz v. Union of India and others, while dealing with preventive detention of a foreign national, it was held that preventive detention for a foreign national who is not resident of the country involves an element of international law and human rights and the appropriate authorities ought not to be seen to have been oblivious of its international obligations in this regard. When an act of preventive detention involves a foreign national, though from the national point of view the municipal law alone counts in its application and interpretation, it is generally a recognised principle in national legal system that in the event of doubt the national rule is to be interpreted in accordance with the state's international obligations. There is need for harmonisation whenever possible bearing in mind the spirit of Covenants. It observed that, in the

\* Supra n. 20
\^ AIR 1990 SC 605
In the context, it may not be out of place to bear in mind that the fundamental rights guaranteed under our Constitution are in conformity with those in the Declaration and the Covenant on Civil and Political rights and Covenants on Economic, Social and Cultural rights to which India had become a party by ratifying them. Legal relations associated with the effecting on legal aid on criminal matters is governed in the international field either by the norms of multilateral international conventions relating to control of crime of an international character or by special treaties concerning legal co-operation.

In *Charan Lal Sahu v. Union of India*, it was observed that in the context of human rights, right to life, liberty, pollution free air and water is guaranteed by the Constitution under Articles 21, 48A and 51(g), it is the duty of the State to take effective steps to protect the guaranteed Constitutional rights. These rights must be integrated and illumined by the evolving international dimensions and standards, having regard to our sovereignty, as highlighted by clauses 9 and 13 of United Nations Code of Conduct of Transnational Corporations. The Court observed that the evolving standards of international obligations need to be respected, maintaining dignity and sovereignty of our people, the State must take effective steps to safeguard the Constitutional rights of citizens by enacting laws.

In *M.V. Elisabeth v. Harwan Investment and Trading Pvt. Ltd., Goa*, it was observed that India seems to be lagging behind many other countries in ratifying and adopting the beneficial provision of various conventions intended to facilitate international trade. Although these conventions have not been adopted by legislature, the principles incorporated in the convention are themselves derived from the common law of nation as embodying the felt necessities of international trade and are as such part of the common law of India and applicable for the enforcement of maritime claims against foreign ships. While the provisions of various international conventions concerning arrest of

\[\text{AIR 1990 SC 1480: (1990) 1 SCC 613}\]
\[\text{AIR 1993 SC 1014}\]
civil and penal jurisdiction in the matters of collision, maritime liens and
gages etc. have been incorporated into the municipal laws of many maritime
countries. India lags behind them in adopting the unified rules. By reason of this
4 doubts about jurisdiction often arise, as in the present case, when
contentious rights such as those recognised by the Carriage of Goods by Sea Act
ought to be enforced. The remedy lies apart from enlightened judicial
construction, in prompt legislative action to codify and clarify the admiralty laws
this country. This required thorough research and investigation by a team of
experts in admiralty law, comparative law and public and private international
law. Any attempt to codify without such investigation is bound to be futile. It
was further held that although India has not adopted the various Brussels
Conventions, the provisions of these Conventions are the result of international
unification and development of the maritime laws of the world, and can, there
therefore, be regarded as the international common law or transnational law
rooted in and evolved out of the general principles of national law, which, in the
absence of specific statutory provisions, can be adopted and adapted by the
courts to supplement and complement national statutes on the subject. It was
further observed that these Conventions embody principles of law recognised by
the generality of maritime states, and can therefore be regarded as part of our
common law. The want of ratification of these conventions is apparently not
because of any policy disagreement, as is clear from active and fruitful Indian
participation in the formulation of rules adopted by the conventions, but perhaps
because of other circumstances, such as lack of adequate and specialised
machinery for implementation of the various international conventions by co-
ordinating, for the purpose, the concerned departments of the government.

Nilabati Behera v. State of Orissa38 referred to Article 9(5) of ICCPR
1966 which indicates that an enforceable right to compensation is not alien to the
concept of enforcement of a guaranteed right. The court went on to award

4(1993) 2 SCC 746: AIR 1993 SC 1960. The other relevant parts of the case have been
discussed in detail in Chapter VI infra
Compensation as a remedy available under public law, based on strict liability, for contravention of fundamental rights to which the principle of sovereign immunity does not apply.

As regards the termination of a treaty, it has been held in *Rosiline George v. Union of India* that whether a treaty has been terminated by the State is essentially a political question. The Governmental action in respect of it must be regarded as of controlling importance.

With regard to environmental protection, the Apex Court, in *Vellore Citizens Welfare Forum v. Union of India and others* held that sustainable development is a balancing concept between ecology and development and has been accepted as a part of customary international law though its salient features are yet to be finalised by the international law jurists. It was held that, once these principles are accepted as part of the customary international law, there could be no difficulty in accepting them as part of domestic law. It was observed that it is almost an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by courts of law. Since our legal system has been founded on the British common law, the right of a person to pollution free environment is a part of basic jurisprudence of the land.

In *C. Masilamani Mudaliar and others v. Idol of Sri S S Thirukoil and others*, after a discussion of the international instruments granting rights against discrimination of women, the Apex Court held that, though the directive principle and fundamental rights provided the matrix for development of human personality and elimination of discrimination, these conventions add urgency and teeth for immediate implementation. It also observed that Article 2(e) of

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1 (1994) 2 SCC 80
2 AIR 1996 SC 2715
3 AIR 1996 SC 1697
EDAW\textsuperscript{42} enjoins the court to breathe life into the dry bones of the Constitution, international Conventions and the Protection of Human Rights Act and to effectuate right to life.\textsuperscript{43}

In \textit{Peoples Union for Civil Liberties v. Union of India}\textsuperscript{44} it was pointed out that 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. It was held that Article 17 of ICCPR does not go contrary to any part of our municipal law and therefore Article 21 of the Constitution has to be interpreted in conformity with the international law.

\textit{D.K. Basu v. State of West Bengal,}\textsuperscript{45} the Supreme Court held that custodial violence and abuse of police power is not only peculiar to this country but it is widespread. It has been the concern of international community because the problem is universal and the challenge is almost global. Observing that the Universal Declaration of Human Rights, which marked the emergence of a world-wide trend of protection and guarantee of certain basic human rights, makes a stipulation against it. The Court, in the light of these instruments, found it necessary to issue requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf. Dealing with the punitive measures, it refers to Article 9(5) of the ICCPR, which provides that anyone who has been the victim of unlawful arrest or detention shall have enforceable right to compensation. Though the Court noticed that the Government of India, at the time of its ratification in 1979, 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 does not become a party to the Covenants it held that the reservation has now lost its relevance in view of the law laid down by the Supreme Court in a number cases awarding compensation for the

\begin{itemize}
\item Convention on the Elimination of All Forms of Discrimination against Women, 249 U.N.T.S.
\item See also for a similar line, \textit{Madhu Kishwar and others v. State of Bihar}, AIR 1996 SC 1864
\item AIR 1997 SC 568; (1997) 1 SCC 301
\item (1997) 1 SCC 416
\end{itemize}

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segment of the fundamental right to life of a citizen. It appreciated that there is no express provision in the Constitution of India for grant of compensation for violation of a fundamental right to life, but, the Court has already evolved a right to compensation in cases of established constitutional deprivation of personal liberty or life. And it drew strength for reviving the right from international agreements on human rights.

In Peoples Union for Civil Liberties v. Union of India,\(^{46}\) it was observed that the main criticism against reading such conventions and covenants into the laws is that the ratification of these Conventions and Covenants is done, in most countries, by the executive acting alone and that the prerogative of the law is that of the Parliament alone. Unless the Parliament legislates, a law cannot come into existence. The Court observed that it is not clear whether Parliament has approved the action of the Government of India ratifying the 1966 Covenant. Assuming that it has, it says that the question yet may arise whether such approval can be equated to legislation and invests the covenants with the sanctity of a law made by Parliament. It says that, as pointed out by the Court in S R Bommai v. Union of India,\(^{47}\) every action of Parliament cannot be said to legislation. Legislation is no doubt the main function of the Parliament but it also performs many other functions all of which do not amount to legislation. In their opinion, this aspect requires deeper scrutiny than has been possible in the case. But for the case, they state that it would suffice to state that provisions of the covenants, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon as facets of those fundamental rights and hence, enforceable as such.

\(^{46}\) AIR 1997 SC 1203
\(^{47}\) AIR 1994 SC 1918: (1994) 3 SCC 1
In *Vishaka v. State of Rajasthan*, the Court held that, in the absence of domestic law occupying the field, to formulate effective measures to check the sexual harassment of working women at workplaces, the contents of the international conventions and norms are significant for the purpose of the interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against harassment implicit therein. Any international convention not consistent with the fundamental rights and in harmony with its spirit must be read into the provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. After discussing the provisions dealing with the implementation of the international norms, the Court states that the power of the Court under Article 32 for the enforcement of the fundamental rights and the executive power of the Union have to meet the challenge of protecting the working women from sexual harassment and make their fundamental rights meaningful. Governance of the society by the rule of law mandates this requirement as a logical concomitant of the constitutional scheme. The judgment further states that the international conventions and norms are to be read into the Constitution in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It observes that, 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.

In *Apparel Export Promotion Council v. A.K. Chopra*, dealing with sexual harassment of female employees at workplaces, after discussing international instruments such as CEDAW 1979, the Beijing Declaration and International Covenants of Economic, Social and Cultural Rights, the Apex
In the case of Githa Hariharan v. RBI, it was again held that the domestic courts are under an obligation to give due regard to international convention and norms for construing domestic law, more so, when there is no inconsistency between them and there is void in domestic law. 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 fields.

In Gita Hariharan v. RBI, it was again held that the domestic courts are under an obligation to give due regard to international convention and norms for construing domestic laws when there is no inconsistency between them. This observation was made while eliciting the message of CEDAW and Beijing Declaration, which direct all state parties to take appropriate measures to prevent discrimination of all forms against women, in the light of India being a signatory to CEDAW and having accepted and ratified it in June, 1993.

In Chairman, Railway Board v. Chandrima Das, after quoting the Universal Declaration of Human Rights 1948 and various other international instruments, the Supreme Court says that the International Covenants and Declarations as adopted by the UN have to be respected by all signatory States and the meaning to various words in those Declarations and Covenants have to such as would help in effective implementation of those rights. The applicability of the UDHR and the Principles thereof may have to be read, if need be, into the domestic jurisprudence. The court relied on the statement of

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(1999) 2 SCC 228: AIR 1999 SC 1149
(2000) 2 SCC 465

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Lord Diplock in *Salomon v. Commissioner of Customs and Excise*\(^5^2\) that there is a prima facie presumption that Parliament does not intend to act in breach of international law, including specific treaty obligations. It also falls back on the observation of Lord Bridge in *Brind v. Secretary of State for the Home Department*\(^5^3\) 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. After quoting so, the Court holds that, for the purpose of the case, interpreting the Constitution is enough. However, it repeatedly fell back on the international norms to make its conclusions.

While dealing with the extradition law, the Supreme Court, in *Daya Singh Lahoria v. Union of India*,\(^5^4\) described it as a ‘dual law’, ostensibly municipal yet international in as much as it governs relations between two sovereign states. This question is decided by national courts but on the basis of international commitments as well as the rules of international law relating to the subject.

In *Union of India v. Association of Democratic Reforms*\(^5^5\) while declaring right to get information in a democracy as a natural right flowing from the concept of democracy reference were made to Article 19, clauses (1) and (2) of the ICCPR.

*T.N. Godavarman Thirumalpad v. Union of India*\(^5^6\) dealt in detail the effect of international obligations. It observed that the Convention on Biological Diversity has been acceded to by the country and, therefore, it has to implement
It reiterated what was stated by the Court in Vishaka\textsuperscript{57} that in the absence of any inconsistency between the domestic law and international conventions, the rule of judicial construction is that regard must be had to international conventions and norms even in construing the domestic law. It was stipulated that it is necessary for the Government to keep in view the international obligations while exercising discretionary powers under the Conservation Act unless there are compelling reasons to depart therefrom.\textsuperscript{58}

Thus, we see that the Supreme Court is taking a definite direction, via judgments, towards the recognition and implementation of the norms developed at the international level. Initially the courts were reluctant to be the torchbearer in such matters as evident from the initial cases. However, lately, probably on recognition that the legislature is not going to anything to implement the international norms, it has taken the task upon itself to implement it, though indirectly is what it can do. In the process, it has been making mends to the earlier approaches taken. Even if the courts have not been vigilant enough to protect the rights of the citizens of this country, it is still not late that such means are resorted to for, if at all any evident injustice is caused by any Court, it must make it a point to act so as to correct the injustice. Our Supreme Court, acting \textit{adibo justitia} and ensuring that \textit{actus curiae neminem gravabit}, has resorted to correction in many cases. In \textit{AR Antulay}\textsuperscript{59}, it observed that there was a duty to correct on a petition or \textit{suo motu}.\textsuperscript{60} What we see here is a correction as and when the opportunity arises for the Court to do so in a subsequent case. Rather
than seeing it as correcting its mistakes, it may be worthwhile to consider this as a case of a gradual evolution by the courts.

Australia

In Australia, there have been a series of cases in which the High Court has read into the Constitution certain international norms by implication. In *Nationwide News* it was held that the spirit of the Australian Constitution as reflected in its leading doctrines becomes a source of Constitutional practice and international covenants on Human Rights have been held to provide basis for such practices.

Sweden

The judgments of the European Court of Human Rights have had its impact on Swedish law. Some have prompted changes in the domestic law even though Sweden was not found to have violated the Convention and some have prompted reforms of the rules.

It is argued that membership of the EU, has enabled, and obliged, the Swedish courts to recognise the ‘Convention dimension’ and interpret European Court of Justice judgments and the preliminary ruling concerning other States (possibly even the Commission Reports) and apply them to the Swedish context.


\[\text{Id., 40}\]
It is an interesting position in the United Kingdom. The Human Rights Act, 1998 which is the most recent and relevant legislation, does not give power to judges to overrule or refuse to apply statutes that contravene Convention rights (except in Scotland, where Acts of the Scottish Parliament are to be vulnerable to challenge in this way). Instead, the courts at all levels are under a duty to do everything possible to interpret legislation in conformity with Convention rights. Where this is not possible, superior courts will be able to give a declaration of incompatibility. This does not of itself change the law or give a remedy to the applicant. Instead, it acts as the trigger for ministers to introduce an order to amend the law (a remedial order or 'fast track' order). Parliament, then, is given the last word of conformity. Orders may be retrospective but there is no guarantee that the litigant who persuades the court to grant a declaration of incompatibility will ultimately benefit from it. Public authorities (specifically including courts) will act unlawfully if they contravene a person’s Convention rights unless clearly required to do so by statute. Changes to common law are not explicitly mentioned, but are debatable that they may be implied from the inclusion of courts as public authorities. 64

Lord Goff in Spycatcher, 65 had stated that courts were bound to develop the common law, were free to do so, in accordance with the Crown’s obligation under the Convention. There is but some controversy over whether it requires ambiguity in the Common law, in the first place, before the Convention can be invoked. In some cases the courts have developed the common law in parallel

with, rather than directly influenced by, the Convention under the unconvincing justification that the two are identical.\textsuperscript{66}

Prior to 1998, it was held that breach of Convention does not give rise to remedies or rights justiciable as such in English law. Nevertheless, there may be some factors which mitigate the full rigours of this rule and give a certain role to the Convention in English law.\textsuperscript{67} The courts in UK did develop the presumption that Parliament does not legislate contrary to UK’s international commitments.\textsuperscript{68}

The principles regarding application of a treaty was identified by the Northern Ireland Court of Criminal Appeal thus - Treaty obligations are not part of the law unless incorporated by statute into that law and there is no rule of law invalidating an Act which conflicts with treaty obligations or compelling a construction which will avoid that result. But treaty obligations are a strong guide to the meaning of ambiguous provisions, since the Government is presumed to intend to comply with such obligations and, both, the presumption of adherence to treaty obligations may be rebutted by clear language or by necessary implication.\textsuperscript{69}

\textbf{United States}

The US Supreme Court, in its decision in \textit{The Paquete Habana} case,\textsuperscript{70} held that customary international law is part of the law of the US to be administered by the Courts, “where there is no treaty and no controlling executive or legislative act or judicial decision....” The Supreme Court seemed to have preferred the monist view. In the context of the customary international

\begin{itemize}
\item \textsuperscript{66}Leigh, \textit{supra} n. 64, 82
\item \textsuperscript{67}Malone v. Metropolitan Police Commr., [1979] 2 All ER 620; [1979] Ch.344
\item \textsuperscript{69}\textit{R} v. \textit{Deery}, (1977) 20 ECHR Yrbk 857 noted in (1977) Crim. L.R. 550
\item \textsuperscript{70}175 US 677 (1900)
\end{itemize}
which must reflect the developments in international society through appropriate changes in the norms, it is argued that in the light of the special role of the President in the US Government, including the conduct of the nation's foreign relations, and the fact he sits at the intersection of the domestic and international responsibilities of the US, he, acting alone, may have the authority under domestic law to place the US in violation of customary international law.\textsuperscript{71}

Prof. Henkin has pointed out that developments subsequent to *The Paquete Habana* have made the classification of the US as monist or dualist not simple matter. Even if customary international law is law of the US, its enforcement through court action is not guaranteed as it must have a subject matter jurisdiction and there must be a cause of action.\textsuperscript{72}

In the US, the courts will not treat an act of government that puts the US in violation of international law as, *ipso facto*, an act in violation of US Constitution as held in the *Chinese Exclusion Case*\textsuperscript{73}.

"The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts. This subject was fully considered by Mr. Justice Curtis whilst sitting at the circuit.... And he held that whilst it would always be a matter of utmost gravity and delicacy to refuse to execute a treaty, the power to do so was prerogative of which no nation could be deprived without deeply affecting its independence.... This Court is not a censor of the morals of other departments of the government; it is not invested with any authority to pass judgement upon the motive of their conduct."

Regarding the role of courts, the US Supreme Court has stressed upon the relevance of consensus among nations thus –

\footnotesize{See Tel Oren v. Libyan Arab Republic, 726 F. 2d 744 (DC Cir. 1984) and Filartiga v. Pena-Irala, 630 F. 2d. 876 (2d Cir. 1980) referred to in Charney, *supra* n. 71, 914
\footnotesize{130 US 581, 602-03 (1889)}

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“It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact.”

The US Supreme Court, in requiring reciprocity in international relations, has held that non-performance by a foreign State with which the US had concluded a treaty (of extradition) would not itself permit the judiciary in the US to declare the treaty void, although it might, for the reason indicated, have become voidable so that the Executive could take steps to terminate it.

South Africa

It is an accepted proposition that international law is part of South African law, and that principles of international law must be applied by South African courts in appropriate cases. In Nduli and another v. Minister of Justice and others, the Court held that “only such rules of customary international law are to be regarded as part of our law as are either universally recognised or have the assent of this country.” This position has been reiterated in S. v. Ebrahim.

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Banco Nacional de Cuba v. Sabbatino, 376 US 398 (1964) at 428 where the court was interpreting the role of a domestic court in an international law case, more precisely, whether the act of state doctrine prevents a domestic court from questioning the validity of a Cuban appropriation of sugar located within Cuban territory at the time of taking. See for an analysis of the case, Richard A. Falk, “The Complexity of Sabbatino”, 58 Am. J. Int’l L. 935 (1964)

Charlton v. Kelly, 229 US 447 (1913)

Before the adoption of the justiciable Interim Constitution in 1994, due to parliamentary supremacy, judges had a limited role and could only mitigate the effects of unjust laws on procedural and technical grounds. Now the courts can evaluate legislation enacted by the Parliament or other bodies under the Bill of Rights when the law’s constitutionality is under challenge.

The Constitutional Court in South Africa has played a crucial role while the drafting of the Final Constitution was being done. It sent a number of provisions back to the Constitution Assembly for reworking in September 1996. Later, it re-examined the revised text and certified it in November 1996.

The Constitutional Court is given enough freedom to interpret treaties. While drafting the interim constitution itself the experts of the parties shied away from pronouncing on the question of abolition of death penalty. It is supposed to be taken care of in the open-ended provision that ‘every person shall have the right to life’. It is argued that this has been a deliberate omission to leave the interpretation of these contentious issues to the Constitutional Court. In other words, the Courts were to decide such a vital question. And, the Constitutional Court has ruled that the imposition of death penalty was unconstitutional. Judgments have also covered juvenile judicial corporal punishment, outlawing...
imprisonment for debt and recognising the right to access police dockets and to consult state witnesses. 86

European Community

The European Community makes the best case study for understanding the perceptions and approaches of various courts, municipal as well as international, to the nature of obligations that are undertaken by a state and the consequential role that the domestic courts are enjoined to play to give effect to them. 87

Historically speaking, there were three organisations 88 that were created. These were later unified as a single organisation by the Merger Treaty of 1965. Under this, four institutions were set up – a Council, a Commission, a European Parliament and the Court of Justice. 89 By virtue of the Single European Act of 1986, the European Economic Community Treaty was amended to provide for

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86 Coetzee v. Government of the Republic of South Africa, 1995 (10) BCLR 1382 (CC) and Maklaala and others v. Attorney General of Transvaal and another, 1995 (12) BCLR 1593 (CC). The application of the Bill of Rights in other fair trial rights issue have also been recognised – Du Plessis and another v. De Klerk, 1996 (5) BCLR 658 (CC) and Parbhoo and others v. Getz NO and another, 1997 (10) BCLR 1337 (CC). All cases cited in Sarkin, supra n. 61.


88 The European Coal and Steel Community 1951, the European Economic Community 1957 and the European Atomic Energy Community 1957.

89 The Council composed of representatives of the governments of member states. The Commission was an independent supranational organ whose members were appointed by common accord of the governments of member states. The Parliament was elected by the peoples of the member states and divided into political groupings largely without distinction as nationality.
increased Community powers and establish a framework for inter-governmental co-operation.\textsuperscript{90}

The European Community came into existence by the entry into force in November 1993 of the Maastricht Treaty on European Union concluded in 1992. The Community has increased powers and responsibilities, especially in relation to economic and monetary policy. The European Union also has the specific mission to provide a framework for increased inter-governmental co-operation in various non-economic spheres and to promote legislative activity in European Community Institutions.\textsuperscript{91}

The Court of Justice, which was a common organ for all the Communities from the beginning, is the supranational judicial institution whose task is to guarantee respect for Community law. The EEC Treaty first created an environment for a permanent dialogue at the judicial level, which by its procedure, laid down that the national courts of last resort in a state could make references for preliminary rulings to the Court of Justice of the European Communities where any question was raised concerning the interpretation of Community law.\textsuperscript{92} The Court of Justice has final authority to interpret Community law whereas the national courts have the task of applying it. It is the national courts that ensure full effectiveness to the Community law in their respective legal systems.

The Court of Justice, for the purpose of ensuring effectiveness, have developed principles, which it calls as the essential characteristics of the Community legal order – the principles of supremacy and direct effect of the Community law.

\textsuperscript{90} As concluded in accordance with the procedure laid down in Article 236 of the Treaty and adopted instead of a draft European Union Treaty approved by the European Parliament in which was intended to create a single institutional framework to replace the existing Communities.

\textsuperscript{91} See EC Law and National Law, supra n. 87, 2.

\textsuperscript{92} Article 177. This procedure is generally characterised as co-operation.
The basic doctrine of supremacy, considered as the basic unwritten rule of community law, was laid down by the Court of Justice in *Costa v. ENEL.*\(^93\) It was further developed in *Internationale Handelsgesellschaft,*\(^94\) *Simmenthal*\(^95\) and *Reg. v. Secretary of State, ex parte Factortame.*\(^96\) This is true of both prior and subsequent national law. In *Simmenthal*, it held that the doctrine of supremacy imposes a duty upon national courts to give immediate and automatic precedence to Community law and to set aside conflicting national provisions. It held that any conflict between Community law and national law must always be a matter for immediate solution by the national trial court. The requirement to refer such a case to another authority (the Constitutional Court in this case) would be incompatible with the full effectiveness of the Community law. The Court of Justice held that the supremacy principle also required national courts to set aside any rule of national law precluding them from granting interim relief in a case concerning Community law.\(^97\) In the words of Judge Pescatore,\(^98\) -

"The Community legal order is intended to bring about a profound transformation in the conditions of life – economic, social and even political – in the Member States. It is inevitable that it will come into conflict with the established order, that is to say the rules in force in the Member States whether they stem from constitutions, laws, regulations or legal usage .... Community law holds within itself an existential necessity for supremacy. If it is not capable in all circumstances of taking precedence over national law, it is ineffective and, to that extent, non-existent. The very notion of a common order would thereby be destroyed."\(^99\)

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\(^93\) *Case 6/64, European Court of Justice, 1964*

\(^94\) *Internationale Handelsgesellschaft mbH v. Einfuhr - und Vorratsstelle fur Getreide und*

\(^95\) *Amministrazione delle Finanze dello Stato v. Simmenthal Spa, Case 106/77, ECJ, 1978*

\(^96\) *Case C – 213/89, 1990; [1990] 3 WLR 852 ECJ*

\(^97\) Ibid.

\(^98\) Judge of the Court of Justice of the European Communities 1967 – 85 quoted in *EC Law and National Law, supra n. 87, 3*

\(^99\) This position is true not just of the Community legal order but of all supranational legal orders.
The domestic courts of the member states, expectedly, took their time for doctrines to be accepted. Among the original members of the Community, the Court of Cassation in Belgium in the *Le Ski* case,\(^{100}\) the German Federal Constitutional Court in *Lutticke*,\(^{101}\) the Italian Constitutional Court in *Frontini*\(^{102}\) and the French Court of Cassation in *Cafes Vabre*\(^{103}\) have accepted the doctrine of supremacy. The *Counseil d’État* in France recognised the supremacy of EEC treaty provisions only in 1989 in the *Nicolo Case*.\(^{104}\) Similarly the *Counseil d’État* in Luxembourg accepted this position in *Bellion*.\(^{105}\)

The acceptance of supremacy in the United Kingdom was fully established only in *Factortame*.\(^{106}\) The Irish Supreme Court accepted the supremacy of Community law in *Crotty*.\(^{107}\) Greece joined the Community in

\(^{100}\) *Gonzos Lutticke GmbH*, 1971, Case No. 1 BvR 248/163, Constitutional Court (FRG). The Court accepted the law laid down by *Simmenthal* (1978) in the *Working Hours Equality Case*, Case No. 1 BvR 1025/82, Constitutional Court (FRG).

\(^{101}\) *Frontini v. Ministero delle Finanze*, Case No. 183/73 Constitutional Court, (Italy), 1973. The Constitutional Court accepted the position described by the Court of Justice in *Simmenthal v. Granital v. Amministrazione delle Finanze dello Stato*, Case No. 170/84, Constitutional Court (Italy), 1984.


\(^{103}\) *Nicolo and another, Conseil d’État* (France), 1989.

\(^{104}\) *Bellion and Others v. Minister for the Civil Service, Conseil d’Etat* (Luxembourg), 1984.

\(^{105}\) *Crotty v. An Taoiseach and Others*, 93 ILR 480, Supreme Court (Ireland), 1987. Ireland like UK, joined only in 1973.
and its Council of State held in *Banana Market case*\(^{108}\) that EEC Treaty
visions took precedence over national law on the basis of Article 28 in the
institution. The Spanish Supreme Court granted precedence to Community
on the basis of Article 93 of their Constitution in the *Canary Islands
ons Regulation Case.*\(^{109}\)

**Direct Effect**

The Court of Justice in *Van Gend en Loos*\(^{110}\) observed thus –

"... the Community constitutes a new legal order of international law...
with subjects comprised not only of the Member States but also their
nationals. Independently of the legislation of Member States, Community
law therefore not only imposes obligations upon individuals but is also
intended to confer upon them rights which become part of their legal
heritage ...."\(^{111}\)

It went on to further state that rights for individuals arise not only where
are expressly granted by the Treaty but also by reason of obligations which
Treaty imposes in a clearly defined manner. This is true for both negative as
well as positive obligations.\(^{112}\) The Court has held so where the provisions at
not leave the Member States with any discretion in relation to its

\(^{108}\) Case No. 815/1984, Council of State (Greece), 1984. The Council followed the *Simmenthal

\(^{109}\) Case No 4524, Supreme Court (Spain), 1989. Spain joined the Community in 1986 along
Ponugal, which indicated its willingness to give direct effect, and thereby supremacy, to
Community law in *Ca’ dima* Case No 12 381-36 053, Court of Appeal of Coimbra, 1986. The
Spanish Constitutional Court accepted *Simmenthal* position in the *Electoral Law
nationality case*, Case No 4524, Constitutional Court (Spain), 1991.

\(^{110}\) *Algemene Transport en Expeditie Onderneming van Gend en Loos v. Nederlandse

\(^{111}\) At this point it may be pertinent to point out that not all provisions of the Community law
direct effect and produce rights for the individuals.

\(^{112}\) *Van Gend en Loos supra* n. 110 and also in *Costa v. ENEL supra* n. 93, it dealt with
e same rights where as in *Lutticke supra* n. 101 it went further to positive obligations.
In Defrenne, the Court of Justice confirmed that some Treaty provisions could have effect not just between individuals and Member States (vertical effect) but also in relations between individuals themselves (horizontal effect).

This position enunciated by the Court of Justice has been largely followed by the national courts e.g. Belgium in Le Ski, Luxembourg in Bellion and Greece in the Real Property Acquisition case. This has been facilitated by the references made under Article 177 of the EEC Treaty which enables and, in the case of courts of last resort, requires national courts to make references for preliminary rulings to the Court of Justice of the European Communities where a question is raised concerning the interpretation of Community law.

Article 189 of the Treaty provides that regulations are directly applicable. The Court of Justice has consistently held that, by reason of their nature and function, regulations have direct effect and are capable of creating individual rights although they do not always do so. In Grad the Court of Justice held that the fact that the Article referred to only regulations did not exclude the possibility that other categories of Community acts, including decisions, could have direct effect. This could apply to directives also. But by later decisions, it has further clarified that the individuals could rely on the directives only when a Member State failed to adopt adequate implementing measures within the prescribed period and only if the provision in...
question was sufficiently precise and unconditional.\textsuperscript{121} It has also held that, unlike Treaty provisions, directives do not have ‘horizontal direct effect’ and could only be relied upon against the State and not against the other individual.\textsuperscript{122}

In the context of the national courts, most of them have accepted this position. The German Constitutional Court in \textit{Kloppenburg}\textsuperscript{123} has held that the jurisprudence of the Court of Justice on direct effect was binding upon the German courts and, despite amounting to judicial legislation, did not exceed the limits of the constitutionally acceptable development of Community law.

Though the \textit{Counseil d’Etat} in France has accepted the supremacy of Community law in general,\textsuperscript{124} and directives in particular,\textsuperscript{125} and has held that the national authorities have a duty to abrogate national legislation incompatible with the provisions of a directive once the time limit for its implementation has expired, it has not expressly accepted that non-implemented directives can create rights directly enforceable by individuals before national courts.\textsuperscript{126}

The Constitutional Court in Italy in \textit{Giampaoli},\textsuperscript{127} the Council of State in Greece in \textit{Karella},\textsuperscript{128} the Court of Appeal in Portugal in \textit{Cadima},\textsuperscript{129} and the Spanish Supreme Court in \textit{Rodolfo DR} v. \textit{FOGASA}\textsuperscript{130} have applied the jurisprudence of the Court of Justice on directives.

\textsuperscript{121} \textit{Becker v. Finanzamt Munster – Innenstadt}, Case No. 8/81, ECJ, 1982; \textit{Francovich, Bonifaci v. Italian Republic (Joined Cases)}, C – 6/90 & C – 9/90, ECJ, 1991
\textsuperscript{122} \textit{Marshall v. Southampton and South – West Hampshire Area Health Authority}, Case 152/84, ECJ, 1986
\textsuperscript{123} Case No. 2 BvR 687/85, Constitutional Court (FRG), 1987
\textsuperscript{124} \textit{Nicola, supra n. 104, 1989}
\textsuperscript{125} \textit{Rothmans International France & SA Philip Morris France, Conseil d’Etat (France), 82}
\textsuperscript{126} It had earlier held in \textit{Minister of the Interior v. Cohn – Bendit, Conseil d’Etat (France), 83; that a directive could not be invoked by an individual against an administrative act addressed to him even though the Court of Justice had expressly held otherwise in \textit{Rutili}, ECR 1219
\textsuperscript{127} \textit{Giampaoli v. Ufficio del Registro di Ancona}, Case No. 168/91, Constitutional Court (Italy), 1991
\textsuperscript{128} \textit{Karella v. Minister of Industry}, Case No. 3312/1989, Council of State (Greece), 1989
\textsuperscript{129} Case No. 12 381 – 36 053, Court of Appeal of Coimbra (Portugal), 1986
\textsuperscript{130} Case No. 5985, Supreme Court (Spain), 1991
Any national legislation adopted for the implementation of a directive should be interpreted by the national court in conformity with the requirements of Community law, in so far as it was given discretion to do so under national law. The Court of Justice, in *Von Colson and Kamann*,\(^\text{131}\) held that, in applying national law and in particular the provisions of national legislation specifically introduced to implement a directive, national courts were required by Article 189 of the EEC Treaty to interpret their national law in the light of the wording and purpose of the directive. Later, in *Marleasing*,\(^\text{132}\) it held that while interpreting in the light of the wording and purpose of the directive, it made no difference whether the provision in question had been adopted before or after that directive.

**National courts – role in enforcing Community law**

In order to ensure that the rights of individuals under the Community law are supported by effective remedies in the national courts, the Court of Justice has developed a range of remedies on the basis of the overriding requirement for national courts to secure the full effectiveness of Community law. The obligations imposed on the national courts include a duty, in cases within their jurisdiction, to protect the rights of individuals by immediately setting aside any provision of national law in conflict with a Community rule;\(^\text{133}\) requiring the national courts to set aside any rule of national law precluding them from granting interim relief in a dispute governed by Community law;\(^\text{134}\) requiring the national courts to award damages in actions brought against Member States by individuals for loss caused by violations of Community law;\(^\text{135}\) and it precludes the national authorities from relying on national procedural rules imposing time

\(^{131}\) *Von Colson and Kamann v. Land Nordrhein – Westfalen*, Case 14/83, ECJ, 1984


\(^{133}\) *Sommethal supra* n. 95, 1978

\(^{134}\) *Facciotame supra* n. 96, 1990

\(^{135}\) *Francovich supra* n. 121, 1991
rights for individuals to bring actions to protect rights conferred upon them by a directive, so long as that directive has not been properly transposed into the legal system of the Member State concerned. 136

The implementation of the Community law is also dependant on the institutional framework of the Member States. These provisions have been the object of judicial interpretation by the courts in these Member States. The variety of proceedings reflects the varying national legal traditions while the institutional position regarding the Community law is examined. 137

Article 54 of the Constitution of France empowers the President, the Prime Minister or Members of Parliament to refer to the Constitutional Council to question whether an international treaty contains any clauses contrary to the Constitution. If it finds so, it can be ratified only after the appropriate constitutional amendments. In Maastricht I, 138 on a reference made by the President, the Council examined the provisions of the Maastricht Treaty in the light of the principles of the Constitution and came to the conclusion that three of the provisions were incompatible with the Constitution. This prompted constitutional amendments which were tested again in Maastricht II, 139 where it was held that the Constitution as amended was fully compatible.

In Spain, under Article 95 to the Constitution, the Government or either of the Chambers of Parliament can request the Constitutional Court to make a declaration as to whether a stipulation contained in an international treaty is contrary to the Constitution. Again a constitutional amendment would be required before ratification. 140

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136 Dannemann v. Minister for Social Welfare and the Attorney General, Case C - 208/90, ECJ, 1993
137 Some of these proceedings can be seen in G. Dannemann, “Constitutional Complaints: The European Perspective”, 1994 Intl. & Comp. L. Q. 142
140 In Re Treaty on European Union, Case No. 1236/92, Constitutional Court (Spain), 1992, the Constitutional Court made a broad examination of the constitutional position regarding the participation of non-nationals in municipal elections and concluded that the Treaty provision was incompatible with Article 13 (2) of the Constitution. An amendment was brought to the said Article and the Treaty was ratified.
The Federal Constitutional Court in Germany, in the *Maastricht Treaty Constitutionality Case*,\(^1\) examined the position and elaborated a series of principles concerning the relationship between the Member States and the European Union including conditions for and restrictions upon its future development.

**Issue of Sovereignty**

Some decisions have dealt with the issue of sovereignty also. As regards the consequence of the formation of the Community, the Court of Justice, in *Costa v. ENEL*,\(^2\) had expressly held that the creation of the Community had brought about a transfer of powers from the Member States involving a permanent limitation to their sovereign rights. It held thus –

"By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply....

The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of Community cannot prevail."

Though the national courts have accepted the position regarding limitation, not all have accepted the aspect of permanency.\(^3\) The French

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\(^1\) Case No. 2 BvR 2134/92, Constitutional Court (FRG), 1993
\(^2\) Supra n. 93, 1964
\(^3\) Many national courts have accepted this view e.g. Belgium in *Le Ski supra* n. 100, 1971; Germany in *EEC Regulations Constitutionality Case*, Case No. 1 BvR 248/163, Constitutional Court (FRG), 1967; Italy in *Frontini supra* n. 102, 1973; Luxembourg in *Bellion supra* n. 105, 1984; and Spain in *Re Treaty on European Union, supra* n. 140, 1992
Constitutional Council, in *Maastricht I*,¹⁴⁴ held that, according to paragraph 15 of the Preamble to the Constitution, France agreed to those limitations of sovereignty necessary for the organisation of peace. It was perfectly consistent with respect for national sovereignty under Article 3 of the Constitution of France to conclude international agreements with a view to participating in permanent international organisations involving the transfer of competences from the Member States. And where such agreements contained a clause contrary to the Constitution or infringed the essential conditions for the exercise of national sovereignty, constitutional revision was required.

Article 24 (1) of the German Constitution permits the Federal Republic to transfer sovereign powers to intergovernmental institutions. The Constitutional Court, in *Internationale Handelsgeellschaft*,¹⁴⁵ held that the Article does not enable the basic constitutional structure of the Federal Republic to be altered without specific amendment, but rather opens up the national legal system to the application of law from another source, thereby enabling the State to withdraw its exclusive claim to control within its sphere of sovereignty. Though, in *Hoppenburg*,¹⁴⁶ it held that it was perfectly compatible with the Article for the international institutions like the Court of Justice to be given authority to develop the law within the framework of their existing powers, it was competent for the Constitutional Court to examine whether an international institution remained within or exceeded the sovereign powers assigned to it. This position was reiterated in the *Maastricht Treaty Constitutionality Case*¹⁴⁷ but it laid down clear limitations from the constitutional standpoint upon further integration and sought to strengthen the sovereignty of the Member States. It felt that the transfer of sovereign powers to Community institutions must not be such as to undermine the position of the Federal Parliament, which must be left with substantial authority and influence so long as democratic legitimacy within the

¹ Supra n. 138, 1992
² Supra n. 94, 1974; reiterated in *Wunsche supra* n. 119, 1986
³ Supra n. 123, 1987
⁴ Supra n. 141, 1993
Member States continues to be supplied by the national parliaments. It observed that although the European Community competencies involved the pooling of sovereignty, they essentially covered only the economic sphere. Other cooperation under the Treaty remained inter governmental in nature.

Article 11 of the Italian Constitution permits those limitations of sovereignty that are necessary in order to establish international organizations for assuring peace and justice between nations. In Frontini,\textsuperscript{148} it was held by the Constitutional Court that this opens up the Italian legal system to enable Italy to conclude Treaties limiting its sovereignty and to implement them by means of an ordinary statute, without the need for constitutional amendment.

The effect of incorporating the principle of the supremacy of Community law into British law in the light of Section 2 of the European Communities Act 1972 has been considered frequently by the courts in the United Kingdom. For the purpose of incorporating the provisions of the Maastricht Treaty, the Act of 1972 was amended in 1993.\textsuperscript{149} Parliamentary sovereignty could be considered to be retained in this area as Section 2 of the Act required the enactment of an Act of Parliament before the United Kingdom could notify the Community of its intention to participate in the next stage of economic and monetary union. The attempt to get a declaration that the United Kingdom could not lawfully ratify the Treaty was turned down in \textit{Ex parte Lord Rees – Mogg}.\textsuperscript{150} The argument that the establishment of a common foreign policy by the Member States under the Maastricht Treaty constituted an abandonment of sovereign powers was rejected on the ground that it was an exercise and not a transfer of those powers. As far as the Crown’s treaty making power as far as Community Treaties is concerned, it was held way back in 1971 that this cannot be challenged in courts.\textsuperscript{151} Though in this case it was felt that there is a possibility that Community membership is irreversible, in a later decision it was observed that

\begin{itemize}
\item \textsuperscript{1} Supra n. 102, 1973
\item \textsuperscript{2} The European Community (Amendment) Act 1993 (UK)
\item \textsuperscript{3} R. v. Secretary of State, \textit{Ex parte Lord Rees – Mogg}, [1994] 2 WLR 115, Divisional Court
\item \textsuperscript{4} Blackburn v. Attorney General, [1971] 2 All E. R. 1380
\end{itemize}
the courts would be bound to follow any statute repudiating the EEC Treaty or some of its provisions. This position was reiterated in *Lord Rees – Mogg*.

In *Crotty*, the Irish Supreme Court felt that the legislative powers of the Community institutions involved a limitation of sovereignty which had necessitated constitutional amendment since the provisions of the Single European Act 1986, concerning the co-ordination of foreign policy between the Member States, involved a diminution of sovereignty.

### What if Community Law infringed fundamental rights protected by the national law

The question here is whether the national courts can examine the allegations that a Community measure is in conflict with the fundamental constitutional rights or principles. The Court of Justice, on its part, in *Internationale Handelsgeellschaft*, has held that the national courts would have no such jurisdiction because otherwise the uniformity and effectiveness of Community law would be undermined. It was more so since the fundamental rights were to be protected within the framework of the Community by the Court of Justice itself, inspired by the constitutional traditions common to the Member States. Later, in *Nold*, it held clearly that it would not uphold Community measures incompatible with fundamental constitutional rights recognized by national constitutions.

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1. *Macarthy*, *supra* n. 106, 1979
2. *Supra* n. 107, 1987
3. Article 29 (4) (3) was amended enabling Ireland to ratify the Act. A similar procedure was adopted for the ratification of the Maastricht Treaty 1992 by amending the same Article. In Denmark, the ratification of the European Treaty was achieved on the basis of the existing constitutional provision, Article 20 which provides for the transfer of sovereign powers to international organizations, of course, after the holding of a referendum under Article 42.
4. *Supra* n. 94, 1970
Though the German Federal Constitutional court, in *Wunsche*, held that in view of recognition of the significance of the European Convention on Human Rights by all the Community institutions, including the Court of Justice in *Johnston*, Community law and in particular the case law of the Court of Justice has ensured the effective protection of fundamental rights. Later, in *Philip Morris* and *Maastricht Treaty Constitutionality* case, it has observed that although it is primarily for the Court of Justice to ensure protection of fundamental rights, the Constitutional Court retains a jurisdiction of last resort. In the latter decision, it further held that the two courts have complementary roles in protecting the fundamental rights.

**Conclusion**

The experience with the Community law is, thus, an ocean of ideas for reproduction at the more broad international level. In this context, it may also be worthwhile to remember that the countries within the Community share largely a common culture and economic status. Most of the constitutions of the countries within the Community have been tuned into for a full fledged participation in the Community affairs and granting recognition to bodies under the Community including the courts. It may also be noted that the judgments referred to in this section have been largely those relating to economic affairs. Human rights and criminal law may be a different cup of tea.

However, it becomes clear that if the international community wishes and works towards such an environment, it may be possible for the world bodies to lay down norms and the same can be referred to be international and municipal courts making the rights available for the individuals in different countries. Our
Experiences in the Courts range from a passive onlookers waiting for the legislature to act first, to a complete usurpation of this role through judicial interpretation.

The Indian Courts, especially the Supreme Court, has been, lately drawing a lot of inspiration from the international norms though recognising the inherent limitations of the courts in giving full direct effect to such provisions. It may be worthwhile to study as to how the courts have approached to this problem in the context to criminal justice administration, with special reference to human rights.