CHAPTER – VIII

DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN INDIA – EXECUTIVE, LEGISLATIVE AND JUDICIAL EFFORTS: A CRITICAL APPRAISAL

8.1 Introduction:

A “treaty” to be valid and binding must first be entered into by an organ of a State that has requisite capacity or source of power to that effect either under its Constitution or a Statute.\(^1\) Once this requirement is fulfilled, a State assumes obligations under the treaty and is accountable for its implementation. The obligations are cast on the State. The term State includes all organs functioning under the State including Parliament, Executive and Judiciary. Thus the obligation “to respect”, “to give effect”, “to ensure” human rights enshrined under the international human rights treaties are cast not only on Executive or Government that ratified such treaties but on all organs of State.\(^2\)

It is not in dispute that Union Executive in India has power to enter into international treaties by virtue of the power conferred on it under Article 73 of the Constitution. Once the treaty is entered into by the Union Executive, the obligation to implement the treaty is cast on the three organs of the State- Executive, Parliament and Judiciary. This Chapter intends to probe as to what efforts are made by these three organs of the State in furtherance of their obligations under the UN Nine Core Human Rights Treaties to which India is a Party. At the same time, it is equally important to examine as to the source of power for these three organs to implement international treaties at the domestic level. That is, whether these organs have requisite power under the Constitution to apply, implement or enforce international treaties at the

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\(^1\) At the time of formation of an international treaty, the representative of a State has to produce an instrument of “authority” possessing power or authority to conclude treaty on behalf of the State concerned. This instrument of authority is called “Full Powers”. Article 7(1) of Vienna Convention on the Law of Treaties, 1969, deals with “Full Powers” that reads as: “A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if; (a) he produces appropriate full powers; or (b) it appears from the practice of the State concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers”.

domestic level? This, I term it as constitutional requirements to enforce international treaties including human rights treaties. The examination of this “constitutional requirement” is *sine qua non* for the ultimate analysis of the issue as to what efforts are made by these three organs in implementing human rights treaties in India. It is because of the simple reason that they operate within the parameters of the Constitution. It is settled principle of law that an act done without the requisite source of power is invalid or cannot be sustained in law. It is in this context that I first undertake to examine the “constitutional requirement” i.e., source of power for each organ - executive, legislature and judiciary- under the Constitution to implement human rights treaties and then proceed to examine the core issue as to the “efforts” undertaken by each of these three organs of the State to implement human rights treaties in India.

**8.2 Constitutional Requirements**³: Constitutional Provisions relating to *Executive Powers* to Implement International Treaty:

The exclusive power to “enter into” treaties does not necessarily mean exclusive power to “implement” as well. Power to enter into and power to implement are two different areas and both are subject to the provisions of the Constitution. The Constitution of India does not make any distinction between treaties, agreements and conventions; whether multilateral or bilateral and also these terms are not defined elsewhere in the Constitution. This means that human rights treaties and conventions are equally placed with other types of treaties, agreements, covenants such as trade and commerce. What follows from this is that the provisions of the Constitution relating to power to enter into and implement treaties are one and the same irrespective of the nomenclature and “subject” of the treaties, agreements and conventions.

Entry 14 of List-1 in the VII Schedule deals with “entering into treaties and agreements and implementing of treaties, agreements and conventions with foreign countries”.⁴ Till date Parliament has not enacted any law on Entry 14. In the absence of specific law on this subject, Union Executive is entering into treaties, agreements

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³ The debate in the *CAD* on the “Power to Implement Treaties” is discussed in Chapter-7.
⁴ Similarly, Entry 13 of List-1 in the VII Schedule deals with “Participation in international conferences, associations and other bodies and implementing of decisions made thereat”. Equally important is Entry 10 of List-1 in the VII Schedule dealing with “Foreign affairs; all matters which bring the Union into relation with foreign country”.

and conventions with foreign countries by exercising its executive power under Article 73(1) (a)\(^5\) read with Entry 14 of List-1 in the VII Schedule.

Now, once we accept this proposition that the source of power for Union Executive to enter into treaties and agreements is Article 73(1) (a), the most crucial issue then would be that, whether Article 73(1) (a) also cloths the Union Executive-the power to implement the treaties and agreements that it has entered into with foreign countries? Logically, the answer to this issue should be YES, because Entry 14 of List-1 in VII Schedule deals with not only of “entering into treaties and agreements” but also of “implementing of treaties, agreements and conventions”\(^6\) and Article 73(1) (b) provides that the executive power of the Union shall extend to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. Hence, one can safely argue that Article 73(1) (a) also empowers Union Executive to implement treaties, agreements and conventions.

Thus, three important issues that arise for consideration here are;

1) What is the philosophy of Article 73(1) (a) in relation to the power of the Union Executive in implementation of treaties?

2) Whether Article 73(1) (a) confers sweeping power on the Union Executive to implement any treaty that it enters into? Or, Whether the power of the Union Executive is subject to any limitation in implementing treaties?

3) What is the nature and scope of Article 73(1) (b)?

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\(^5\) Article 73 reads as; **Extent of executive power of the Union-** (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend - (a) to the matters with respect to which Parliament has power to make laws, and (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement: provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.

\(^6\) The term “conventions” is not mentioned in the first part of Entry 14 of List-1 in VII Schedule, that is, regarding “entering into” - only “treaties” and “agreements” are mentioned. However, the term “conventions” creeps into the second part of Entry 14, that is, “implementing” aspect. Further, Article 253 mentions “treaties, agreements, conventions and decision made at any international conference, association or other body” suggesting both the subjects in Entry 13 and 14 of List-1 in VII Schedule. Even Article 73(1) (b) mentions only “treaty” or “agreement”, leaving the terms “conventions” and “decision”. What is more striking is none of these terms are defined in the Constitution. However, this anomaly does not make much difference since the term “treaty” includes convention also under Article 2(1) (a) of Vienna Convention on the Law of Treaties, 1969.
It is significant to note that Article 73(1) starts with - “Subject to the provisions of this Constitution, the executive power of the Union shall extend- …”

Accordingly, the executive power of the Union to “enter into” and “implement” treaties, agreements and conventions is subject to the provisions of the Constitution.

8.2.1 “Subject to the Provisions of this Constitution” and the Executive Power to Implement Treaties:

What does the phrase “subject to the provisions of the Constitution” mean/suggest? It means limitation or restriction or exception provided in the Constitution. As far as “power to implement” is concerned, it means;

1) The Union Executive cannot implement a treaty of its own if the subject upon which the treaty is entered into is also a subject upon which the Constitution expressly provides for making of a law by Parliament or State, (subject intrusion) or

2) The Union Executive cannot implement a treaty, if any of the provision of the Constitution expressly confers this power on any particular organ of the State.

Now the task is to find out what provisions of the Constitution operate as limitation or restriction or exception on the power of the Union Executive in the area of implementation of treaties. A careful scrutiny of the provisions of the Constitution reveals that, apart from the three Lists in the VII Schedule, the Constitution has expressly authorized the Parliament to legislate on certain areas. Such authorization is inbuilt in the various provisions of the Constitution itself. That is, wherever it is provided in the provisions of the Constitution that “Parliament may by law” or “Parliament by law” or “provisions of any law that may be made by Parliament” or “State from making law” or addition/deletion of a provision either in the Constitution or Statute that requires an amendment and if the Union Executive enters into a treaty on such aspect, is disabled from implementing it since it expressly falls within the legislative competence of the Parliament.

For example, acquisition of new (foreign) territory or ceding of Indian territory- the Union Executive can enter into a treaty with a foreign country agreeing to acquire foreign territory or cede certain Indian territory but its implementation

7 Emphasis supplied.
requires a law by Parliament or an amendment to the Constitution, since the effect of acquiring a foreign territory or ceding a territory affects the First Schedule of the Constitution and also Articles 2 and 3 that expressly provide for a law by Parliament to that effect.\footnote{Foreign territories when acquired under Article 1(3) (c) – (i) may be admitted to the Union under Article 2; (ii) made into a new State under Article 2; (iii) added to a State under Article 3(a). Similarly the ceding of an Indian territory requires a law by Parliament. See Re. Berubari case. AIR 1960 SC 845.} Similarly, if the Union Executive enters into a Convention agreeing not to discriminate \textit{persons} on any \textit{grounds} including race, caste, sex etc., but its implementation requires an amendment to the Constitution, since Article 15 and 16 only prohibits the State from making discrimination against \textit{citizen} on grounds \textit{only} of religion, race, caste, sex, or place of birth or any of them.\footnote{Articles 15 and 16 of the Constitution apply only to citizens and State can discriminate citizens on grounds other than the grounds mentioned under them. In effect, there is no prohibition on State to make discrimination against non-citizens on any grounds including the grounds mentioned under Article 15 and 16.} This is exactly the case with almost all International Human Rights Conventions, wherein the Government of India undertakes not to discriminate persons on any grounds.\footnote{For example, Article 2(1) of ICCPR- “Each State Party to the present Covenant undertakes to respect and to ensure to \textit{all individuals} within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without \textit{distinction of any kind}, such as, race, color, sex, language, religion, political or other opinion, national or social origin, property, birth other status.” Emphasis supplied. Similar provisions exist under Article 2(2) of ICESCR,} Further, what happens when the Union Executive enters into a Convention agreeing that a particular act or conduct is a crime and further agrees to punish the perpetrator if found within its jurisdiction though the act or conduct is not an offence under the penal laws in India? Will the Union Executive be able to arrest and punish the perpetrator of the crime when found in India? It is clear that unless such an “act’ or “conduct” is an offence under Indian penal laws, the Union Executive will not be in a position to arrest and punish the perpetrator (implement the Convention) because of the express bar under Article 20(1) of the Constitution.\footnote{It may be (i) crime against humanity, (ii) crime against peace, (iii) genocide, (iv) terrorism, (v) hijacking of aircraft, etc.} Further, even if it is an offence under the Indian penal laws, what happens if the Convention provides higher or lesser punishment than prescribed under the Indian penal laws? Will the Union Executive be able to plead before the court for punishment according to the Convention? Here again, the second part of Article 20(1) of the Constitution comes in the way which prohibits imposing of...
greater penalty than in force under the law.\textsuperscript{13} Thus it is clear that, unless there is an amendment to that effect to the Indian penal law, Convention provision cannot be given effect to by the Union Executive. Similarly, Union Executive having entered into a treaty agreeing to impose/reduce tax on certain good/s or service/s, cannot levy tax as agreed in the treaty as it is hit by Article 265 of the Constitution.\textsuperscript{14}

Thus, what follows from the above discussion is that, when the subject of an international treaty or Convention is the subject of law making of Parliament as provided under the various provisions of the Constitution, the Union Executive cannot implement such treaty or Convention of its own. This is the effect of the phrase “subject to the provisions of this Constitution” appearing in Article 73(1).

Further, what happens if the international Convention on human rights introduce a host of new rights that are absent or say not at all recognized in the laws of India? Similarly, what happens if the international Convention on human rights results in modification of the rights already existing in the Statutes? Whether such human rights Convention amounts to modification of the laws/statutes? The questions that need to be asked are;

1) Whether executive has power to create or recognize new “rights”?  
2) Whether executive has power to modify the “rights” already existing in the Statutes?

Again, the answer to these two questions depends on the Constitution or practice of India in this regard.\textsuperscript{15} If the Constitution/practice of India expressly

\textsuperscript{13} Though Article 20(1) only prohibits imposing of greater penalty and not lesser penalty, and if the Convention provides for lesser penalty compared to the penalty provided under Indian penal laws, an amendment to the relevant penal laws is necessary as it amounts to modification of the law in force. The prescription of punishment for a crime falls within the legislative competence of Parliament and not within the power of Union Executive.

\textsuperscript{14} Article 265 says- Taxes not to be imposed save by authority of law - “No tax shall be levied or collected except by authority of law”. Article 13(3) defines the term law which reads as: In this article unless the context otherwise requires.- “law” includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. Here, law means- Statute that expressly authorizes levying of tax and not “treaty”, where executive make arrangements for levying tax. Therefore, each tax levied or collected has to be backed by an accompanying law, passed either by the Parliament or the State Legislature. In India “tax” matters are governed by Income Tax Act, 1961, The Central Tax Act, 1957, Wealth Tax Act, 1957, Central Excise Act, 1944, Customs Act, 1964, etc. and host of State Tax legislations.

\textsuperscript{15} This issue could be examined from jurisprudential angle also. The term “right” means “an interest/claim recognized and protected by law”. The sources of law at the domestic level are 1) legislation, 2) precedent and 3) custom. Treaties are not recognized as a source of law at the domestic level. International treaties are basically agreements wherein the State parties agree on certain subject/s. Human rights treaty is also an agreement wherein the State parties agree to respect and ensure human
recognizes the competence of the executive in this regard, the rights recognized under the human rights Convention can be enforced directly without there being an enabling legislation by the Parliament.

In India, as already stated above, the power of the Union Executive to enter into and implement treaties is subject to the provisions of the Constitution. As far as entering into treaties is concerned, the Constitution does not impose any limitation on the Union Executive to enter into an international treaty or Convention that involves creation of new rights or modification of rights existing in the Statutes, however, the Union Executive is not free to execute such treaties because of inherent limitations inbuilt in the Constitution itself. In a Parliamentary form of Government such as India the Constitution has adopted the principle of separation of power- though in a limited sense- provides for Distribution of Powers between the organs of the State. Accordingly, the creation, amendment and repeal of Statutes (laws) are in the exclusive domain of the Parliament. Hence, the Parliament has to take a call when the treaty or Convention on human rights provides for new rights or modification of rights already existing in the Statutes. Otherwise, it amounts to clothing the Union Executive the power to create new laws, rights and also to introduce amendments to the existing Statutes through the medium of treaties, which is against the principle of Distribution of Powers between the Parliament and Executive envisaged under the Constitution.16

The most glaring example that could be given in this context is what happens if India ratifies the Second Optional Protocol to the ICCPR (OP2-ICCPR in short) that obligates the State Parties to abolish the death penalty? Whether courts in India are debarred from imposing death penalty upon the ratification of OP2-ICCPR? Or, Should Courts in India stop imposing death penalty in view of India’s ratification of OP2-ICCPR? Whether a convict who is already sentenced to death can rely on OP2-ICCPR to convert his death sentence into life imprisonment in appeal?

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15 See Infra on “Separation of Power Doctrine and Executive Power to Implement Treaties”.

16 See Infra on “Separation of Power Doctrine and Executive Power to Implement Treaties”.
To say that OP2-ICCPR is directly enforceable without an enabling legislation and Courts in India cannot award death sentence any more is nothing but to say that Sections 121, 132, 194, 302, 305, 307 and 396 of Indian Penal Code (I.P.C. in short) that provide for death sentence on committing the acts defined in the respective sections and the procedure contemplated for imposing death sentence under Section 354(3) of Code of Criminal Procedure (Cr.P.C. in short) stand deleted/amended.

It is submitted that, in the absence of a law on Entry 14 of List 1 in VII Schedule by the Parliament, the Union Executive in India can enter into and implement treaties subject to the provisions of the Constitution, to be precise, the executive qua Article 73 read with Entry 14 of List 1 in VII Schedule cannot encroach upon the legislative power of Parliament through treaty making power.

The second aspect of “subject to the provisions of this Constitution” is that the Union Executive cannot implement a treaty, if the Constitution expressly confers this power on any particular organ of the State. In fact, none of the provisions of the Constitution do expressly empower any organ of the State including the Union Executive to implement treaties.\(^\text{17}\) It is by virtue of Article 73 read with Entry 14 of List 1 in VII Schedule the Union Executive assumes power to enter into and implement as well. However, Article 253\(^\text{18}\) has been construed as a limitation on the power of the Union Executive to implement treaties, saying that it has expressly authorized the Parliament to pass a law for giving effect to treaties. In this context it is imperative to examine as to the scope of Article 253 and its relationship with Article 73.

8.2.2 Article 253 and the Executive Power to Implement Treaties\(^\text{19}\):  

The corollary between Article 253 and Article 73 was aptly put forward by the Union of India in \textit{Re: Berubari and Exchange of Enclaves} case\(^\text{20}\) which is as follows: “…the powers conferred on the Union Executive under Art. 73(1) (a) have reference to the powers exercisable by reference to Entry 14, List 1 in the Seventh

\(^{17}\) Moreover Parliament has not enacted any law on this subject.  
\(^{18}\) Article 253 reads as: \textit{Legislation for giving effect to international agreements}- Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.  
\(^{19}\) See Infra at p. for more discussion on the nature and scope of Article 253.  
\(^{20}\) \textit{AIR} 1960 SC 845.
Schedule, whereas the powers conferred by Art. 73(1)(b) are analogous to the powers conferred on the Parliament by Art. 253 of the Constitution”. The analogy between Articles 73(1)(b) and 253 could be seen from another angle also. That is, the scope of Article 73(1)(a) is that, it refers to all the 97 subjects mentioned under the List-1 of VII Schedule, whereas the scope of Article 73(1)(b) is that, it refers only to “treaty” or “agreement” having reference to Entry 14 of List-1 in the VII Schedule and the scope of Article 253 is also with respect to “treaty, agreement etc” having reference only to Entry 14 of List-1 in the VII Schedule. In this way one can safely argue that Article 73(1)(b) is analogous to Article 253.

The nature and scope of Article 253 and its linkage with Article 73 has been succinctly explained by J.C.Shaw J. in his separate but concurrent judgment in Maganbhai Ishwarbhai Patel v. Union of India that:

“The argument that power to make or implement a treaty, agreement or convention can only be exercised under authority of law proceeds upon a misreading of Art. 253. The effect of Art. 253 is that if a treaty agreement or convention with a foreign State deals with a subject matter within the competence of the State Legislature, the Parliament alone has, notwithstanding Art. 246(3), the power to make laws to implement the treaty agreement or convention. In terms, the Article deals with legislative power; thereby power is conferred upon the Parliament which it may not otherwise possess. But it does not seek to circumscribe the extent of the executive power conferred by Art.73; the exercise of this power must be supported by legislation only if in

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21 The above contention was made by the Attorney General of India while relying on the observation of the Supreme Court in Rai Sahib Ram Jawaya Kapur & Ors. v. The State of Punjab (AIR 1954 SC 549). In Rai Sahib case, while dealing with the question about the limits within which the executive Government can function under the Indian Constitution, Chief Justice Mukherjea, who delivered the unanimous decision of the Court, has observed that “the said limits can be ascertained without much difficulty by reference to the form of executive which our Constitution has set up, that the executive function comprised both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State”.

22 Article 73 of the Constitution relates to the executive powers of the Union, while the corresponding provision in regard to the executive powers of a State is contained in article 162. The provisions of these articles are analogous to those of section 8 and 49 respectively of the Government of India Act, 1935 and lay down the rule of distribution of executive powers between the Union and the States, following the same analogy as is provided in regard to the distribution of legislative powers between them under Article 246.

consequence of the exercise of the power, rights of citizens or others are restricted or infringed or laws are modified”.

What follows from this is that Article 253 provides an exception to the legislative competence of State Legislatures. That is, if the subject of an international treaty, agreement, convention or decision taken at international conference falls within the Concurrent List (List III) or State List (List II) of Seventh Schedule, only Parliament has power to legislate with respect to implementation of treaty and not State Legislatures. Similarly Article 73(1) (b) provides that only the Union Executive can exercise rights, authority and jurisdiction that are accrued by virtue of any treaty or agreement entered into with foreign countries and not any State Executive.

Thus, in matters of international treaty, agreement and convention etc., the Constitution confers exclusive power on the Union Executive, be it of “entering into” or “implementation” thereof and also to the exercise of such rights, authority and jurisdiction that are accrued by virtue of any treaty or agreement. Accordingly Article 253 cannot be construed as a limitation on the power of the Union Executive to implement international treaties, agreements or conventions. However, this power is to be exercised subject to the provisions of the Constitution as discussed above.

8.2.3 Separation of Power Doctrine and the Executive Power to Implement Treaties:

The principle of separation of powers deals with the mutual relations among the three organs of the government, namely legislature, executive and judiciary. This doctrine tries to bring exclusiveness in the functioning of the three organs and hence a strict demarcation of power is the aim sought to be achieved by this principle. This doctrine signifies the fact that one person or body of persons should not exercise all the three powers of the government.25 The legislative organ of the state makes laws,

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24 The Bombay High Court in its historic judgment in P.B.Samant v. Union of India, AIR 1994 Bom 323, followed the above observation of J.C.Shaw J. while rejecting PIL that sought writ of mandamus against the Central Government not to enter into WTO agreement. See Chapter 7 for facts of the case.
25 Montesquieu, who propounded Doctrine of Separation of Powers, said- There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals. Through his doctrine Montesquieu tried to explain that the union of the executive and the legislative power would lead to the despotism of the executive, for it could get whatever laws it wanted to have, whenever it wanted them. Similarly the union of the legislative power and the judiciary would provide no defense for the individual against the state. The importance of the doctrine lies in the fact that it seeks to preserve the human liberty by avoiding concentration of powers in one person or body of persons. The same was expounded by the Madison as- “The accumulation of all powers, legislative,
the executive enforces them and the judiciary applies them to the specific cases arising out of the breach of law. Each organ while performing its activities tends to interfere in the sphere of working of another functionary because a strict demarcation of functions is not possible in their dealings with the general public. Thus, even when acting in ambit of their own power, overlapping functions tend to appear amongst these organs.

8.2.4 Constitutional Provisions relating to Separation of Power:

Part V of the Constitution of India expressly provides for creation of “The Executive, Parliament and The Union Judiciary”. It also distributes their respective powers. The executive power of the Union is vested in the President, and is exercised by him either directly or through officers subordinates to him. The legislative powers are vested in the Parliament and subjects upon which Parliament can legislate are clearly laid down in the Union List (List-1) and Concurrent List (List-3) of VII Schedule read with Article 245 and 246. The judicial powers are vested in Supreme Court, High Courts and subordinate Courts.

However, a close look at the provisions of the Constitution discloses that, the Constitution has not adopted the principle of separation of power in strict sense of the term but favors the balancing of powers between the three organs. It would be apt to say that the Constitution prefers the distribution of functions and not of powers. This is so because depending on the necessity, each organ of the State has powers to trench on the functions of the other. For example, the President in whom the executive power of the Union vests, has legislative powers under Article 123, he also exercises executive and judicial, in the same hands whether of one, a few, or many and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny”. Therefore, separation of powers doctrine acts as a check against tyrannical rule. The purpose underlying the separation doctrine is to diffuse governmental authority so as to prevent absolutism and guard against arbitrary and tyrannical powers of the state, and to allocate each function to the institution best suited to discharge it.

26 Part VI deals with the corresponding provisions on separation of power at States. The executive power vests with the Governor (Article 154), Legislative powers vest with State Legislatures (Articles 245 and 246) and Judicial powers vest with High Courts and subordinate Courts (Article 226 and 227 and relevant Statutes in force in States for subordinate Courts, for example, Karnataka Civil Courts Act, Karnataka Small Causes Court Act).

27 Article 53. The Constitution does not define what is an executive power? Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away.

28 Articles 32 and 132 to 137.

29 Article 123 reads as: Power of President to promulgate Ordinances during recess of Parliament-(1) If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate...
judicial functions under Article 72\textsuperscript{30} and 103.\textsuperscript{31} The Parliament, whose primary function is to legislate, exercises judicial function under Article 246.\textsuperscript{32} It is also interesting to note that, the Parliament is designed in such a way that, the President who is executive head of the Union is part and parcel of the Parliament.\textsuperscript{33} Further, the judiciary whose primary function is to adjudicate disputes presented before it, exercises legislative functions under Article 145.\textsuperscript{34} Thus, the Constitution allows the three organs of the State to discharge the functions of the other organ depending upon the \textit{necessity, contingency} and subject to the provisions of the Constitution. In this way one may say that Constitution of India has not adopted the principle of “separation of power” in its strict sense.\textsuperscript{35} \textit{What is to be borne in mind is that, when the one organ performs the function of the other organ or organs of the State, it does so because the Constitution expressly authorizes it.}

\textsuperscript{30} Article 72 reads as: \textbf{Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases-} (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence- (a) in all cases where the punishment or sentence is by a court Martial; (b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends; (c) in all cases where the sentence is a sentence of death. (2) Noting in sub-clause (a) of Clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.

\textsuperscript{31} Article 103 reads as: \textbf{Decision on questions as to disqualifications of members-} (1) If any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of Article 102, the question shall be referred for the decision of the President and his decision shall be final. (2) Before giving any decision on any such question, the President shall obtain the opinion of the Election Commission and shall act according to such opinion.

\textsuperscript{32} Article 245 reads as: \textbf{Extent of laws made by Parliament and by the Legislatures of States-} (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State. (2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

\textsuperscript{33} Article 79 reads as: \textbf{Constitution of Parliament-} There shall be a Parliament for the Union which shall consist of the President and two Houses to be known respectively as the Council of States and the House of People. (Emphasis supplied).

\textsuperscript{34} Article 145 reads as: \textbf{Rules of court, etc.-} (1) Subject to the provisions of any law made by Parliament, the Supreme Court may from time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court including - … …

\textsuperscript{35} \textit{Sahib Ram Jawaya Kapur & Ors. v. The State of Punjab}, AIR 1954 SC 549.
8.2.5 Article 123 and the Power of the Union Executive to Implement Treaties:

Since Ordinance is a “law” under Article 13 (3) of the Constitution, an interesting issue that needs to be addressed is that, whether the Government can promulgate Ordinance under Article 123 of the Constitution to implement international human rights treaties? The fact that the Constitution allows the Union Executive (Government) to discharge the functions of the other organs, should Union Executive step into the shoes of Parliament and enact law i.e., promulgate Ordinance to implement human rights treaties? It is worth to note here that NHRC was created through an Ordinance in 1993 and Indian Intellectual Property Laws were amended by way of Ordinances to fulfill India’s obligations under the Trade Related aspects of Intellectual Property Rights (TRIPS in short) particularly to meet the deadline under the World Trade Organization (WTO in short) regime.

A careful scrutiny of the legislative power of the Union Executive under Article 123 reveals that when Parliament is not in session and the President is satisfied that circumstances are such that an Ordinance (law) is necessary to meet the urgent requirements, and then only an Ordinance could be promulgated. Promulgation of Ordinance is the subjective satisfaction of the President (in reality, the Union Cabinet) and given the life span of an Ordinance under Article 123, it can remain in force for a maximum period of six months. In the case of WTO, there was 10 years time period for India (1995 to 2005) to meet the obligations and to tune its laws according to WTO Agreements. In the case of international human rights treaties, there is no such time limit within which human rights treaty is to be implemented at the national level.

Technically, the Union Government may Promulgate Ordinance implementing international human rights treaty; however it will expire after six weeks from date of the reassembly of the Parliament. A Bill got to be tabled before the Parliament to replace the Ordinance to make it an Act. Otherwise the Ordinance automatically

36 See Supra note 14 for text of Article 13(3).
37 See Supra note 29 for text of Article 123.
38 For example “Product Patent Regime” was introduced into the Indian Patents Act, 1970 through Indian Patents (Amendment) Ordinance, 2004. Later a Bill was passed in the Parliament and an Amendment Act was passed.
39 Satisfaction has to be on the advice of the cabinet. See Cooper v. Union of India, AIR 1970 SC 564.
40 Article 85 stipulates that the gap between two sessions of Parliament shall not exceed six months and Article 123 (2) says that an Ordinance expires after six weeks of reassembly of Parliament. Further, an Ordinance can not be promulgated during the session of Parliament.
expires by operation of law. The Government may re-promulgate an Ordinance, if Bill could not be tabled before the Parliament, however such attempts would amount to inappropriate unless there are compelling reasons to do it. In the case of NHRC, there was no such urgency or time limit imposed by any international treaty, but it was due to the international pressure that the then P.V. Narasimha Rao led Union Government Promulgated the Ordinance establishing the NHRC. Later, Protection of Human Rights Act, 1993 was passed retrospectively replacing the Ordinance.

8.2(vi) Article 51 (c) and Executive Power to Implement Treaties:

Article 51 (c) enjoins the State to foster respect for International Law and Treaty Obligations. The term State includes the Government (Union Executive) under Article 12 of the Constitution. In this context, an issue that arises for consideration is that whether Article 51 (c) confers power on the Government (Union Executive) to implement International Treaties? Article 51 (c) finds place in Part IV of the Constitution that deals with the Directive Principles of State Policy. The nature and scope of Directive Principles of State Policy is that they are fundamental in the governance of the country and the State is mandated to apply them in making laws. However, they are non justiciable. Thus, the status of Article 51 (c) is that it directs the State to respect Treaty Obligations while making laws meaning any law made by the Parliament shall not conflict with the Treaty Obligations. Further, how Treaty Obligations are to be respected is a matter to be determined as per the provisions of the Constitution. It is submitted that the power of the Union Executive to implement International (human rights) Treaties is “subject to the provisions of the Constitution” as discussed above and that Article 51 (c) being merely a Directive Principles of State Policy cannot override the express saving clause under Article 73. Even to implement any Directive Principle of State Policy the Government has to pass a law to give effect to it. Thus, to say that Government (Union Executive) can implement Treaties by virtue of duty under Article 51 (c) without an enabling legislation by the Parliament holds no water.

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41 Article 123 (2).
42 See infra, for origin/background of Protection of Human Rights Act, 1993.
43 Article 37 of the Constitution.
8.2.7 Judicial Interpretation of the Executive Power to Implement Treaties:

In 1960, within a decade of coming into force of the Constitution, the Supreme Court confronted with the issue of implementation of international treaty in Re:The Berubari and Exchange of Enclaves. The main issue involved in the Reference made by the President was; whether a law by Parliament is necessary to give effect to the agreement entered into between the Prime Ministers of India and Pakistan on exchange of certain territories between the two countries. The Seven Bench Judgment ruled that, the exchange of territories amounts ceding of an Indian territory and a law by Parliament is a must to give effect to the agreement.

The reason behind insisting a law by Parliament was not that Union Executive cannot enter into an agreement to cede Indian Territory but because cession of Indian Territory affects the First Schedule of the Constitution. Because, the territories being exchanged were defacto and dejure under the control of India and the extent of their territories having been mentioned in the First Schedule of the Constitution, an act of cession of such territories warranted an amendment to the First Schedule of the Constitution. Accordingly, Ninth Amendment to the Constitution, 1960, amending the First Schedule, was passed to give effect to the agreement.

Nine years later, the Supreme Court confronted with yet another case of cession of Indian Territory in Maganbhai Ishwarbhai Patel v. Union of India. The
main issue involved in this case was whether an Arbitration Award involving cession of Indian Territory could be given effect directly by the Government of India (executive) without a law by Parliament. A Five Judge Constitutional Bench of the Supreme Court held that, it was not a case of cession of territory but was a case of identifying the true border between two countries. However, the Court held that cession of territory cannot be effected without amending the Constitution but the case in hand does not require such a course of action.46

In Union of India v. Azadi Bachao Andolan,47 the Supreme Court observed that, “…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 the Parliament under entries 14 of List 1 of the Seventh 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 law 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”.

Though the above cited judgments are not connected with human rights treaties, but the fact remains is that the Constitution does not make any distinction between human rights treaties and other treaties. The Re: Berubari and Maganbhai emphasize that the power of the Union Executive in implementing a treaty is “subject to the provisions of the Constitution” as discussed above. The observation in Azadi Bachao Andolan is significant in the context of absence of a law by Parliament on Entry 14 of List 1 of Seventh Schedule. It says that the Union Executive cannot implement a treaty of its own if the treaty concerned 1) operates to restrict the rights of persons, or 2) modifies the law of the state and that a law by Parliament is necessary. It is submitted that the philosophy of human rights treaties is to enhance the scope of protection of human rights and not to restrict the rights of persons. But, in

M.Hidayatullah, C.J. on his behalf and for V.Ramaswami, GK.Mitter, and Grover JJ., while J.C.Shah J. delivered separate but concurring Judgment.

The distinction between Re: Berubari and Maganbhai is that in the former the territory was part and parcel of Indian territory and was in control of the Government of India but in the latter the territory was in dispute for a long period of time and both parties having laid their claims over the territory, it was purely a border dispute and was referred to the Arbitration.

AIR 2004 SC 1107 at para 18. Similar observation was made by J.C. Shaw J. in his separate but concurrent judgment in Maganbhai Ishawrbhai Patel v. Union of India, AIR 1969 SC 783. At para 80 of the judgment the learned Judge observed that: “If in consequences of the exercise of executive power, rights of the citizen 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.”
most situations they are “rights” specific and that either they require creation of new law or modifications in the existing laws of the State party. This is because the existing laws in the State Parties to the human rights Conventions do not deal human rights aspects specifically and in detail. In such a situation, the impact of human rights treaty is that it requires creation of new law or modifications in the laws of the State Party. Modifications require amendments to the existing laws, accordingly “amendments and creation of new laws” being the exclusive domain of Parliament, the same cannot be done by the executive via treaties.

The above analysis of the constitutional requirements relating to the Executive power to implement international human rights treaties reveals that, the power of the Union Executive is subject to the provisions of the Constitution and that, it depends on the subject of law making of Parliament. If the subject on which treaty is entered into is not an area/subject of law making of Parliament, then the Union Executive can very well implement the treaty. However, if the subject of treaty falls within the exclusive domain of law making of Parliament including creation of new rights as discussed above, the Union Executive cannot implement the treaty of its own. It is needless to emphasize that all human rights treaties are rights specific and their realization requires backing of law in India. It is submitted that neither the Constitution nor any Statute authorize the Union Executive to implement/enforce treaties that create “rights”. The power to implement or enforce human rights treaties being akin to process of creation of law (new right), modification of existing law (right) which is prerogative power of the Parliament, necessarily require an enabling legislation by the Parliament.

8.3 Executive Efforts to Implement International Human Rights Treaties:

Each State Party to the nine core U.N. human rights treaties required to submit Reports to the treaty bodies indicating the measures adopted to implement the treaty provisions at the domestic level.48 Given the executive power to implement the international human rights treaty provisions under the scheme of the Constitution as discussed above, it is imperative to examine the Reports that India has submitted to the treaty bodies. The approach to the Reports adopted herein is to find out as to what

48 For example Article 40 (1) of ICCPR – “The State Parties to the present Covenant undertake to submit reports on the measures they adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the State Parties Concerned; (b) Thereafter whenever the Committee so requires.
the Government of India (executive) has said about the legal status of international human rights treaties, its role and efforts made in implementing them in India.

8.3.1 Government of India’s View on the Legal Status of Human Rights Treaties in India: Periodic Reports to the Human Rights Treaty Bodies:

According to Government of India, “treaties and covenants are not self-executing but require enabling legislation or constitutional and legal amendments in cases where existing provisions of law and Constitution are not in consonance with the obligations arising from the treaty or covenant”. However, the Government of India has not given any explanation or basis for such a statement and it is also not clear as to whether the statement is made with reference to human rights treaties in general or ICCPR or on all types of treaties. The analysis of the constitutional provisions on the executive power to implement treaties and the judicial decisions in this regard as discussed above make it very clear that not all treaties are non self-executing. Accordingly, the statement that “treaties and covenants” are not self-executing in India should be understood in the context of human rights treaties and covenants only and is not restricted to ICCPR only.

The Human Rights Committee of ICCPR (CCPR in short), noting the statement of Government of India that international treaties are not self-executing, recommended at para 13 of its Concluding Observations on the 3rd Periodic Report that “steps be taken to incorporate fully the provisions of the Covenant in domestic law, so that individuals may invoke them directly before the Courts”.

After the 3rd Periodic Report, India has not submitted its 4th and 5th Report which is due since 1997. The above recommendation is significant in the context of effective implementation of ICCPR through legislative process and it is curious thing know as to what the Government of India will say on this recommendation in its ensuing Report which is due since 1997.


50 If at all the intention is to restrict the statement to ICCPR only, the Government of India would not have used the terms “treaties and covenants”.


The significance of the statement and the recommendation is that, the statement by Government of India is not confined to ICCPR only. Had there been such an intention the Government of India would have specifically stated ICCPR and not “treaties and covenants” and noting such a statement the recommendation by a treaty body- CCPR that “steps be taken to incorporate fully the provisions of the covenant in domestic law”, should necessarily extend to all human rights treaties and covenants to which India is a party.

Now, in view of CCPR recommendation on domestication of ICCPR, the issue is what steps Government of India can take to incorporate fully the provisions of ICCPR in domestic law? The answer to this issue is, considering the constitutional provisions and judicial decisions on the executive power to implement human rights treaties, the only way for the Government of India is to push for suitable amendments to the existing laws or enact new laws in order to incorporate the international human rights provisions into corpus juris of India.

8.4 Evaluation of Executive Efforts:

Whether enacting an enabling legislation is the only way for implementing international human rights treaty? Is there any other way in which Executive can implement international human rights treaties in India? Theses two issues merit consideration in view of the typology of obligations provided under international human rights treaties. The obligation to “respect, protect and fulfill” human rights has been described as tripartite obligation and this is found in every international human rights treaty.54 The obligation to “respect” requires States to abstain from violating a right: the obligation to “protect” requires States to prevent third parties from violating that right: and the obligation to “fulfill” requires the State to take measures to ensure that the right is enjoyed by those within the State’s jurisdiction.55 Article 51(c) of the Constitution also directs the State to foster respect for International Law and Treaty Obligations. Reading the tripartite obligation and Article 51(c) together, it is incumbent on the Government to respect human rights enshrined under international treaties to which India is a Party. To “respect” human right is to abstain

53 See Infra on “Judicial Efforts”.
from violating a right. It is this obligation of the Government needs to be examined. To “respect” human rights, whether Government needs a specific law? In other words, whether an enabling legislation by the Parliament implementing international human rights treaty is necessary to “respect” human rights? It is submitted that there is already a constitutional mandate for the Government to respect treaty obligations as provided under Article 51(c) as far as “respect” is concerned.

A look at the number of complaints filed against the State machinery for violating human rights shows the scant “respect” for human rights by the State and its machinery. From 1993 to 2010, NHRC registered a total of 4, 25,877 complaints against the police authorities under various counts including deaths in judicial and police custody. These numbers are relating to the registered cases and the unregistered cases of violations of human rights by the Government and its agencies must be equal to it. Apart from this, civil suits, service related matters, Writ Petitions etc., filed against the State and its agencies before the various Courts and Tribunals for seeking relief is estimated to cross more than a crore. These numbers reveal that nearly half of the total court cases are against the State and its agencies. The State being a protector of the rights has portrayed itself as violator and litigant. It is submitted that to “respect” human rights, State and its agencies do not require an enabling legislation by the Parliament- implementing international human rights treaties- what they require is the spirit and zeal to humanize its activities.

It is in this context - “to respect” human rights enshrined under international human rights treaties - the application of doctrine of legitimate expectation against the State (Executive) could be pressed into.

As far as obligation to “protect” and “fulfill” is concerned, an enabling legislation is required, since it involves “restraining others” from violating the rights and “conferment of rights”. Restraining others from violating rights require a law clearly defining the limits within which one has to conduct himself in the society and conferring a right on individuals being prerogative of Parliament has to be backed by the law. The Union Executive does a solemn act when it ratifies/accedes to an international treaty on human rights and sets the ball rolling and under the scheme of

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56 For State wise list of complaints registered with NHRC, see www.nhrc.org
57 See http://nhrc.nic.in/disparchive.asp?fno=2407 visited on 02-01-2012 at 8.03 p.m.
the Constitution it is for the other two organs of the State- Parliament and Judiciary- has to step in and perform their obligation.

8.5 Constitutional Requirements: Provisions relating to Legislative Powers of Parliament to Enact Law for Implementing International Treaty:

Article 246(1) 58 read with Entry-14 of List-1 empowers the Parliament to enact suitable legislation for implementing international treaties, agreements and conventions. Interestingly Article 253 59 also empowers Parliament to legislate for the purpose of implementing any treaty, agreement or convention entered into with any other country or countries or any decisions made at any international conference, association or other body. One would tend to ask the necessity of Article 253 when Entry 14 of List-1 specifically deals with the legislative power of the Union on the subject of making law to implement international treaties, etc.

8.5.1 Whether Article 253 was necessary? If so what is the nature and scope of Article 253?

Part XI 60 of the Constitution containing two Chapters deals with “Relations between the Union and the States”. Article 253 finds place in Chapter-1 of Part XI that specifically deals with “Legislative Relations” between Union and States.

According to Upendra Baxi, the insertion of Article 253 was probably the result of Privy Council decision in Attorney-General for Canada v. Attorney-General for Ontario, 61 wherein the Privy Council was seized with the issue of the competence of the Federal power to implement international obligations in areas of provincial jurisdiction without provincial cooperation. (Canada is a federal State with a distribution of powers between the federal government and the Provinces).

58 Article 246 reads as; “Subject matter of laws made by Parliament and by the legislatures of States-(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the “Union List”).” Entry-14 in List–I of Seventh Schedule reads as “Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.”

59 Article 253 reads as: Legislation for giving effect to International Agreements -“Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the Territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any International Conference, Association or Other body.”

60 Part XI runs from Articles 245 to 263 consisting of two Chapters. Chapter-I runs from Articles 245 to 255 that deal with Legislative Relations and Chapter-II runs from Articles 256 to 263 that deal with Administrative Relations of Union and States.

61 (1937) A.C. 326.
Privy Council held that the federation had no power to legislate in respect of the matters, which fell within the exclusive jurisdiction of the Provinces. This was so held in the light of S.92 of the British North America Act, 1867. Upendra Baxi opines that it would be legitimate to presume that the Founding Fathers of the Constitution were actually aware of this decision and have consciously provided for a departure there from in two respects. Firstly, they expressly included the treaty-making power within the legislative competence of the Parliament and secondly they incorporated Article 253 in Part XI of the Constitution. The opening words of the Article “Notwithstanding anything in the foregoing provisions of this Chapter” mean that this power is available to Parliament notwithstanding the division of power between the Centre and States effected by Article 246 read with the Seventh Schedule. Accordingly, he states that in the light of this Article, it is evident, the situation similar to the one arising in Canada by virtue of the 1937 decision afore-mentioned, may not arise.\(^62\)

The single importance of placing Article 253 in the Constitution over and above the Entries in List-I of the Seventh Schedule was to clarify beyond doubt that for implementation of an international treaty, agreement or covenant or to give effect to a decision taken at an international forum, the Union Parliament could make any law irrespective of some items in the State List being attracted. Thus Article 253 is one of those set of Articles, which provide certain exceptional situations in which the Parliament can legislate with respect to matters in the State List.\(^63\)

Thus, Article 253 in Chapter-I of Part-XI implies that, in a federal set up like India; the distribution of legislative powers between the Union and the States under the Constitution cannot come in the way of international law obligations being implemented through Parliamentary law and Parliament alone has exclusive power to implement treaties, agreements, conventions etc., by law and not Legislatures of States.

### 8.6 Legislative Efforts Of Parliament:

The above analysis of constitutional provisions reveals that, Parliament has requisite legislative powers to enact laws for the enforcement of international human

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\(^63\) As per Article 246 (3), State Legislatures alone have the exclusive power to legislate with respect to matters in the State List.
It is important to note that international human rights treaties directly cast an obligation on the State Parties to take steps to adopt laws according to their constitutional process for domestication of the rights. Hence Parliament assumes pivotal role and is central to the machinery for the implementation of international human rights treaties in India and is required to enact laws that incorporate human rights guaranteed under international treaties in order to facilitate their enforcement before the domestic courts.

India is a Party to several human rights Conventions including the six of the UN Nine Core Human Rights Conventions. Chapter VI sets out legislative obligations of India under various provisions of international human rights treaties to which India is a party. This Chapter analyses the efforts made by the Parliament of India in incorporating the treaty rights in to the corpus juris of India. The following are the legislations that are enacted specifically to fulfill India’s obligations under various international human rights Conventions.


For example, Article 2 (2) of ICCPR states that: “Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant”.

The six core human rights Conventions are: 1. ICCPR, 2. ICESCR, 3. CEDAW, 4. CERD, 5. CRC, 6.CPRD. See Table 2 for a list all the human rights conventions to which India is a party.

The search is carried out using Manupatra Legal Database with the hits “treaty”, “convention”, “covenant”, “international”, and “agreement”.

8.6.1 The Immoral Traffic (Prevention) Act, 1956:

The Preamble of the Act provides that, the Act is enacted in pursuance of the International Convention signed at New York on the 9th day of May, 1950, for the Prevention of Immoral Traffic in Persons.67 The Act provides for punishment for keeping broth or allowing premises to be used as broth and for living in the earnings on prostitution, seducing, soliciting for the purpose of prostitution, procuring inducing or taking person for sake of prostitution. However, the Act does not deal with the traffic of persons in the area of domestic work, labour, etc. which is rampant in India. The Act has given full implementation of the Convention.

8.6.2 Geneva Conventions Act, 1960:

The preamble of the Act discloses that the Act is enacted to give effect to certain international conventions done at Geneva on the 12th day of August 1949 to which India is a party and matters connected therewith. The Act notes four conventions, known as Geneva Conventions of 1949, which are as follows;


iii) Geneva Convention relative to the Treatment of Prisoners of War, of August 12, 1949.


These four Geneva Conventions are reproduced in the Four Schedules appended to the Act.68 Section 5 says that the Court of Sessions shall have power to try any

67 Previously the Act was titled as ‘Suppression of Immoral Traffic in Women and Girls’, and by Amendment Act of 1986, the title was replaced as the present one.
68 Section 2(a) defines the term “Convention” for the purpose of the Act, meaning Conventions setout in First, Second, Third and Fourth Schedule.
offences punishable under Chapter II, which invariably refers to offences referred under the four Conventions.

Each of these four Conventions calls upon the State Parties to adopt appropriate legislative measures to give effect to the provisions of the Conventions at the domestic level. For example Article 49 of Wounded and Sick in Armed Forces in the Field states that “The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.” Accordingly, the Act has given full implementation of the objectives of the four Geneva Conventions, 1949.

8.6.3 Anti Apartheid (United Nations Conventions) Act, 1981:

The Preamble of the Act says that it is an “An Act to give effect to the International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973 (ICSPCA). It further says, “India having acceded to the said Convention, should make provisions for giving effect to it.” Thus Preamble makes it absolutely clear that the Act is enacted to fulfill India’s obligations under the Convention. The obligation to adopt legislative measures flows from Article IV of the Convention, which says that “The States Parties to the present convention undertake: a) to adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime; b) to adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction…”

The Act contains only seven sections and one schedule. Section 2 makes the ICSPCA part of corpus juris of India. However, section 6 states that previous sanction of the Central Government is required for arrest or prosecution in respect of any offence enumerated under Article II and III of the Convention. The Schedule reproduces Articles II and III of the ICSPCA.

69 Section 2(1) reads as; “Notwithstanding anything to the contrary contained in any other law, such of the provisions of the International Convention on the Suppression and Punishment of the Crime of Apartheid as are setout in the Schedules shall have the force of law in India.”
8.6.4 The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995:

This Act is enacted to give effect to the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region. The Preamble notes “the meeting to launch the Asian and Pacific Decade of Disabled Persons 1993-2002 convened by the Economic and Social Commission for Asia and Pacific held at Beijing 1st to 5th December, 1992, adopted the Proclamation”. The Preamble specifically notes that “India is a signatory to the said Proclamation and it is considered necessary to implement the Proclamation.

8.6.5 Juvenile Justice (Care and Protection of Children) Act, 2000:

The Preamble of the Act notes the adoption of Convention on the Rights of the Child by the General Assembly of the United Nations on the 20th November, 1989, and further emphasizes that the Convention has prescribed a set of standards to be adhered to by all State Parties in securing the best interests of the child including social reintegration of child victims without resorting to judicial proceedings. The Preamble specifically notes that the Government of India has ratified the Convention on the 11th December 1992 and states that it is expedient to re-enact the existing law relating to juveniles bearing in mind the standards prescribed in the Convention, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juvenile Deprived of their Liberty (1990), and all other relevant international instruments.

The Act is a partial fulfillment of CRC, providing for greater care to be followed by the courts while adjudicating matters in which accused is a child and his rehabilitation.

8.6.6 Protection of Women from Domestic Violence Act, 2005:

Though the Preamble of the Act is silent on the India’s international obligation, the Statement of Objects and Reasons of the Act notes the international obligation for enacting the legislation. It says, “Domestic violence is undoubtedly a human rights issue and serious deterrent to development. The Vienna Accord of 1994 and the Beijing Declaration and the Platform of Action (1995) have acknowledged this. The United Nations Committee on Convention on Elimination of All Forms of Discrimination against Women (CEDAW) in its General Recommendation No. XII
(1989) has recommended that State Parties should act to protect women against violence of any kind especially that occurring within the family”.

Though the Act confers jurisdiction on Magistrate Courts and application of Code of criminal Procedure, 1973, the Act is more of Civil in nature. Any woman who is or has been in a relationship with the abuser where both parties lived together in a shared household and are related by consanguinity, marriage or through a relationship in the nature of marriage or adoption or joint family or even sisters, widows, mothers, single women are entitled to legal protection under the Act. The legal protections contemplated under the Act are (a) protection orders (section 18) (b) residence orders (section 19) (c) maintenance (monetary relief) (section 20) (d) custody orders (section 21) (e) compensation orders (section 22).

The Act is only a partial implementation of the CEDAW. That is, the Act aims at protecting women from domestic violence that occur within the family.

**8.6.7 The Commissions for Protection of Child Rights Act, 2005**

The Preamble of the Act notes India’s participation in United Nations General Assembly Summit in 1990 that adopted a Declaration on Survival, Protection and Development of Children and also accession by India of the Convention on the Rights of the Child (CRC) on the 11th December 1992. The Preamble further emphasizes that the Convention is an International Treaty, which makes it incumbent on India being a signatory State to take all necessary steps to protect children’s rights enumerated in the Convention. It further accounts the UN General Assembly Special Session on Children held in May 2002, that adopted an Outcome Document titled “A World Fit for Children” containing the goals, objectives, strategies and activities to be undertaken by the member countries for the current decade. What is important note here is that the Preamble specifically notes, “It is expedient to enact a law relating to children to give effect to the policies adopted by the Government in this regard, standards prescribed in the CRC, and all other relevant international instruments.”

It is crystal clear from the Preamble of the Act that the Act was enacted to give effect to the CRC and other decisions taken at the international level as noted above.

The Act contemplates establishment of Commissions at the National and at State level for protection of child rights. According to the Central Government

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constituted in March 2007 the “National Commission for Protection of Child Rights”72 (NCPCR here in after). One of the Functions of the NCPCR under section 13(c) of the Act is to inquire in to violation of child rights and recommend initiation of proceedings in such cases. The NCPCR is empowered to recommend the concerned Government or authority, the initiation of proceedings to prosecute or other action against the concerned person or persons if the inquiry discloses that such person violated the child rights. It may also approach Supreme Court or High Court concerned for directions, orders or writs in this regard. The NCPCR can also recommend the concerned Government or Authority for grant of interim relief to the victim or the members of victim’s family.73

Further, the Act provides for creation of Children’s Courts for speedy trial of offences against children or violation of child rights.74 It is for the State Government to specify at least a Court in the State or specify, for each district, a Court of Sessions as Children’s Court with the concurrence of Chief Justice of High Court.

However, the Act does not define or specify as to what constitute an offence against children. Child rights are defined under section 2(b) of the Act which is inclusive one and says that it includes rights adopted in the CRC. This is a sweeping definition. It is surprising to see as to how an infringement of substantive rights guaranteed under CRC or any other law for that matter gives rise to criminal liability. To constitute an act to be an offence, it should be clearly defined, like Indian Penal Code; otherwise a person can not be punished for an act which is not clearly defined under a penal law. Merely because a right is guaranteed under CRC or in any other law, an infringement of that right does not necessarily result into a crime.

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71 Section 3 reads as: **Constitution of National Commission for Protection of Child Rights.**- (1) The Central Government shall, by notification, constitute a body to be known as the National Commission for Protection of Child Rights to exercise the powers conferred on, and to perform the functions assigned to it, under this Act. (2) The Commission shall consist of the following Members, namely:- (a) a Chairperson who is a person of eminence and has done outstanding work for promoting the welfare of children; and (b) six Members, out of which at least two shall be women, from the following fields, to be appointed by the Central Government from amongst persons of eminence, ability, integrity, standing and experience in, (i) education; (ii) child health, care, welfare or child development; (iii) juvenile justice or care of neglected or marginalized children or children with disabilities; (iv) elimination of child labour or children in distress; (v) child psychology or sociology; and (vi) laws relating to children.

72 The Central Government has also enacted The National Commission for Protection of Child Rights Rules, 2006 laying down the procedure to be followed by the Commission while discharging its functions.

73 Section 15 of the Act.

74 Section 25 of the Act.
Further, this Act by defining “child rights” as including the rights guaranteed under CRC,\textsuperscript{75} has in fact woven the CRC provisions into the \textit{corpus juris} of India. What is striking is section 2(b) of the Act does not cast any limitation as to the application of CRC provisions unlike the limitation engrafted under section 2(d) of Protection of Human Rights Act, 1993. The NHRC, SHRCs, or Courts established under the Protection of Human Rights Act, 1993, can consider rights guaranteed under International Covenants provided such International Covenants are enforceable by \textit{Courts in India}. This is a significant departure given the dualist approach the Courts in India have adopted with regard to the domestic use of international human rights law with little modifications, of late, and indeed this goes to the root of the matter.

Further, when this Act confers so much of power for the Commission to interpret CRC and any other laws on children and decide as to the infringement of rights of children under CRC or any other laws, recommend for prosecution or interim relief of compensation to victims or members of his family- its composition is not strong and effective compared to the NHRC. The Act does not specifically provide for appointment of a Member to the Commission from Judiciary, be it of Supreme Court or High Court. In this way the Act fails to provide a strong and effective Commission to meet the objectives of the Act.

The Act creates an institutional mechanism to protect rights of children. The Act makes the CRC part of the \textit{corpus juris} of India empowering the NCPCR and Sessions Courts to apply CRC provisions while dealing with infringement of rights of children. The Act is still in its infant stage and as the time progress; one would expect the NCPCR and Courts to utilize the true spirit of the CRC provisions to make the world fit for children.

It is submitted that the Act should make a provision for appointment of a Member from Judiciary to NCPCR for effective utilization of the CRC and laws relating to children in India. It should also provide for mandatory co-ordination between NHRC and NCPCR. As far as utilization of CRC provisions are concerned

\textsuperscript{75} Section 2(b) defines - “Child Rights” includes the children’s rights adopted in the United Nations Convention on the Rights of the Child on the 20\textsuperscript{th} November 1989 and ratified by the Government of India on the 11\textsuperscript{th} December, 1992.
the NCPCR has no legal hurdles unlike the NHRC has under the Protection of Human Rights Act, 1993.76

8.6.8 The Factories (Amendment) Act, 2005:

Section 66(1)(b) of the Factories Act, 1948 prohibits employment of women in factories between 7 p.m. to 6 a.m. This section was incorporated into the Factories Act after India’s ratification of the International Labor Organisation Convention No.89. Due to the liberalisation policies of the Government and growth in IT sector, there was enormous increase in the women employment and the restriction was seen as deterrent to the progress and empowerment of women. The Madras and Andhra Pradesh High Courts have struck down section 66(1) (b) which imposed prohibition on night shifts for women as unconstitutional.

Noting the changing scenario and the need for women to work in night shifts, the General Conference of the ILO in June 1990 adopted a Protocol relating to Convention No.89, known as Protocol of 1990. Under the provisions of this Protocol, the competent authority in a country under its national laws and regulations authorized to modify the duration of the night shifts or to introduce exemption from the prohibition within certain limits. Thus in order to provide flexibility in the matter of employment of women during night and to generate employment for women and also in pursuance of ILO June1990 Protocol, the Central Government intends to amend section 66 to allow women to work in night shifts.

8.6.9 The Protection of Children from Sexual Offences Bill, 2011:

The Preamble of the Bill77 states that the Government of India has acceded to the Convention on the Rights of the Child on 11th December 1992, which has prescribed a set of standards to be followed by all State Parties in securing the best interest of the child (below 18 years). It further notes that the State Parties to the Convention on the Rights of the Child are required to undertake all appropriate national, bilateral and multilateral measures to prevent (a) the inducement or coercion of a child to engage in any unlawful sexual activity (b) the exploitative use of children

76 That is, when NHRC receives a complaint alleging violation of rights guaranteed under International Convention, first it has to decide whether alleged International Convention rights are “enforceable by Courts in India” because of the inherent limitation u/s 2(d) of the 1993 Act. However, the NCPCR is at liberty to apply the provisions of CRC directly without going into the requirement of judging the “enforceability of CRC by courts in India”. See Infra on Protection of Human Rights Act, 1993.
77 Bill No.XIV of 2011 introduced in the Rajya Sabha.
in prostitution or other unlawful sexual practices (c) the exploitative use of children in pornographic performances and materials. Thus the Bill seeks to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of special courts for trial of such offences.

The Bill was passed by the Rajya Sabha on 12th May 2012 and the Lok Sabha on 22nd May 2012.

8.6.10 Protection of Women against Sexual Harassment at Workplace Bill, 2010:

The Statement of Object and Reasons of the Bill does not note any international obligation of India in proposing the Bill. It notes the Vishaka v. State of Rajasthan judgment of the Supreme Court. The Apex Court in the said case worked out a definition of sexual harassment and issued guidelines to be followed for prevention of sexual harassment of women at workplace. The Court did note the absence of specific law on the issue and referred Convention on Elimination of All Forms Discrimination against Women (CEDAW) to which India is a Party. It is curious to note here that the proposed Bill is an attempt to fulfill India’s international obligation under CEDAW but fails to mention it.

The Bill seeks to ensure protection of women against sexual harassment at the workplace, both in public and private sectors whether organized or unorganized. Under the Bill, women can complain against harassment ranging from physical contact, demand or requests for sexual favors, sexually colored remarks or showing pornography. The Bill provides for an effective complaints and redressal mechanism and in this regard proposes two committees Internal Complaints Committee (ICC) and Local Complaints Committee (LCC) to be setup by the employer and District Officer respectively to deal with complaints and recommend action to the employer or District Officer as the case may be.

Further, the Bill provides protection not only to women who are employed but also to any woman who enters the workplace as a client, customer, apprentice and daily wageworker or in ad-hoc capacity. Students, research scholars in colleges and universities and patients in hospitals have also been covered.

On 07/12/2010 the Bill was referred to the Parliamentary Standing Committee on Human Resource Development and the Committee is scheduled to submit its

78 AIR 1997 SC 3011.
report by the end of June-2011. Notably the Bill excluded domestic workers from the purview of the Act and it is expected that the Committee will consider the same in its ensuing report.

8.6.11 The Prevention of Torture Bill, 2010:

The Statement of Object and Reasons of the Bill clearly states that the Bill is intended to facilitate ratification of the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT), to which India signed on 14/10/1997. It further notes that “Ratification of the Convention requires enabling legislation to reflect the definition and punishment for “torture”. Although some provisions relating to the matter exist in the Indian Penal Code, yet they neither define torture as clearly as in Article 1 of the said Convention nor make it a criminal offence as called for by Article 4 of the Convention. In the circumstances it is necessary for the ratification of the Convention that domestic laws of our country are brought in conformity with the Convention”.

The proposed legislation intends to provide punishment up to 10 years and fine for “torture” inflicted by a public authority or by any one with the consent of public authority for the purpose of obtaining information or confession.

The Bill was introduced in the Lok Sabha on 26/04/2010 and the same was passed on 06/05/2010. The Rajya Sabha referred the Bill to the Select Committee consisting of 13 Members of Rajya Sabha. On 06/12/2010 the said Committee submitted its report suggesting changes, modifications in the Bill to make it more deterrent. The Report suggests comprehensive definition of torture on par with the definition provided in CAT including cruel, inhuman and degrading treatment and minimum punishment of 3 years and fine of one lakh rupees, compensation to victims

79 Though the Bill says that, it is an enabling legislation to ratify the CAT, but it is incorrect to say that, in India, an enabling legislation is required to ratify CAT or any Convention for that matter. Neither International Law nor Indian Constitution and even any Convention on human rights do stipulate that an enabling legislation is a must before ratification. Under the scheme of the Indian Constitution, neither Parliamentary consent nor an enabling legislation is required for ratification of an International Convention.

80 Section 3 of the Bill defines torture as “Whoever being a public servant or being abetted by a public servant or with the consent or acquiescence of a public servant, intentionally does any act for the purposes to obtain from him or a third person such information or a confession which causes – a) grievous hurt or any person; or b) danger to life, limb or health (whether mental or physical) of any person, is said to inflict torture: Provided that nothing contained in this section shall apply to any pain hurt or danger as aforementioned caused by any act, which is inflicted in accordance with any procedure established by law or justified by law.”

81 The full text of the Report is available at www.prs.org Visited on 14/08/2011 at 09.35 p.m.
of torture and inclusion of public companies and educational institutions under the control of State or Center under the definition of public servants.

As noted above the Preamble of these legislations and Bills specifically refers to India’s international obligation to enact suitable legislation to provide domestic protection to human rights provided in the respective human rights Conventions. Apart from these specific legislations the Central Government has also enacted Protection of Human Rights Act, 1993, which requires deeper scrutiny as it provides definition of “human rights”, “international covenants” and enforcement of international human rights Conventions in India.

8.6.12 The Rights of Persons with Disabilities Bill, 2011:

The Statement of objects and reasons as well as Preamble of the Bill makes it clear that the Bill is intended to fulfill India’s obligation to enact suitable law to implement Convention on the Rights of Persons with Disabilities, 2007 (CRPD). The Bill when comes into force will replace the existing law i.e., The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

The salient features of the proposed legislation are as follows: 1) to guarantee equality and non-discrimination to all persons with disabilities; 2) to recognize legal capacity of all persons with disabilities and make provision for support where required to exercise such legal capacity; 3) to recognize the multiple and aggravated discrimination faced by women with disabilities and induct a gendered understanding in both the rights and the programmatic interventions; 4) to recognize the special vulnerabilities of children with disabilities and ensure that they are treated on an equal basis with other children; 5) to mandate proactive interventions for persons with disabilities who are elderly, confined to their homes, abandoned and segregated or living in institutions and also those who need high support; 6) to establish National and State Disability Rights Authorities which facilitate the formulation of disability policy and law with active participation of persons with disabilities; dismantle structural discrimination existing against persons with disabilities and enforce due observance of regulations promulgated under this Act for the protection, promotion

82 India acceded to the CRPD on 01-10-2007.
and enjoyment of all rights guaranteed in this Act; 7) to specify civil and criminal sanctions for wrongful acts and omissions.

The significance of the Bill is that it incorporates all the civil and political rights enumerated in the UNCRPD and intends to implement the whole UNCRPD into the corpus juris of India.

8.6.13 Protection of Human Rights Act, 1993:

The Protection of Human Rights Act, 1993 (Act, herein after), was a result of Paris Principles, 199183 and Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on June 25, 1993,84 wherein it was recommended that every State ought to provide an effective framework of machinery or institution to address human rights violations. Under pressure,85 the Government of India promulgated an Ordinance on 28-09-1993 that established National Human Rights Commission (NHRC). Later, the Act was enacted replacing the earlier Ordinance.86

The Act is one of the important pieces of legislation in enforcing the international human rights treaties in India. It defines the term “Human Rights”, “International Conventions”, creates NHRC, and provides for creation of SHRCs and Human Rights Courts at district level. May it be stated here that the Act mainly provides for institutional mechanisms like NHRC and SHRCs to redress human rights violations by the public authorities and thereby enforce human rights guaranteed

84The World Conference on Human Rights was held in Vienna, Austria by the United Nations, on 14 to 25 June 1993. It was the second human rights Conference with the first having been the International Conference on Human Rights held in Tehran, Iran, during April–May 1968 to mark the twentieth anniversary of the Universal Declaration of Human Rights (UDHR). The main result of the Conference was the Vienna Declaration and Programme of Action.
85 There was immense pressure from Western Countries and International Monetary Fund (IMF) on India to establish National human rights Commission for better protection of human rights.
86 The Protection of Human Rights Bill was passed in the Loka Sabha on 18th December 1993. It received the assent of the President on 8th January 1994. The Act was given retrospective effect from 28th September, 1993 (Section 1(3) of the Act). The Act contains 43 sections divided in 8 Chapters. Chapter-I deals with preliminary aspects including definition part in first two sections. Chapter II deals with constitution of NHRC under sections 3 to 11. Chapter III deals with powers and functions of NHRC under sections 12 to 16. Chapter IV deals with procedure to be adopted by NHRC in dealing with complaints under sections 17 to 20. Chapter V deals with constitution of State Human Rights Commission (SHRC), etc., under sections 21 to 29. Chapter VI deals with Human Rights Courts under section 30 and 31. Chapter VII deals with finance, accounts and audit of accounts of NHRC and SHRC. And finally Chapter VIII deals with miscellaneous matters power of Central and State Governments to make Rules to carryout the provisions of the Act.
under the Constitution and international human rights treaties to which India is a party. In this context an overview of the Act is essential for its critical appraisal.

8.7 An Overview of the Act:

8.7.1 Preamble:

The main object of the Act is envisaged in the Preamble of the Act, which says that it is an Act to provide for the establishment of NHRC, Human Rights Commission in States (SHRC) and Human Rights Courts at the District level for better protection of human rights.\(^{87}\)

8.7.2 Definitions:

The Act makes bold attempt to define the term “Human Rights”. Section 2(1) (d) of the Act says that - “human rights” means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the constitution or embodied in the International Covenants and enforceable by Courts in India”. Section 2(1) (f) says that - “International Covenants” means the International Covenant on International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16\(^{th}\) December, 1966 and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may by notification specify”.

8.7.3 Constitution of NHRC:

NHRC is constituted by the Central Government to exercise the powers conferred upon and to perform the functions assigned to it under the Act.\(^{88}\) It consists of

1) A Chairperson who has been the Chief Justice of the Supreme Court;

2) One Member who is, or has been, the Judge of the Supreme Court;

3) One Member, who is, or has been the Chief Justice of a High Court;

4) Two Members to be appointed amongst persons having knowledge of, or practical experience in, matters relating to human rights.

\(^{87}\) The Preamble of the Act.

\(^{88}\) Section 3(1) of the Act.

\(^{89}\) Section 3(2) of the Act.
Apart from these, the Chairpersons of National Commission for Minorities, National Commission for Schedule Caste, National Commission for Schedule Tribes, National Commission for Women are deemed to be Members of the NHRC for the discharge of functions specified in section 12(b) to (j). The Act also provides for appointment of a Secretary General who shall be the Chief Executive Officer of the NHRC and shall exercise such powers and discharge such functions of the NHRC, except judicial functions and the power to make regulations under section 40B, as may be delegated to him or by the Chairman of NHRC as the case may be.

8.7.4 Functions of the NHRC:

Section 12 of the Act outlines the following functions of the NHRC, namely;

1. Inquire, *suo moto* or on a petition presented to it by a victim or any other person on his behalf or on a direction or order of any Court, into complaint of-
   (a) violation of human rights or abetment thereof; or
   (b) negligence in the prevention of such violation by a public servant;
2. intervene in any proceeding involving any allegation of violation of human rights pending before a Court with the approval of such Court;
3. visit, notwithstanding anything contained in any other law for the time being in force, any jail or any other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection to study the living conditions of inmates and make recommendations thereon to the Government;
4. review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommends measures for their effective implementation;
5. review the factors, including acts of terrorism, that inhibit the enjoyment of human rights and recommend appropriate remedial measures;
6. study treaties and other international instruments on human rights and make recommendations for their effective implementation;
7. undertake and promote research in the field of human rights;

90 Section 3(3) of the Act.
91 Section 3(4) of the Act.
8. spread human rights literacy among various sections of the society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means;

9. encourage the efforts of non-governmental organizations and institutions working in the field of human rights; and

10. such other functions as it may consider necessary for the promotion of human rights.

**8.7.5 Jurisdiction of NHRC and its Limitations:**

Interestingly the Act does not specifically say the extent to which NHRC can exercise territorial jurisdiction over complaints alleging violations of human rights. Section 36(1) of the Act which is placed in last Chapter VIII (Miscellaneous) says that the NHRC shall not inquire into any matter which is pending before a SHRC or any other Commission duly constituted under any law for the time being in force and Section 36(2) places an embargo on the NHRC that no inquiry shall be made on any matter alleging violation of human rights that are presented to it after expiry of one year from the date of alleged violation. Thus it would mean that NHRC can entertain complaints without any territorial restrictions subject to the above two limitations.

**8.7.6 Powers relating to Inquiries:**

The Act confers on the NHRC all the powers of a Civil Court trying a suit under the Code of Civil Procedure, 1908, while inquiring into complaints, and in particular in respect of the following matters;\(^2\)

1. Summoning and enforcing the attendance of witnesses and examining them on oath;
2. Discovery and production of any document;
3. Receiving evidence on affidavits;
4. Requisitioning any public record or copy of thereof from any court or office;
5. Issuing commissions for the examination of witnesses or documents;
6. Any other matter which may be prescribed.

\(^2\) Section 13 (1) of the Act
8.7.7 Powers relating to Investigation:

The NHRC may, for the purpose of conducting any investigation pertaining to the inquiry, utilize the services of any officer or investigation agency of the Central Government or the State Government, as the case may be. For the purpose of investigating into any matter pertaining to the inquiry, any officer or agency whose services are utilized under section 14(1) noted above, may, subject to the direction and control of the Commission;

1. Summon and enforce the attendance of any person and examine him;
2. Require the discovery and production of any document;
3. Requisite any public record or copy thereof from any office.

8.7.8 Procedure for dealing with complaints:

In exercise of the powers under section 10(2) of the Act, the NHRC has framed National Human Rights Commission (Procedure) Regulations, 1994. Regulation 8 lays down the procedure for dealing with complaints of alleged violation of human rights which is as follows;

1. All complaints in whatever form received by the Commission shall be registered and assigned a number and placed for admission before a Bench of two Members constituted for the purpose not later than two weeks of receipt thereof.
2. No fee is chargeable on complaints.
3. It may entertain complaints sent through fax, telegraph, e-mail.
4. It may dismiss a complaint at the threshold if it does not disclose clear picture of the matter or the NHRC may ask for more information by the complainant.
5. It may transfer any complaint filed or pending before it, to the SHRC of a State from where such complaint originates, if it is necessary or expedient to do so, for disposal in accordance with the Act.
6. Upon the admission of complaint the Chairperson/Commission shall direct whether the matter would be set down for inquiry by it or should be investigated into.

93 Section 14(1) of the Act.
94 Section 13(6) of the Act. (Inserted by 2006 Amendment).
7. On every complaint on which a decision is taken by the Chairperson/Commission to either hold an inquiry or investigation, the Secretariat shall call for report/comments from the concerned Government/authority giving the latter a reasonable time therefore.

8. On receipt of the comments of the concerned Government/authority, a detailed note on the merits of the case shall be prepared for consideration of the Commission.

9. The directions and recommendations of the Commission shall be communicated to the concerned Government/authority and the complainant as provided for under section 18 and 19 of the Act.

10. The Commission may, in its discretion afford a reasonable hearing to the complainant or any other person on his behalf and such other person or persons as in the opinion of the Commission should be heard, for appropriate disposal of the matter before it and where necessary call for records and examine witnesses in connection with it. The commission shall afford a reasonable hearing, including opportunity of cross-examining witnesses, if any, in support of the complaint and leading of evidence in support of his stand to a person whose conduct is enquired into by it or where in its opinion the reputation of such person is likely to be prejudicially affected.

11. Where investigation is undertaken by the team of the Commission or by any other person under its discretion, the report shall be submitted within a week of its completion or such further time as the NHRC may allow. The NHRC may, in its discretion, direct further investigation in a given case if it is of the opinion that investigation has not been proper or the matter requires further investigation for ascertaining the truth or enabling it to properly dispose of the matter. On receipt of the report, the NHRC on its own motion, or if moved in the matter, may direct inquiry to be carried by it and receive evidence in course of such inquiry.

12. The NHRC or any of its Members when requested by the Chairperson may undertake visits for and on-the-spot study and where such study is undertaken by one or more Members, a report thereon shall be furnished to the NHRC as early as possible.
8.7.9 Steps after Inquiry:

The NHRC, during or after the completion of the inquiry, may take any of the following steps:95

1. Where the enquiry discloses the commission of violation of human rights, or negligence in the prevention of violation of human rights by a public servant, it may recommend to the concerned Government or authority, (i) to make payment of compensation or damages to the complainant or victim or members of his family, as the NHRC may consider necessary, (ii) the initiation of proceedings for prosecution or such other action as the NHRC may deem fit against this concerned person or persons; (iii) to take such further action it may think fit.

2. Approach the Supreme Court or the High Court concerned for such directions, orders or writs as that Court may deem necessary;

3. Recommend to the concerned Government or authority for the grant of such immediate interim relief to the victim or the members of his family as the NHRC may consider necessary;

4. The NHRC shall send a copy of its enquiry report together with its recommendations96 to the concerned Government or the authority and the concerned Government or authority shall, within a period of one month, or such further time as the Commission may allow, forward its comments on the report, including the action taken or proposed to be taken thereon, to the NHRC;

5. The NHRC shall publish its enquiry report together with the comments of the concerned Government or authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the NHRC.

95 Section 18 of the Act.
96 Copy of such report is also provided to the petitioner or his representative.
8.7.10 Special Procedure with respect to Complaints against Armed Forces:

The Act contemplates different procedure in dealing with the complaints of violation of human rights by the armed forces.\(^\text{97}\) The NHRC is under a duty to adopt the following procedure as it is mandatory;

i) it may, either on its motion or on receipt of a petition, seek a report from the Government,

ii) after the receipt of report, it may, either not proceed with the complaint or as the case may be, make recommendations to that Government.

The Central Government shall inform the NHRC of the action taken on the recommendations within three months or such further time as NHRC may allow. The NHRC shall publish its report together with its recommendations made to the Central Government and the action taken by that Government on such recommendations, and a copy the report be provided to the petitioner or his representatives.

8.7.11 Annual and Special Reports:

Section 20 the Act mandates the NHRC to submit an annual report to the Central Government and to the State Government concerned. It may also submit special reports on any matter which, in its opinion, is of such urgency or importance that it should not be deferred till submission of the annual report.

Further, the Central Government and State Government, as the case may be, is required to cause the reports to be laid before each House of Parliament or the State Legislature respectively, along with a memorandum of action taken or proposed to be taken on the recommendations of the Commission and the reasons for non-acceptance of the recommendations, if any.

8.7.12 Constitution of State Human Rights Commissions (SHRCs):

Chapter 5 of the Act deals with Constitution and functions of SHRCs. A State Government may constitute Human Rights Commission for its State to exercise powers and functions conferred under Chapter 5.\(^\text{98}\) The SHRC consists of-\(^\text{99}\)

1. A Chairperson who has been a Chief Justice of a High Court;

\(^\text{97}\) Section 19 of the Act.
\(^\text{98}\) Section 21 (1) of the Act.
\(^\text{99}\) Section 21 (2) of the Act. Prior to 2006 Amendment SHRC consists of five members and a Secretary, now the 2006 Amendment reduced the number of Members to three and a Secretary.
2. One Member who is, or has been a Judge of a High Court or who is, or has been a District Judge in the State;

3. One member to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights.

Further, the Act mandates that there shall be a Secretary, who shall be the Chief Executive Officer of the State Commission and shall exercise such powers and discharge such functions of the SHRC as it may delegate to him.100

8.7.13 Jurisdiction of SHRC and its Limitations:

SHRC may inquire into violation of human rights only in respect of matters relating to any of the Entries enumerated in List II and List III in the Seventh Schedule to the Constitution.101 However, SHRC can not enquire into any matter that is already being enquired into by NHRC or any other Commission duly constituted under any law for the time being in force.102 Section 29 of the Act says that the provisions of sections 9, 10,12,13,14,15,16,17 and 18 shall apply to a SHRC and shall have the same effect.

8.7.14 Human Rights Courts:

The Act envisages for creation of Human Rights Courts in each District for the purpose of providing speedy trial of offences arising out of violation of human rights. The State Government may with the concurrence of the Chief Justice of the High Court, by notification, specify for each district a Court of Sessions to be a Human Rights Courts to try the said offences.103 The Act mandates that a Special Public Prosecutor be appointed for every Human Rights Courts.104

100 Section 21 (3) of the Act.
101 Section 21 (5) of the Act. In relation to the Jammu and Kashmir SHRC, the words and figures “List II and List III in the Seventh Schedule to the Constitution” shall be substituted as “List II and List III in the Seventh Schedule to the Constitution as applicable to the State of Jammu and Kashmir in respect of matters in relation to which the State Legislature of that State has power to make laws” had been substituted (Section 21(5) of the Act).
102 The other limitations attached to the exercise of Jurisdiction are similar to that of NHRC. See Jurisdiction of NHRC and its Limitations, Infra.
103 Section 30 of the Act. However no such Court shall be specified if (a) Court of Sessions is already specified as a special court; or (b) a special court is already constituted for such offences under any other law for the time being in force.
104 Section 31 of the Act. Section 30 which envisages for creation of Human Rights Court in each district uses the word “may” indicating it as optional, whereas section 31 which deal with appointment of Special Public Prosecutor to such Court uses the word “shall” which is mandatory.
8.8 Critical Evaluation of the Act:

8.8.1 The Origin/Background of the Act:

As noted above the Act was a result of Paris and Vienna Principles, 1991 and Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on June 25, 1993 that called for creation of national institutions to address human rights violations. Further, the background record suggests that India was not keen to establish an institutional mechanism like NHRC. Until the early 1990s, the Indian Government displayed scant regard for local human rights and civil liberties organizations. Their reports, appeals and petitions on human rights abuses, particularly in view of anti insurgency operations in Kashmir, Punjab and Northern States, met with deafening silence. The scathing reports of Amnesty International and Asia Watch had sharpened the international visibility of these human rights abuses. Even the international financial institutions and donors have threatened to stop lending loan, aid to India. Due to the international pressure, the Government began to debate the creation of NHRC which was also a major subject for the political parties during the 1991 Parliamentary elections. Under continued pressure from all quarters and realizing the need to improve the image of India at international level, on 14-05-1993, the final day of the Budget Session of Lok Sabha, “The Human Rights Commission Bill, 1993” (Bill No. 65 of 1993) was introduced by the P.V. Narasimha Rao Government. Curiously the Bill was referred to Parliamentary Standing Committee of the Home Ministry instead of referring it first to the Parliamentary Standing Committee for Scrutiny. The said Bill did not see the light of the day and virtually faded. The international pressure was so much that the Government was

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105 See Supra notes 83, 84 and 85.
108 Human Rights violations in Kashmir and Punjab were subject of a debate in U.S. Congress in 1991. The debate was sparked by the introduction of House measure calling for a cutoff of all U.S. development aid if the Indian Government did not allow human rights groups access to India. The Bill, sponsored by Representative Dan Burton, was aimed at gaining access for Amnesty International, which has been barred from conducting fact-finding missions in India. Later an amended version of the Bill was adopted by the House on 19-06-1991, without the aid cutoff. See May 1991 Report, supra, note 107.
109 The creation of NHRC was a subject of manifesto of Congress and Bharatiya Janata Party (BJP) during 1991 Parliamentary Election.
forced to promulgate “Protection of Human Rights Ordinance” through the President under Article 123 of the Constitution, on 28-09-1993. Thus NHRC of India came into existence by overnight without any debate in the Parliament. Later in the year 1994, a new “Protection of Human Rights Bill” (Bill No. 10 of 1994), came to be passed in the Parliament and received the assent of President on 08-01-1994. The Act came into force retrospectively from 28-09-1993, the day NHRC was established through an Ordinance.

It is in this background that the Act was enacted. No fruitful discussions took place either at Parliament or elsewhere before NHRC was established as it was already in place through an Ordinance. It was observed that the Governments in the region have used national commissions largely to enhance their national images and primarily to rebuff international pressure, criticism and scrutiny over violations of human rights by the governmental forces and agencies. Whether for good or ill, setting up a NHRC is clearly in fashion for the Governments of the region. The manner and the hurriedness in which the Ordinance was Promulgated and statutory sanction accorded later, was nothing short of a cosmetic exercise aimed mostly at appeasing international audiences and to boost the Government’s human rights image in the eyes of global community.

Whatever may be the background in creating the NHRC, what matters is whether the NHRC possesses all the characteristics and strength that make it autonomous or independent and effective one to hold the Government and its agencies accountable for non implementation of human rights obligations or liable for human rights violations? It is apt to recall here that the Paris Principles mandates the States to setup national institutions for the effective protection and promotion of human rights. Infact, the Paris Principles primarily refers to the status and functioning of such national institutions enlisting a number of responsibilities on such national institutions, which inter-alia fall under five distinct headings which are as follows;

1. Firstly, the institution shall monitor any situation of violation of human rights which it decides to take up.


2. Secondly, the institution shall be able to advise the Government, the Parliament and any other competent body on specific violations, on issues related to legislation and general compliance and implementation with international human rights instruments.

3. Thirdly, the institution shall relate to regional and international organizations.

4. Fourthly, the institution shall have a mandate to educate and inform in the field of human rights.

5. Fifthly, such institutions are given a quasi-judicial competence.

According to Paris Principles the key elements of the composition of a national institution are its independence and pluralism. In relation to the independence the guidance in the Paris Principles is that the appointment of commissioners or other kinds of key personnel shall be given effect by an official Act, establishing the specific duration of the mandate, which may be renewable. Compliance with the Paris Principles is the central requirement of the accreditation process that regulates National Human Rights Institution (NHRI) access to the United Nations Human Rights Council and other bodies.

Now the task is cutout to examine as to, whether the Act is in tune with the Paris Principles and whether NHRC has in it the legal force and mandate (a) to protect and promote human rights enshrined in international human rights Conventions and Constitution of India, (b) to hold Government and its agencies accountable for violations of human rights (c) to make Government realize the fact that it is the primary duty bearer having international and Constitutional obligation to discharge the same.

8.8.2 The Mandate – Definition of “Human Rights”, “International Covenants” and Jurisdiction of NHRC:

8.8.2(i) Definitions:

The Act starts with a weak foundation on the understanding of the term “Human Rights” and “International Covenants”. It takes a very narrow view of these terms. Section 2(1) (d) of the Act defines “Human Rights” - which provides that –

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112 United Nations Human Rights Council is a peer review system operated by a subcommittee of the International Coordinating Committee of National Human Rights Institutions (NHRIs)
“Human Rights” means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Courts in India. Further, section 2(1) (f) defines “International Covenants” as - “International Covenants” means the International Covenant on International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th December, 1966 and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may by notification specify”.

The definition is not inclusive one but exhaustive as it uses the word “means”. When an Act intends to provide an exhaustive definition on a term which has not been defined elsewhere, immense care must be taken. It is submitted that the term was defined in a casual manner and anyone who has read the basic literature on human rights will not endorse the definition. Had it been inclusive definition, there would have been some scope for liberal interpretation, but that is not the case here.

Further, the definition attaches two more important qualifications on the second leg of the definition. Section 2(1) (f) says that - “International Covenants” means the International Covenant on International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th December, 1966 and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may by notification specify”.

A careful scrutiny of section 2(1) (d) and 2(1) (f) of the Act reveals the following limitations;

1. Both the definitions use the word “means”, suggesting that they are exhaustive one and not inclusive. In the case of “Human Rights”, there is no scope what so ever for liberal or inclusive interpretation by the judiciary, NHRC or SHRCs as to the meaning of the term “Human Rights”;

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113 Emphasis supplied.
2. As a result *NHRC, SHRCs or Human Rights Courts cannot entertain a complaint/petition if it relates to violation of “Human Rights” other than right to life, liberty, equality and dignity even though guaranteed either under the Constitution of India or under International Covenants.*

3. The definition on the term “International Covenants” is vague. It specifically mentions International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and leaves it to the sweet will of the Central Government to specify, through Notification, any other Covenant or Convention that are adopted by the General Assembly of the United Nations. Till date the Central Government has not notified any other Covenant or Convention within the meaning of “International Covenants” under section 2(f) of the Act. Thus *NHRC, SHRCs or Human Rights Courts cannot consider complaints alleging violation of human rights guaranteed under other international conventions except ICCPR and ICESCR.*

4. Yet another important qualification on the definition of “International Covenant” under section 2(f) is that *such Covenant or Convention adopted by the General Assembly of the United Nations.* Thus Section 2(f) excludes all other Covenants or Conventions which are not adopted by the General Assembly of the United Nations from its purview. For example Conventions adopted by the International Labor Organization (ILO) or Bilateral or Regional Conventions, Conferences, like South Asian Association for Regional Co-operation (SAARC), Association of South East Nations (ASEAN).

5. The most important limitation on the use of “International Covenants” is *such Covenants are enforceable by Courts in India.* It is a matter of record that Courts in India follows dualist view on the domestic application of international law including Human Rights Covenants. This limitation is

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115 Section 2(f) was amended by The Protection of Human Rights (Amendment) Act, 2006 (No. 43of 2006), that added the following text “and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may by notification specify”. Previously Section 2(f) contained only ICCPR and ICESCR.

116 Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region adopted in “the meeting to launch the Asian and Pacific Decade of Disabled Persons 1993-2002 convened by the Economic and Social Commission for Asia and Pacific held at Beijing 1st to 5th December, 1992.
not found in the definition on “Child Rights”\textsuperscript{117} under section 2(b) of Commissions for Protection of Child Rights Act, 2005. It means that the Commission for the Protection of Child Rights established under the said Act is fully competent to make use of CRC without any inhibition unlike NHRC, as to whether the rights guaranteed under CRC are enforceable by Courts in India or not. This anomaly needs to be remedied at the earliest.

It is submitted that the definition on Human rights should have been inclusive one. Needless to say human rights encompass the rights that are associated with every human being by virtue of him being human and are not confined to life, liberty, equality and dignity as provided under section 2(d) of the Act. It is also pertinent to note that in its First Annual Report, 1993-94, the NHRC has recommended for rewriting of section 2(1)(d) and deletion of section 2(1)(f).\textsuperscript{118} The recommended version of section 2(1) (d) is as follows-“Human rights” means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants, Conventions and Treaties to which India is a party.” Till date its recommendation has not been considered positively. Though in 2006 substantial changes have been made to the Act including section 2(1) (f), but the Government thought it fit to retain the section 2(1) (d) as it is. The 2006 Amendment though retained the content of the section 2(1) (f) but added “such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may by notification specify” in to the latter part of the section, which is against the recommendation of NHRC. It is submitted that section 2(1) (f) becomes redundant if the recommendation of the NHRC is accepted.

\textbf{8.8.2(ii) Jurisdiction and its Limitations:}

The Act does not specifically declare the extent to which NHRC could exercise its territorial jurisdiction over complaints made to it or it can initiate \textit{sou moto} action. A combined reading of section 12 and 36 of the Act reveal that the jurisdiction of the NHRC extends to whole of India subject to the following limitations which are as follows;


\textsuperscript{118} http://nhrc.nic.in/ar93_94.htm visited on 01-01-2012 at 5.25 p.m.
1. No inquiry over complaints/matters that are already pending before any State Human Rights Commission (SHRC) or other Commissions duly constituted under any law for the time being in force;\textsuperscript{119}

2. No inquiry over complaints that are made after expiry of one year from the date of alleged infringement of human right;\textsuperscript{120}

3. No inquiry over complaints of violation of human rights by members of armed forces, except after seeking a report from the Central Government on such complaint;\textsuperscript{121}

4. No inquiry over complaints that are sub-judice.\textsuperscript{122}

With regard to the first limitation it is submitted that we have too many Commissions (apart from SHRCs) established under different Statutes. For example we have National Commissions for;

1. Minorities\textsuperscript{123}
2. Scheduled Caste\textsuperscript{124}
3. Scheduled Tribes\textsuperscript{125}
4. Women\textsuperscript{126}
5. Backward Classes\textsuperscript{127}
6. Safai Karmacharis\textsuperscript{128}
7. Child Rights\textsuperscript{129}

and we also have State Commissions for Women\textsuperscript{130}, State Commissions for Child Rights.\textsuperscript{131} The creation of National and State Commissions besides SHRCs, on

\textsuperscript{119} Section 36(1) of the Act.
\textsuperscript{120} Section 36(2) of the Act.
\textsuperscript{121} Section 19 (a) & (b) of the Act.
\textsuperscript{122} Regulation 8 of the NHRC(procedure) Regulations, 1994. Further the Bombay High Court in State of Maharashtra v. San Shobha Vitthal Kotle, AIR 2006 Bom. 44, held that the no direction could be issued to NHRC where the complaint alleges violation human right, that is based on a right created under a statute and the statute itself creates mechanism for redressal. In this case a teacher complained that his service had been terminated in violation of human rights which was based on right created under a statute that provides for separate mechanism for redressal. The NHRC did not entertain the complaint stating that it had no jurisdiction.
\textsuperscript{123} Constituted under section 3 of The National Commission for Minorities Act, 1992.
\textsuperscript{124} Constituted under Article 338 of the Constitution of India, 1950.
\textsuperscript{125} Constituted under Article 338 A of the constitution of India, 1950.
\textsuperscript{126} Constituted under section 3 of The National Commission for Women Act, 1990.
\textsuperscript{127} Constituted under section 3 of The National Commission for Backward Classes Act, 1993.
\textsuperscript{129} Constituted under section 3 of The Commissions for Protection of Child Rights Act, 2005.
\textsuperscript{130} Some States have constituted State Commissions for Women under their State Legislations. For Example Karnataka has such Commission for Women.
subjects like Child Rights, Minorities, Women etc., which are very much part of Human Rights, creates confusion in the minds of citizen as to the jurisdiction and also creates dilemma as to whom to approach and which body is better and best suited to deal with their grievance. Further there exists no coordination between these Commissions. Some times vested interests may thwart the jurisdiction of NHRC by moving a petition or complaint before any other Commission or may constitute a Commission under the Commissions of Inquiries Act or any other Statute.\textsuperscript{132} It also results in unnecessary competitiveness among the Commissions.

Further, the most important lacuna in the Act is, it does not delineate jurisdiction between NHRC and SHRC. Thus the Act creates a complex web of National and several SHRCs resulting in a host of confusion regarding jurisdiction for the common man. No hierarchical relationship is mandated which is surprising given the composition of the two Commissions.\textsuperscript{133} Section 3(2) (a) of the Act contemplates that NHRC shall consist of retired Chief Justice of Supreme Court as a Chairperson, sitting or retired Judge of Supreme Court as a Member and sitting or retired Chief Justice of High Court as a Member, etc., on the other hand section 21(2)(a) contemplates that SHRC shall consist of retired Chief Justice of High Court as a Chairperson, sitting or retired Judge of High Court as a Member and sitting or retired District Judge of the State concerned, etc. Given the kind of composition of NHRC compared to SHRC, the Act ought to have placed the NHRC in hierarchical position as it is headed by retired Chief Justice of India. Besides, any matter which is already being inquired into by the SHRC or any other Commission, the NHRC cannot inquire into such matter.\textsuperscript{134} Similar is the case with SHRCs that they also cannot inquire into any matter which is already being inquired into by the NHRC or any other

\textsuperscript{131} Section 17 of The Commissions for the Protection of Child Rights Act, 2005 provides that State Governments may constitute State Commissions. Karnataka Government has constituted such Commission for the Protection of Child Rights.

\textsuperscript{132} For example, when NHRC took up a complaint alleging that serious human rights violations had been committed in respect of the manner in which the State Tamil Nadu police had arrested the former Chief Minister Mr. Karunanidhi and Union Ministers Mr. M. Maran and Mr. T.R Balu and some others. In respect of a notice from the NHRC, the Tamil Nadu State Government contended inter-alia, that since a Commission of Inquiry had been set up by the Government to look into the matter, the jurisdiction of the NHRC to inquire into the matter was barred by Section 36(1) of the Act. See NHRC, Human Rights News Letter, New Delhi, November 2001, cited in Reenu Paul, Supra note 106, p.27.

\textsuperscript{133} Section 3(2) (a) of the Act contemplates that NHRC shall consist of retired Chief Justice of Supreme Court as a Chairperson, sitting or retired Judge of Supreme Court as a Member and sitting or retired Chief Justice of High Court as a Member, etc., on the other hand section 21(2)(a) contemplates that SHRC shall consist of retired Chief Justice of High Court as a Chairperson, sitting or retired Judge of High Court as a Member and sitting or retired District Judge of the State concerned, etc.

\textsuperscript{134} Section 36(1) of the Act.
Commission.\textsuperscript{135} This results in unnecessary competition between NHRC and SHRCs because of jurisdictional overlap.

Another shortcoming of the Act in relation to jurisdiction is that, it does not provide for minimum coordination and cooperation between NHRC and SHRCs. Neither the NHRC nor SHRCs utilize the other’s potential or expertise, thus losing the opportunity for a mutually beneficial relationship.\textsuperscript{136} It is submitted that there can be adhoc coordination between the NHRC and the SHRCs. There is potential for cooperation in the areas of training in the investigative expertise of higher order and norms setting. To avoid the conflicts and increase the efficiency, complaints of that specific State should be mandated to be dealt at the State level and the SHRC’s order and directions should be open to challenge before the NHRC by way of revision. In this way SHRCs shall be subject to the judicial control of the NHRC.\textsuperscript{137}

\textbf{8.8.3 Composition of NHRC:}

The fact that it is headed by a retired Chief Justice of India and two of its members are either retired or sitting Judge of Supreme Court and Chief Justice of High Court makes it truly an expert body. They are appointed by the President of India under his hand and seal on the recommendation of a Committee consisting of Prime Minister, Speaker of the House of People and Leader of the Opposition in the House of People etc.,\textsuperscript{138} which in itself is a testimony to the fact that its composition is authenticated at the highest level. Their tenure is five years from the date of assuming office or until they attain the age of seventy years, whichever is earlier. They cannot be removed from office except as provided in the Act,\textsuperscript{139} and in this way their tenure and independence in the office is protected.

\textsuperscript{135} Section 21(5) of the Act.
\textsuperscript{137} See Annexure VI of the NHRC’s first Annual Report 1993-94, cited in Reenu Paul, Supra note 104, p.27.
\textsuperscript{138} The Committee consists of (1) Prime Minister (Chair person) (2) Speaker of the House of the People (Member) (3) Minister in Charge of Ministry of Home Affairs in the Government of India (Member) (4) Leader of the Opposition in the House of the People (Member) (5) Leader of the Opposition in the Council of States (Member) (6) Deputy Chairman of the Council of States (Member). See section 4 of the Act.
\textsuperscript{139} Section 5 of the Act says that the President may by order remove from office the Chairperson or any other Member if the Chairperson or such other Member, as the case may be, a) is adjudged an insolvent; or b) engages during his term of office in any paid employment outside the duties of his office; c) is unfit to continue in office by reason of infirmity of mind or body; or d) is of unsound mind.
The Supreme Court in *Paramajit Kaur v. State of Punjab* observed that the Chairman of NHRC in his capacity as a former Chief Justice of India, and so also two other members who have held high judicial offices as Judge of Supreme Court and Chief Justice of High Court, have throughout their tenure, considered, expounded and enforced fundamental rights and are, in their own way, experts in the field.

### 8.8.4 Complaint Mechanism and *Suo moto* Powers:

The Act contemplates complaint mechanism for common man and also *suo moto* powers for NHRC to address violation of human rights by the Governmental agencies. After receiving the complaints the NHRC asks for explanation from the government and if it is not satisfied with the reply, it undertakes independent investigation on its own. The Act has conferred necessary powers on NHRC to conduct independent inquiry with the powers of a civil court, like summoning and enforcing the attendance of witnesses etc., and also utilize the services of any officer or investigation agency of the Central Government or State Government with the concurrence of the Government respectively. Following the investigation, the NHRC can award compensation or can issue directions to the Government. It may recommend the granting of immediate interim relief to a victim or his family.

It is submitted that the complaint mechanism has brought the NHRC closer to the common man. During the first year-1993-94, it received mere 496 complaints and the very next year-1994-95, it received 6987 complaints. The number of complaints increased year by year. The record number of complaints were received during the

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and stands so declared by a competent Court; or e) is convicted and sentenced to imprisonment for an offence which in the opinion of the President involves moral turpitude.

140 AIR 1999 SC 340 at 343. In this case the Court was examining whether the limitation of one year engrafted under section 36(2) of the Act to inquire in to complaints by the NHRC is applicable even when a reference is made by the Supreme Court under Article 32 of the Constitution. The Court held that no limitation could be applied in such a case and observed that NHRC is truly an expert body to which reference could be made.

141 Section 12 of the Act.

142 Section 13 and 14 of the Act.

143 Section 18(3) of the Act.

144 During 1995-96 – 10,195, 1996-97 – 20514, 1997-98 -36,791, 1998-99 – 40,724, 1999-2000, 50,634, 2000-01, 71,555, 2001-02, 69,083, 2002-03, 68,779, 2003-04, 72,990, 2004-05, 74,401, 2005-06, 74,444, 2006-07, 82,233, 2007-08, 1,00,616(highest) 2008-09, 90,946, 2009-10, 82,021, 2010-11, 84611 complaints were received. See NHRC Reports of the respective years. Reports for the year 1993-94 to 2008-09 could be accessed through [http://nhrc.nic.in/archive.htm](http://nhrc.nic.in/archive.htm) visited on 30-12-2011 between 7 to 8-15 p.m. Reports for the year 2009-2010 and 2010-11 are not available in the said website and the figures of these two years are stated based on the material available on google search. See also [www.asiapacificforum.net/members/full-members/india/.../India.doc](http://www.asiapacificforum.net/members/full-members/india/.../India.doc) visited on 29-12-2011 at 6.30 p.m.
year 2007-08 is 1,00,616. Last year 2010-11, it received 84,021 complaints. This rise in complaints shows the confidence that NHRC has gained over the years.

It is submitted that the limitation of one year to make complaint from the date of alleged act of violation of human rights engrafted under section 36(2) of the Act is in appropriate and unreasonable. The Act even does not make a provision for condoning the delay in making complaint after one year, even where sufficient reasons are made out. Section 5 of the Limitation Act, 1963 should be made applicable to the proceedings before the NHRC, which provides for condonation of delay on proof of just and sufficient reasons.145

NHRC is dependent on the Central or State Government nod for seeking assistance of an investigation agency as per section 14 of the Act. It is submitted that given the provision for investigating mechanism of its own, the NHRC is placed in advantage and need not depend on Central or State agency for inquiring into complaints of human rights violation when the allegation of violation is against the Government and its agency itself.146

The *suo moto* powers of NHRC to initiate *suo moto* inquiries147 are an important aspect of independence and autonomy of NHRC. This *suo moto* power is particularly necessary given the social condition and poverty prevailing in India. It helps NHRC to reach to those individuals or groups belonging to the marginalized sections of the society who do not have the financial or social resources to lodge complaints.148 It is submitted that a national institution with the power to inquire *suo moto* and capacity to initiate investigation on its own can make a significant contribution in ensuring that vulnerable groups are given a public voice and human

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145 **Extension of prescribed period in certain cases.** Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908(5 of 1908 ), may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period. Explanation.- The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.

146 Section 11 (b) says that “The Central Government shall make available to the Commission –such police and investigative staff under an officer not below the rank of Director-General of Police and such other officers and staff as may be necessary for the efficient performance of the functions of the Commission.” See also section 13(2) & (3) of the Act.

147 Section 12(a) of the Act.

rights violations wherever they occur become a matter of general knowledge and concern.\textsuperscript{149}

\textbf{8.8.5 NHRC: Is it mere a Recommendatory Body?}

Section 18 of the Act confers only recommendatory powers on NHRC. It can recommend the Government to pay interim compensation to the victim or his family members. Though the recommendations of NHRC are not binding, the Governments have largely accepted the recommendations considering the fact that it is headed by the retired Chief Justice of India.\textsuperscript{150} The rise in the number of complaints made to NHRC is itself a testimony to that effect. It is submitted that the Act must provide for binding nature of recommendations/directions of NHRC given the stature of NHRC. Same holds good for SHRCs as well.

\textbf{8.8.6 SHRCs:}

The Act makes it optional for each State to have SHRC.\textsuperscript{151} As a result so far only 18 States have constituted SHRC in their respective States. Compared to NHRC, the status of SHRCs in States is dismal and pathetic. It is mainly due to non-cooperation of States Governments in providing adequate staff, infrastructure and financial assistance to the SHRCs. The Chairperson of Karnataka SHRC has gone on record saying that the human rights of its staff itself is being violated as the Government is not providing requisite infrastructure and financial assistance inspite of repeated demands made by the body in this regard. The SHRC had requested for 491 staff members, but the Karnataka Government has sanctioned only 105 members, a meagre 21\% of the actual requirement, of which only 76 have been actually appointed. Of the 76 staff members, 51 were employed on contract basis and 25 were deputed staff from the police department. The Karnataka SHRC is functioning in a small 4,500 sq ft space as against the demanded space of 25,000 sq ft area. Further, the Commission that is designated with the responsibility of protecting human rights in the state has only one inspector general of police, one superintendent of police, two


\textsuperscript{150} According to 2008-09 Report, 95\% of NHRC’s recommendations are accepted.

\textsuperscript{151} Section 21(1) says that “A State Government may constitute a body to be known as…….” The word \textbf{may} make it optional for States to constitute SHRC. Whereas Section 3 of the Act uses the word \textbf{shall} which makes it mandatory for the Central government to constitute NHRC. It is submitted that there is need for amendment of Section 21(1) to make SHRCs mandatory for every State.
head constables and two police constables and as a result investigations are delayed and human rights violations are not addressed in time and victims could not be compensated in time.152

On 5th December 2011, a Division Bench comprising acting Chief Justice Vikramajit Sen and Justice A.S. Bopanna of Karnataka High Court, Bangalore, directed the State Government to provide, within six months, the necessary infrastructure and staff to the Karnataka State Human Rights Commission (KSHRC). The Bench passed the Order while disposing of a PIL filed by South India Cell for Human Rights Education and Monitoring (SICHREM), complaining about lack of staff and infrastructure even after many years of the establishment of the Commission. In its assurance to the Court, the State Government submitted that it has sanctioned 105 posts and would fill 23 of them as early as possible, and agreed to provide sufficient infrastructure. The Bench also directed the State to consider the need for establishment of SHRC police wings in six ranges.153

This is the fate of SHRCs in India and it is not surprising that NHRC receives more complaints than SHRCs. It is submitted that there is a need to strengthen SHRCs with adequate staff, space with financial assistance. SHRCs are more nearer than NHRC and are able to address human rights violations much faster than NHRC as they understand the local language and nearer to place of violation of human rights.

8.8.7 Section 12(f) of the Act:

One of the important functions of NHRC under section 12(f) of the Act is to “study treaties and other international instruments in the field of human rights and make recommendations for their effective implementation”. A scrutiny of Annual Reports from 1993-94 to 2008-2009 reveal that the NHRC has recommended for ratification international human rights Covenants and Protocols of Covenants. Like, the Convention relating to the Status of Refugees, 1951 and its two Protocols of 1967, Convention on the Rights of Persons with Disabilities, 2006,154 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984,155

152 See news article published in http://expressbuzz.com/cities/bangalore/Provide-facilities-to-KSHRC-within-6-months-HC/340652.html visited on 29-12-2011 at 11-55 p.m.
154 Ratified by India on 01-10-2007.
155 India signed this Convention on 14-10-1997, but yet to ratify.
(CAT), etc., Two Optional Protocols to CRC\textsuperscript{156}, ILO Convention No. 138-142, Convention on Enforced Disappearance, 2006. What is striking is NHRC has not made any recommendations to the Government of India to get the International Human Rights Conventions, to which India is a party, implemented through domestic legislation. The reason is not forthcoming. This is particularly important because, the Chairperson and one Member are from highest judiciary-Supreme Court and are aware that the judicial approach to the domestic use of international human rights Conventions is largely based on dualist view. It is the Supreme Court in good number of cases held that unless there is a domestic legislation incorporating the provisions of international Convention, rights guaranteed under such Convention cannot be enforced directly.\textsuperscript{157} However, of late, Supreme Court adopted harmonious way of interpreting international Conventions with Indian law, and said if there is no inconsistency between international Convention and domestic law such international Convention could be read into Indian law.\textsuperscript{158}

\textbf{8.8.8 Section 19- Limitation on NHRC to Inquire into Complaints against Armed Forces:}

NHRC is handcuffed from inquiring into any complaint of alleged violation of human rights by the armed forces under the Act.\textsuperscript{159} Though NHRC received complaints against armed forces, especially from Jammu and Kashmir and Assam region, it can only seek a report from the Government and cannot inquire into such complaints. This offers complete immunity to armed forces. Needless to say the Government has to defend the actions of its armed forces and the experience has shown the least improvements in this regard. The Committee on ICCPR (CCPR in short), on 24-25/07/1997, while considering India’s Third Periodic Report, in its concluding observations, at para 22, “regrets that the NHRC is prevented by section 19 of the Act from investigating directly complaints of human rights violations against the armed forces, but must request a report from the central government.” The CCPR recommended “that these restrictions be removed and that the NHRC be

\textsuperscript{156} India ratified the First Optional Protocols to CRC on 30-11-2005 and the Second on 16-08-2005. The First Optional Protocol deals with prohibition of involvement of children in armed conflicts and the Second deals with prohibition of sale of children, child prostitution and pornography.


\textsuperscript{158} \textit{Vishaka v. State of Rajasthan}, AIR 1997 SC 3011.

\textsuperscript{159} Section 19 of the Act.
authorized to investigate all allegations of violence by agents of the State." It is submitted that the NHRC should be given powers to inquire into allegations of violations of human rights by armed forces, if necessary, after getting report from the Government.

8.8.9 District Human Rights Courts:

Section 30 of the Act provides for constituting District Human Rights Courts for speedy trial of offences arising out of violation of human rights. It empowers the State Governments to specify for each district a Court of Session to be a Human Rights Court. However section 30 does not make it mandatory for State Governments to constitute Human Rights Courts. The word “may” made it optional. Further what constitute “offence” has not been clearly stated. This is because not every human right violation constitutes offence. To make a person liable for prosecution for an offence, there must be a well defined penal law, like, Indian Penal Code. Merely stating that offences arising out of violation of human rights is vague and results in unsuccessful prosecution unless there is clearly defined law in the offing. If Human Rights Courts were to try offences arising out violation of human rights under the existing penal laws like Indian Penal Code or Immoral Traffic (Prevention) Act, Civil Rights Act, etc., then there is no meaning in specifying a Court of Session as Human Rights Court in each district. For example, if the Human Rights Court, after due trial, comes to a conclusion that a particular provision in an International Covenant on Human Rights or Indian Statute (non-penal) is violated, would the Court able to punish the accused? The Answer is emphatic No. Because, it is the cardinal principle of criminal law that an act to be a crime must be categorically stated as an offence under a Statute. Interestingly the 1993 Act leaves it to the States to define what constitute an “offence arising out of human rights violation”. This would make worse if different States define the offence differently. A State may leave out a particular act as an offence arising out of human right violation and another State may make it an offence.  

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161 The reasoning is based on assumption and at present no State in India where the Human Rights Courts are constituted has attempted to define acts as “offence arising out of violation of human rights”. Only Tamil Nadu, Assam, Andhra Pradesh, Sikkim, Karnataka and West Bengal have notified Sessions Courts as Human Rights Courts in terms of section 30 of the Act. In Karnataka though Sessions Court are designated as Human Rights Courts in 2005, Rules were framed in 2006 but failed to define as to what acts constitute an offence arising out violation of human right. It means that one has to fall back upon the acts that are prohibited under the penal laws in India, then relate them to
Another problem is that the Act does not say who has to take cognizance of offences. Under Code of Criminal Procedure, 1973 (Cr.P.C.), Sessions Courts are not empowered to take cognizance of offences unless the case has been committed to it by the Magistrate Courts under section 193 of the Cr.P.C. Further, experience has shown that most of the complaints of violation of human rights are against police and in such cases, who will investigate and file final report (charge sheet) under section 173 of Cr.P.C? Is it the same police or any other investigative body of the State? The Act makes no reference with regard to these crucial issues. It is high time for Parliament to look into these issues and address the same.

Further, the Act does not empower the Human Rights Courts to award compensation for violation of human rights. This is particularly important and necessary to avoid multiplicity of proceedings. The ends of justice would be met if the victim or his family is adequately compensated apart from punishing the culprit.

What is required is a provision for “Special Human Rights Courts” and not merely specifying the existing Sessions Court as “Human Rights Court”. Hence it is submitted that the Act must make it mandatory for constitution of Special Human Rights Courts in each district with power to award compensation.

The above analysis of the Act reveals that the composition of NHRC, its powers and functions make it an independent and autonomous body and is in tune with the Paris Principles, 1991. Ninety five percent of its recommendations are respected and implemented by the Government. Its recommendations are largely on monetary compensations especially in cases relating to deaths in judicial custody or police custody. With regard to the aspect of (a) Definition of “Human Rights” and “International Covenants”, and (b) making “SHRCs” and “Human Rights Courts”

human rights and if the court comes to the conclusion that it constitutes “offence arising violation of human rights” a case could be proceeded with. This would lead to chaos.

Section 193 of Cr.P.C. reads as: Cognizance of offences by Courts of Session.- Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code.

According to NHRC, more than fifty percent of complaints are against police. See http://nhrc.nic.in/disparchive.asp?fno=2407 visited on 02-01-2012 at 8.03 p.m.

The relevant part of Section 173 reads as: Report of police officer on completion of investigation.- (1) Every investigation under this Chapter shall be completed without unnecessary delay. (2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report,.....”.

See http://nhrc.nic.in/disparchive.asp?fno=2407 visited on 02-01-2012 at 8.03 p.m.

Ibid.
compulsory, (c) especially empowering Human Rights Courts to award compensation, necessary changes in the Act as discussed above must be done at the earliest to realize the purpose and object of the Act for which it is enacted.

During the last 18 years of its existence, the NHRC has registered a total 10,94,113 cases of human rights violations, either suo moto or on complaints or on intimation by the prison and police authorities, out of which 10,77,622 cases have been disposed of till date. A total of Rs. 510,942,500 has been recommended by the NHRC in 2604 cases as monetary relief for the victims of human rights violation or their next of kin. This is in addition to recommending punitive action against the public servants wherein it was found that they had either violated human rights or been negligent in protecting them.167

Apart from this amount, Rs. 2596.25 lakhs have been recommended as monetary relief for the next of kin of 1400 identified deceased persons in the Punjab Mass Cremation case. Maximum Rs. 178,465,500 as monetary relief was recommended in 580 cases during the year 2010-11. According to NHRC, in the 2011-12 financial year, it has recommended monetary relief of Rs. 71,498,000 in 315 cases of human rights violations. The NHRC has registered highest 622635 number of complaints from Uttar Pradesh followed by Delhi 69409. The ten top states from where maximum complaints have been registered include Uttar Pradesh, Delhi, Bihar, Haryana, Rajasthan, Madhya Pradesh, Maharashtra, Uttarakhand, Tamil Nadu and Jharkhand. Minimum 41 complaints have been received from the state of Lakshadweep. The NHRC registered 20604 cases on death in judicial custody, out of which 19770 have been registered on the basis of intimation received from the prison authorities as per the guidelines of the NHRC. 4303 cases have been registered in the category of death in police custody out of which 2692 are based on intimations received from the concerned police authorities in different states.168

Maximum 425877 complaints have been registered against the police authorities under various counts. In the category of death in police custody, the NHRC registered maximum (901) complaints from Uttar Pradesh followed by Maharashtra (453), Andhra Pradesh (305), Gujarat (260), Tamil Nadu (221), West Bengal (219) and Bihar (207). In the category of death in judicial custody, Uttar

\[\text{167} \text{ Ibid.}\]
\[\text{168} \text{ Ibid.}\]
Pradesh registered highest (3822) cases followed by Bihar (2435), Maharashtra (2014), Andhra Pradesh (1621), Punjab (1080) and West Bengal (997).\footnote{Ibid.}

The above statistics reveals, at what length and magnitude human rights are being violated in India. This is a fact sheet of registered cases with NHRC only and the number of unregistered cases due to social, economic and other reasons must be the double or equal at least. The creation of NHRC is indeed a step forward in realizing human rights in India, but it has only recommendatory body with limited manpower and depends largely on State agencies for investigation into the violation of human rights cases. Further it can not enforce rights guaranteed in human rights treaties because of the inherent limitations under Section 2(d) and 2(f) of the 1993 Act.

8.9 Evaluation Of Legislative Efforts:

The above analysis of legislative efforts to implement international human rights treaties reveals that, among the six out of nine core UN human rights treaties, only CRC is fully implemented through The Commissions for the Protection of Child Rights Act, 2005. Section 2(b) of this Act defines - “Child Rights” includes the children’s rights adopted in the United Nations Convention on the Rights of the Child on the 20\textsuperscript{th} November 1989 and ratified by the Government of India on the 11\textsuperscript{th} December, 1992. Thus the Commissions constituted under this Act have power to apply and interpret rights guaranteed under CRC. Further, when the Orders of Commissions are challenged before the High Courts or Supreme Court, these constitutional courts will apply and interpret CRC provisions and thereby develop new jurisprudence on the rights of the child in India in terms of CRC.

As far as CEDAW is concerned, the Protection of Women from Domestic Violence Act, 2005 is enacted to implement the Recommendation No. XII of 1989 of Committee on the CEDAW, that recommended that State parties should act to protect women against violence of any kind especially that occurring within the family. Further, CEDAW does not talk about domestic violence specifically. Hence, this Act cannot be said to have implemented CEDAW. The Protection of Women against Sexual Harassment at Workplace Bill, 2010 is only intended to implement Article 11(f) of CEDAW. It is been 15 years since the Vishaka judgment was pronounced on...
the protection of women on sexual harassment at work places and guidelines were
framed on this issue by the Supreme Court saying the guidelines will have to be
treated as law till the Parliament enacts suitable legislation in this regard. Till date
Parliament could not pass suitable legislation on this issue. Had *Vishaka* was not
there, even this Bill would not have been there.

The Rights of Persons with Disabilities Bill, 2011 is intended to implement the
Torture Bill, 2010 is also intended to implement the Convention against Torture and
other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, though India not
yet ratified this Convention but signed on 14-10-1997. The Protection of Children
from Sexual Offences Bill, 2011 intends to implement Articles 19 and 34 of CRC that
obligates State Parties to protect children from all forms of sexual exploitation and
sexual abuse.

The most disappointing exercise of legislative measure to implement
international human rights treaty is the Protection of Human Rights Act, 1993 (1993
Act in short). This Act has misled many as an Act empowering the NHRC, SHRCs
and District Human Rights Courts to apply and enforce international human rights
treaties in India. Legally speaking, this Act imposes restrictions on the use of
international human rights treaties and they are: 1) definition on human rights (section
2(d)), 2) definition on “International Covenants” (section 2 (f)) and 3) enforceability
of international human rights guaranteed under “International Covenants” subject to
standards set by the courts in India as to enforceability of international human rights
treaties (section 2 (f)).\(^\text{170}\) Though NHRC recommended for the amendment of these
anomalies in its very first report,\(^\text{171}\) the Parliament though amended the Act, 2006
with respect to section 2 (f), but added only any other Covenant or Convention that
may be specified by the Central Government.\(^\text{172}\) However, the crucial limitation of
“enforceable by courts in India” was retained. This means that, only ICCPR and
ICESCR could be used subject to conditions and they are: 1) rights relating to life,

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\(^{170}\) See supra for critical analyses of these definitions and limitations under the heading “The Mandate
– Definition of “Human Rights”, “International Covenants” and Jurisdiction of NHRC.

\(^{171}\) The NHRC recommended that section 2 (d) and 2 (f) be amended to encompass all the human rights
guaranteed under the Constitution and Conventions and all the International Human Rights
Conventions/Covenants to which India is a Party respectively. The First report can be accessed on
www.nhrc.org

\(^{172}\) Till date no other Convention/Covenant is specified by the Central Government.
liberty, equality and dignity enshrined under ICCPR and ICESCR and 2) subject to the standards set by the judiciary as to enforceability of these Covenants in India. The Act was enacted in 1993 and was amended in 2006 on the limitation as said above. The Parliament is aware that, in the year 1980 itself, the Supreme Court in **Jolly George Verghese v. Bank of Cochin**\(^\text{173}\) enunciated the law that “rights guaranteed under international human rights treaties cannot be enforced at the instance of an individual before the domestic courts”\(^\text{174}\). However, the Parliament chooses to add the limitation “enforceable by courts in India”. This shows the intention of the Parliament that it is not serious in incorporating the basic human rights into the *corpus juris* of India.

It is submitted that, had Parliament accepted the NHRC recommendations on the removal of limitations, the 1993 Act would have been regarded as a law providing for the enforcement of international human rights treaties in India. But, that is not the case- considering the serious limitations inbuilt in the 1993 Act.

Further, a careful examination of the legislative measures adopted by the Parliament in implementing international human rights treaties makes it clear that from 1950 to 1981, the three legislations that Parliament has passed during this period, namely The Immoral Traffic Prevention Act, 1956, Geneva Conventions Act, 1960 and Anti Apartheid (United Nations Convention) Act, 1981, the Parliament has shown great interest in incorporating the respective treaties\(^\text{174}\) that call for an enabling legislation for domestic implementation. After 1981, Parliament did not show much interest in this regard and 1993 Act was a great disappointment and misleading one on the point of enforceability of international human rights treaties in India. Knowingly or unknowingly the Parliament through the Commissions for the Protection of Child Rights Act, 2005 made CRC part of the *corpus juris* of India. Overall, the legislative efforts by the Parliament is disappointing considering the pivotal place it occupied under the Constitution as well as under the international treaties in domesticating the international human rights instruments.

\(^{173}\) AIR 1980 SC 470. See *infra* on Judicial Efforts for a detailed discussion on this case.

\(^{174}\) See supra on “Legislative Efforts”. 
8.10 Constitutional Provisions Relating To Judicial Powers To Enforce International Human Rights Treaties:

Articles 124 to 147 in Chapter IV of Part V of the Constitution deal with Union Judiciary. Article 124 provides for establishment and constitution of a Supreme Court for whole of India. Articles 214 to 231 in Chapter V of Part VI deal with the High Courts in the States. Article 214 says that there shall be a High Court for each State. Articles 233 to 237 in Chapter VI of Part VI deal with the Subordinate Courts. The Supreme Court of India, as the name itself suggests, is the highest court in India and the law declared by it is binding on all courts in India including High Courts.\(^{175}\) Though there is no specific provision in the Constitution as to the binding nature of law declared by High Courts, as a matter of practice, the law declared by High Courts is binding on all subordinate courts in their respective States.

Article 32 of the Constitution empowers the Supreme Court to issue directions against the State for the enforcement of any of the rights guaranteed under the Part III of the Constitution, whereas, Article 226 empowers the High Courts to issue directions against \textit{any person} or State for the enforcement of any of the rights guaranteed under the Part III of the Constitution or for \textit{any other purpose} in an appropriate proceeding. Thus, the High Courts have more powers than Supreme Court as they can issue directions to any person or authority under Article 226 for the enforcement of any right whether guaranteed under Part III or any Part of the Constitution or in any Statute. However, the High Courts are bound to follow the law declared by the Supreme Court as per Article 141 of the Constitution.

Both, Supreme Court and High Courts are empowered to declare an Act of Parliament or Legislature of a State as unconstitutional if the Act is ultra virus of the Constitution.\(^{176}\) The judicial power of these two constitutional courts to review any action of the State including the constitutionality of the Acts has been held as one of the Basic Structures of the Constitution.\(^{177}\)

\(^{175}\) Article 141 reads as: \textbf{Law declared by Supreme Court to be binding on all courts}- The law declared by the Supreme Court shall be binding on all courts within the territory of India.

\(^{176}\) Article 13(2) reads as- The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause, to the extent of the contravention, be void.

Unlike Articles 32 and 226 that empower the Supreme Court and High Courts to enforce fundamental rights guaranteed under the Constitution, there is no specific provision in the Constitution that empowers these constitutional courts to enforce international treaty rights against the State. The only provision that deals with the international treaty obligations of the State is Article 51(c) of the Constitution which mandates the State to foster respect for international law and treaty obligations.

8.10.1 Nature and Scope of Article 51(c):

Article 51 of the Constitution had its source and inspiration in the Havana Declaration of 30th November 1939. The first draft (draft Article 40) provided:

“The state shall promote international peace and security by the prescription of open, just and honourable relations between nations, by the firm establishment of the understandings of International Law as the actual rule of conduct among governments and by the maintenance of justice and scrupulous respect for treaty obligations in the dealings of organized people with one another”.

During the Constituent Assembly Debate, all the speakers emphasized commitment of India to promoting International Peace and Security and adherence to principles of International Law and Treaty obligations. The debate was largely concentrated on the “world peace and security” and the aspiration of India becoming strong nation and accordingly the draft Article 40 was adopted by the Constituent Assembly in its present form as Article 51.

Article 51- Promotion of International Peace and Security.-The state shall endeavour to –

(a) promote international peace and security

(b) maintain just and honourable relations between nations

(c) foster respect for international law and treaty obligations in the dealings of organized people with one another; and

(d) encourage settlement of International dispute by arbitration.

179 Ibid.
It is significant to note that clause ‘c’ of Article 51 specifically mentions ‘international law’ and ‘treaty obligations’ separately. According to Prof. C. H. Alexandrowicz the expression ‘international law’, in the said paragraph connotes Customary International Law and ‘treaty obligations’ stands for obligations arising out of International Treaties. This interpretation seems to be logical in the context of the text of the Draft Article 40 referred above.\textsuperscript{180} It is also significant to note that Article 51 (c) treats both International Customary Law and Treaty Obligations on the same footing.

Article 51 finds place in Chapter IV of the Constitution which provides for Directive Principles of State Policy (DPSP) and is \textit{non-justiciable} by virtue of Article 37.\textsuperscript{181} Dr. Ambedkar had said in the Constituent Assembly that the intention was that the executive and legislature should not only pay lip service to these directive principles but “they should be made the basis of all executive and legislative action that may be taken hereafter in the matter of governance of the country”.\textsuperscript{182}

The Supreme Court in \textit{State of Kerala v. N.V. Thomas},\textsuperscript{183} observed that the directive principles “form the fundamental feature and the social conscience of the Constitution and the Constitution enjoins upon the State to implement these directive principles. The directives thus provide the policy, the guidelines and the end of socio-economic freedom…..” However, the fact remains is that it is not enforceable one.

\textbf{8.10.2 Judicial interpretation of Article 51(c):}

In \textit{Keshavanand Bharati v. State of Kerala},\textsuperscript{184} Chief Justice Sikri, after quoting entire Preamble of Universal Declaration of Human Rights, 1948 and International Covenant on Economic, Social and Cultural Rights, 1966 posed a very interesting question to himself, that is:


\textsuperscript{181} Article 37- \textit{Application of the principles contained in this Part}.- The provisions contained in this Part shall not be enforceable y any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.


\textsuperscript{183} AIR 1976 SC 490.

\textsuperscript{184} \textit{Keshavananda Bharati v. State of Kerala}, AIR 1973 SC 1461 at para 164. (emphasis supplied)
“Do rights remain inalienable if they can be amended out of existence?” His Lordship then 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. Although there is a sharp conflict of opinion whether respect for human dignity and fundamental human rights is obligatory under the Charter, it seems to me that, in view of Article 51 of the Constitution this court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of United Nations Charter and the solemn declaration subscribed to by India”.

His Lordship then quoted Lord Denning from Corocraft v. Pan American Airways185- “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.”186

The above observation of Sikri C.J. has been followed by the Supreme Court whenever the provisions of international law are in conflict with Indian laws and attempts have been made to interpret Indian laws in conformity with international law.187

Thus, the status of Article 51(c) is that it could be used for interpretive tool and to harmonize the Indian laws with International law including treaty obligations whenever there is a conflict between the two.

8.11 Judicial Efforts:

When the Parliament passes an enabling legislation incorporating international human rights treaty into the Indian corpus juris, the task of the Judiciary in enforcing the treaty rights is easy. Here the Courts will apply and enforce the law enacted by the Parliament that has incorporated treaty provisions into the corpus juris of India. However, the problem will surface when the Parliament has not enacted an enabling

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185 (1969) 1 All E.R. 82; 87
186 However, the learned Judge, having said so, held that the Parliament has power to amend Part-III of the Constitution- meaning that Parliament can take away the right/s guaranteed under Part-III. Though the Court evolved the principle of “Basic Structure” and held that the same is immune from amendment, but what is “Basic Structure” was defined in specific terms and was left to the wisdom of Judges and individual cases. Today, we have reached a stage where Part-III itself is a Basic Structure of the Constitution.
legislation transforming the international human rights treaty, to which India is a party,\(^{188}\) into the Indian *corpus juris*. Further, there are instances where human rights forming part of international customary law or rights enshrined under an international human rights treaty to which India is not a party were agitated before the courts. Thus three situations could arise before a domestic court in terms of question of enforcement of international human rights treaty or norms:

1) where the executive has ratified/acceded an international human rights treaty but Parliament has not enacted an enabling legislation incorporating treaty rights into the Indian *corpus juris*; or

2) where the executive has not ratified/acceded to an international; or

3) human rights forming part of customary international law.

In the first type of cases the Supreme Court in majority of cases categorically held that in the absence of an enabling legislation by the Parliament, international human rights treaty to which India is a party is non-self executing. This has been the General Rule till 1997. However, the judgment in *Vishaka*\(^{189}\) carved an exception to the General Rule and held that in the absence of specific domestic law governing the case in hand, international human rights treaties could be relied upon. Hence, discussion on the first type of cases is divided in to two phases as *pre Vishaka* and *post Vishaka* for better appreciation of the approach of the Supreme Court in this regard. In the second type of cases, it is implicit that they are not enforceable per se. In the third type of cases, the courts have used such customary norms more in environmental cases than in human rights matters.\(^{190}\)

### 8.11.1 Judicial Efforts - *Pre Vishaka*:

In the first type of cases, a fact needs to be placed on record is that India is a Party to SIX of the NINE Core UN Human Rights Treaties. ICERD is the first of the nine core UN human rights treaties that came into force on 4\(^{th}\) January 1969. India ratified ICERD on 3\(^{rd}\) December 1968. ICESCR is the second that came into force on 3\(^{rd}\) January 1976 and the third is ICCPR that came into force on 23\(^{rd}\) March 1976.

\(^{188}\) A State becomes Party to the treaty/convention when it ratifies or accedes to the treaty/convention. Mere signing a treaty does not entail the status of Party.

\(^{189}\) AIR 1997 SC 3011.

\(^{190}\) Sustainable Development and Polluter Pays Principles have been held to be part of customary International Law. See, *Vellore Citizens Welfare Forum vs Union Of India & Ors*, AIR 1996 SC 2715. *A. P. Pollution Control Board v. Prof. M. V. Nayudu*, AIR 1999 SC 812.
India acceded to both the Covenants on 10th April 1979. It is an accepted principle of international law that a treaty is binding on a State from the date of ratification/accession. Hence the enforcement of human rights treaties in the Indian courts required to be probed from the date of their respective ratification/accession by India. (See Table appended for dates of ratification/accession of human rights treaties by India).

It is in this context that the judgment of the Kerala High Court in Xavier v. Canara Bank Ltd. deserves to be mentioned at the first place. The question arose on whether Article 11 of the ICCPR 1966, viz., that “no one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation” has become part of the Municipal Law of this Country consequently conferring right to remedial action at the instance of an aggrieved individual of this Country. In dealing with this question, the High Court observed:

“……The remedy for breaches of International Law in general is not be found in the law courts of the State because International Law per se or proprio vigore has not the force or authority of civil law, till under its inspirational impact actual legislation is undertaken. I agree that the Declaration of Human Right merely sets a common standard of achievement for all peoples and all nations but cannot create binding set of rules. Member States may seek, through appropriate agencies, to initiate action when these basic rights are violated, but individual citizens cannot complain about their breach in the municipal courts even if the country concerning has adopted the covenants and ratified

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191 Prior to this India ratified the four Geneva Conventions of 1949 (came into force on 21st October 1950) on 9th November 1950 and the Convention on Prevention and Punishment of the Crime of Genocide, 1948 (came into force on 12th January 1951) on 27th August 1959. India is an original Member of the U.N.O. that came into existence on 24th October 1945. UDHR was adopted on 1948 and Declarations, Principles are not binding under International Law.

192 1969 Ker.L.T . 927. It was Hon’ble Mr. Justice V.R. Krishna Iyer delivered the Judgment and later became Judge of the Supreme Court of India.

193 In this case the appellant (judgment debtor) was 70 year old and was suffering from various illnesses known to the old age and an order for his arrest and imprisonment was made on the application of the respondent bank as he could not pay the debts determined in the decree. Accordingly the issue was whether a judgment-debtor can avail himself of the immunity from detention in the civil prison on the score of serious illness, as provided in S. 59, Civil Procedure Code(CPC). Section 51 of CPC which provides for arrest and detention upon non payment of decreed amount was construed harmoniously with the noble objective of Article 11 of ICCPR and the Order of the court below and remanded the matter to the court of first instance for fresh disposal in the light of the observations made in the judgment.
the Optional Protocol. The individual cannot come to court but may complain to the Human Rights Committee, which in turn, will set in motion other procedures. In short, the basic human rights, enshrined in the International Covenants above referred to may at best inform judicial institutions and inspire legislative action within member-States but apart from such deep reverence, remedial action at the instance of an aggrieved individual is beyond the area of judicial authority.”

The Xavier was decided on 10th September 1969 and at that time ICCPR was not in force. It came into force on 23rd March 1976 and India acceded to it only on 10th April 1979. Thus, legally ICCPR cannot be the subject matter of enforcement. The learned Judge Hon’ble Mr. Justice V.R. Krishna Iyer (as he then was) has completely lost sight of these basic tenets of International Law and held that “the remedy for breaches of International Law in general is not be found in the law courts of the State because International Law per se or proprio vigore has not the force or authority of civil law, till under its inspirational impact actual legislation is undertaken….” With due respect to the learned Judge, what best he could have said was that ICCPR has not yet come into force and India has not even signed it and accordingly Article 11 of ICCPR cannot be pressed into muchless be agitated before the Court.

Eleven years later Xavier confronts Hon’ble Mr. Justice V.R Krishna Iyer in the name of Jolly George Varghese on the same set of facts but this time before the Supreme Court as the learned Judge was elevated to the Supreme Court by then.

The issue in Jolly George Varghese v. Bank of Cochin was whether a person could be arrested and detained in civil prison in terms of Section 51 of Code of Civil Procedure (herein after as CPC) for non-payment of decreed amount as

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194 At p. 930-31.
195 AIR 1980 SC 470. The facts of the case were that the Judgment Debtors (appellants in the case) suffered a decree against the Decree Holder (respondent) for a sum of Rs.2.5 lakhs. In execution of the decree, a warrant was issued to the appellants under section 51 and Order 21 Rule 37 of CPC. The Respondent Bank attached the immovable properties of the judgment debtors for the purpose of sale in an earlier proceeding. Against the Order of arrest the appellants approached the Supreme Court.
196 Section 51 of CPC reads as “Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree- (a) by delivery of any property specifically decreed;(b) by attachment and sale or by sale without attachment of any property; (c) by arrest and detention in prison; (d) by appointing a receiver; or (e) in such other manner as the nature of the relief granted may require. Provided that, where the decree is for the payment of
against the right guaranteed under Article 11 of ICCPR to which India was a party by then, which says that “no one shall be imprisoned merely on the ground of inability to fulfill contractual obligation”. \textit{Inter alia}, the issue was one of interpretation between Article 11 of ICCPR and Section 51 of CPC. The case was very important one as the Supreme Court was dealing with a case wherein there was a conflict between domestic law and international treaty right to which India became Party just eight months ago and any result would have far reaching effect on the subsequent cases involving invocation of international human rights treaties before Indian courts and it is submitted that \textit{Jolly George} was the first real case that offered a great opportunity for the Supreme Court to apply and interpret an international human rights treaty into the corpus-juris of India.\footnote{India became Party to ICCPR on 10\textsuperscript{th} April 1979 and Jolly George Case was decided on 4\textsuperscript{th} February 1980.}

\begin{flushright}
It was a sheer coincidence that \textit{Xavier} in the guise of \textit{Jolly George} met again the same Judge and the learned Judge quoted with approval his own observation in \textit{Xavier} now sitting as judge of the highest Court and enunciated the law on the point of “enforceability of international human rights treaties at the instance of individuals before the domestic courts”. The Division Bench consisting of V.R. Krishna Iyer (delivered the judgment) and R.S.Pathak JJ. held that:

\begin{quote}
“The positive commitment of the States parties ignites legislative action at home but \textit{does not automatically make the covenant an enforceable part of the Corpus juris of India}.\footnote{At para 13.(emphasis supplied)}
\end{quote}

The Court observed that U.N. Resolutions and Covenants mirror the conscience of mankind and inseminate, within the member States, progressive legislation; but till this last step of actual enactment of law takes place, the citizen in a
world of sovereign States, has only inchoate rights in the domestic Courts under these international covenants.199

After the categorical assertion that the international human rights treaties cannot be enforced without Parliamentary intervention by an enabling legislation, the Court adopted harmonious construction reading Article 11 of ICCPR into the Section 51 of CPC. The Court observed at para 12 that “Article 11 of ICCPR only interdicts imprisonment if that is sought solely on the ground of inability to fulfill the obligation. Section 51 also declares that if the debtor has no means to pay he cannot be arrested and detained. If he has and still refuses or neglects to honour his obligation or if he commits acts of bad faith, he incurs the liability to imprisonment under s. 51 of the Code, but this does not violate the mandate of Article 11. However, if he once had the means but now has not or if he has money now on which there are other pressing claims, it is violative of the spirit of Article 11 to arrest and confine him in jail so as to coerce him into payment.”

Further, the learned Judge V.R. Krishna Iyer himself opined that construction of Section 51 of CPC adopted by him has the flavor of Article 11 of ICCPR.200

199 The court founded its decision (on the issue of enforcement of international human rights covenant in India) mainly on the influence of theory of Positive Law and Juristic Writing. This is very much evident at para 10 and 12 of the judgment. The Court while dealing with the impact of Article 11 of ICCPR on Section 51 of CPC said “India is now a signatory to this Covenant and Art. 51 (c) of the Constitution obligates the State to “foster respect for international law and treaty obligations in the dealings of organized peoples with one another”. Even so, until the municipal law is changed to accommodate the Covenant what binds the court is the former, not the latter. A. H. Robertson in "Human Rights-in National and International Law" rightly points out that international conventional law must go through the process of transformation into the municipal law before the international treaty can become an internal law. From the national point of view the national rules alone count. With regard to interpretation, however, it is a principle generally recognized 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.” Further at para 13 the Court said “While dealing with the impact of the Dicean rule of law on positive law, Hood Phillips wrote-and this is all that the Covenant means now for Indian courts administering municipal law. The significance of this kind of doctrine for the English lawyer is that it finds expression in three ways. First, it influences legislators. The substantive law at any given time may approximate to the "rule of law", but this only at the will of Parliament. Secondly, its principles provide canons of interpretation which express the individualistic attitude of English courts and of those courts which have followed the English tradition. They give an indication of how the law will be applied and legislation interpreted. English courts lean in favour of the liberty of the citizen, especially of his person: they interpret strictly statutes which purport to diminish that liberty, and presume that Parliament does not intend to restrict private rights in the absence of clear words to the contrary”. Emphasis supplied.

How good are these basis? Theory of Positive Law, Juristic Writings of A.H.Robertson and Hood Philips prevailed over the noble directive in Article 51(c) of the Constitution of India! The interpretation of Article 51(c) made by Sikri C.J. in Keshavanada Bharati case was not even mentioned muchless discussed.

200 At para 12
The impact of Article 11 of ICCPR is very much visible. Article 11 prohibits imprisonment on every ground of inability whereas Section 51 lays down certain grounds on which a person can be detained in civil prison. The Court read Article 21 of Indian Constitution and Article 11 of ICCPR into Section 51 of CPC, and held that interpreted in that way Section 51 of CPC cannot be unfair, unreasonable and cannot be struck down. The Court also examined 54th Report of Law Commission of India that examined Section 51 of CPC in the light of Article 11 of ICCPR. The Court held that; “We concur with the Law Commission in its construction of s. 51 C.P.C. It follows that quondom affluence and current indigence without intervening dishonesty or bad faith in liquidating his liability can be consistent with Art. 11 of the Covenant, because then no detention is permissible under s. 51 C.P.C.”

It is submitted that the Law Commission submitted the 54th Report on 3rd February 1973 and even at that time ICCPR was not in force and moreover India was not a party to it at that point of time. In this context the very propriety of examining the validity of Section 51 of CPC in the light of Article 11 of ICCPR by the Law Commission of India was uncalled for and needless.201

What is surprising in the entire judgment of Jolly George is that except Article 51(c), the other relevant provisions of the Constitution namely Article 73, 253 and Entry 14 of List 1 in VII Schedule governing the implementation aspect of the international treaties and the Constituent Assembly Debates on these provisions were not at all mentioned muchless considered by the Court. When Article 51(c) received cold reception in the judgment, well, the fate of other provisions of the Constitution would not have been different.

The significance of the judgment is that it virtually incorporated Article 11 of ICCPR into the Indian jurisprudence through Article 21 of the Constitution. Section 51 of CPC allows the detention and arrest of the judgment debtor, inter alia, if he had or has had since the date of decree the means to pay the amount of the decree and refuses or neglects to pay the same. The court, reading Article 11 of ICCPR, 54th Law

201 At Chapter 1-E of the Report under the title EXECUTION, the Commission at point no.1-E.7 p.40 raised the question which is as follows: “The question to be considered is whether any change is needed in the present position. The first point is whether the provision in the International Covenant on Civil and Political Rights which provides- “No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation” is violated by section 51.” The Law Commission then at 1-E.8 p.40-41 discussed Xavier (C.V. Zavier- as referred in the foot note of the Report) and agreed with the judgment on the construction of section 51 of CPC. 54th Report of the Law Commission available at http://lawcommissionofindia.nic.in/51-100/Report54.pdf visited on 04-07-2012 at 11-20 a.m.
Commission Report and Article 21 of the Constitution, has actually created an exception to Section 51 by saying that “even if he has means to pay the debt, if there are other pressing needs on his means, or if he had the means at the date of the decree, but now he does not have it, he need not be arrested and detained.” It is submitted that the Supreme Court has virtually amended Section 51 of CPC at the instance of Article 11 of ICCPR. It is submitted that Article 11 of ICCPR became an eye opener for the Supreme Court and the result was evident – judicial amendment of Section 51 of CPC. Justice was done to the party but the judgment on the point of “enforceability of international human rights treaties in the domestic courts” was negative and disappointing as it was made on incorrect considerations- positive law theory and juristic writings and ignoring the dictum on Article 51(c) by Sikri C.J. in *Keshavananda Bharati* case.

The Supreme Court remanded the matter back to trial court for readjudication in the light of the observation made and current means of the debtors in relation to his present pressures of indebtedness.

Just two months after the *Jolly George* decision, Justice V.R. Krishna Iyer referred ICCPR and UDHR in the case of *Premshankar Shukla v. Delhi Administration*. In this case, the prisoner namely- Premshankar Shukla had sent a telegram to the Court accusing the police of handcuffing the prisoners in transit from jail to court and court to jail inspite of the Court Order and directions of your Lordship in *Sunil Batra v. Delhi Administration*. Justice V.R. Krishna Iyer voluntarily referred Article 5 of UDHR and Article 10 of the ICCPR. However, the learned judge remarked that “while these larger considerations may color our mental process, our task cannot overflow the actual facts of the case or the norms in Part III and the Provisions in the Prisoners (Attendance in the Courts) Act, 1955.” The Bench relying on Article 21 of the Constitution directed the police not to resort to handcuffing the prisoners in transit form prison to court and vice versa and under

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202 AIR 1980 SC 1535. (decided on 29-04-1980) The Bench consisted of V.R. Krishna Iyer, O. Chinnappa Reddy and R.S. Pathak JJ. The majority judgment was delivered by V.R. Krishna Iyer J. for himself and for O. Chinnappa Reddy J. R.S. Pathak J. delivered separate judgment and was of the view that the decision as to whether a prisoner be handcuffed or not be left to the concerned Magistrate before whom the prisoner is produced during trial.

203 AIR 1978 SC 1675.

204 Article 5 of UDHR reads as—“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

205 Article 10 of ICCPR reads as—“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”
exceptional circumstances handcuffing could be resorted to under the conditions of judicial supervision (indicated in the judgment) to be justified before or after.

In *Bachan Singh v. State of Punjab*, the constitutional validity of preservation of death penalty under Indian Penal Code and the sentencing procedure under Code of Criminal Procedure, 1973 was challenged as violative of Article 19 (1) and 21 of the Constitution. It was argued before the Constitutional Bench of the Supreme Court that, India by becoming Party to ICCPR stand committed to the policy of abolition of death penalty. It was contended that the constitutional validity and interpretation of the impugned limb of Section 302, Penal Code, and the sentencing procedure for capital cases provided in Section 354(3) of the Cr.P.C. 1973, must be considered in the light of the Stockholm Declaration and the ICCPR, which represent the evolving attitudes and standards of decency in a maturing world.

It is important to note that Article 6 of ICCPR states that (1) “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. (2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime.”

The Supreme Court observed: “that Clauses (1) and (2) of Article 6 do not abolish or prohibit the imposition of death penalty, in all circumstances. All that they require is that, firstly, death penalty shall not be arbitrarily inflicted; secondly, it shall be imposed only for most serious crimes in accordance with a law, which shall not be an ex post facto legislation. Thus the requirements of these clauses are substantially the same as the guarantees or prohibitions contained in Articles 20 and 21 of our Constitution. *India's commitment therefore does not go beyond what is provided in the Constitution and the Indian Penal Code and the Criminal Procedure Code...* India's penal laws, including the impugned provisions and their application, are thus entirely in accordance with its international commitment. It will be pertinent to note that most of the countries including those who have subscribed to this International

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207 Sections 121, 132, 194, 302, 305, 307 and 396 of Indian Penal Code (IPC in short).
208 Section 354(3) of Code of Criminal Procedure (CrPC in short).
Covenant retain death penalty for murder and certain other crimes even to the present day in their penal laws.”

The significance of the judgment is that the Constitution Bench while observing that ICCPR does not outlaw the death penalty altogether further observed that India's commitment can not go beyond what is provided in the Constitution and the Indian Penal Code and the Criminal Procedure Code. This is a very important observation meaning that the executive cannot commit the nation beyond what is provided in the Constitution and other statutory provisions. This means that any commitment that travels beyond the constitutional and statutory provisions requires an enabling legislation by the Parliament. The majority held that the provisions of IPC and Cr.P.C. are not unconstitutional.

The Full Bench decision in Ram Narayan Agarwal and others v State of Uttar Pradesh and others, is significant in the context that the Supreme Court yet again reiterated that the ICCPR is not part of the corpus juris of India. The issue involved in the case was similar to the one involved in Jolly George, but it was a public debt. In this case, the petitioner challenged the order of arrest and detention for recovery of arrears of tax due under Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (U.P. ZALR in short). It was argued that the impugned Order was violative of Article 11 of ICCPR and the decision in Jolly George. The Bench distinguished the ratio laid down in Jolly George saying that it was case of private debt and not public. The Court observed: “In so far as the International Covenant referred to above is concerned, it has to be observed that it has not been yet made a

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209 At para 139 and 140 of the judgment (Emphasis supplied).
210 Y.V. Chandrachud C.J., A Gupta, N Untwalia and R Sarkaria JJ. Justice P.N. Bhagwati did not agree with the majority view and rendered minority judgment (at para 210 and 211) and held that-“I am of the view that Section 302 of the Indian Penal Code in so far as it provides for imposition of death penalty as an alternative to life sentence is ultra vires and void as being violative of Articles 14 and 21 of the Constitution since it does not provide any legislative guidelines as to when life should be permitted to be extinguished by imposition of death sentence. I would therefore strike down Section 302 as unconstitutional and void in so far as it provides for imposition of death penalty as an alternative to imprisonment for life. I shall give my reasons for this view on the day on which the Court reopens after the summer vacation.” Justice P.N. Bhagwati took almost two years to express his reasoning and the detail judgment was delivered on 16-08-1982 and is reported in AIR 1982 SC 1325.
211 AIR 1984 SC 1213 at para 7.
212 Article 11 of ICCPR reads as- “No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation”
part of our municipal law and secondly it relates to a debt under contractual obligation. We have here a case involving public dues payable under a Statute.”

What is surprising is that the Full Bench omits to give reasoning as to how ICCPR is not part of municipal law. None of the constitutional provisions relating to implementation of international treaties, namely Article 51(c), 73, 253 and Entry 14 of List 1 in VII Schedule were discussed.

In *Sheela Barse v. Secretary, Children’s Aid Society*, the petitioner-appellant, a journalist, complained about the state of affairs in an observation home for children and sought prohibition over employment of children without remuneration while in custody and also sought direction for proper upkeep of the observation home. While issuing directions to the State of Maharashtra, the Supreme Court observed that:

> “Children are the citizens of the future era. On the proper bringing up of children and giving them the proper training to turn out to be good citizens depends the future of the country. In recent years, this position has been well realized. In 1959, the Declaration of all the rights of the child adopted by the General Assembly of the United Nations and in Article 24 of the International Covenant on Civil and Political Rights 1966. The importance of the child has been, appropriately recognized. *India as a party to these International Charters having ratified the Declarations, it is an obligation of the Government of India as also the State machinery to implement the same in the proper way.*”

213 However, the Court set aside the Order of arrest and detention on the ground of not following the procedure i.e., necessary inquiry to be conducted before passing an Order of arrest and detention, contemplated under the Rule 251 of U.P. ZALR Rules.

214 AIR 1987 SC 656 at para 5. Decided on 20-12-1986. The Bench consisted of P.N. Bhagwati C.J. and R.S. Pathak J. This case was an Appeal against the Judgment of the Bombay High Court which issued certain directions and recommendations but not all that were sought for by the petitioner. The High Court criticized the petitioner for her stand in the petition and also did not agree with petitioner on the point of treating the respondent Society as a State under Article 12 of the Constitution. The Supreme Court held that respondent Society is a State and also deleted the remarks made on the petitioner observing that she was not a lawyer and cannot be accepted to acquaint with the procedure of the Court. The Supreme Court directed the Maharashtra Government to implement the Bombay Children’s Act of 1948 in true spirit.

215 Emphasis supplied. The Court said employment of children without remuneration is not illegal and it is intended to bring about adaptability in life aimed at bringing about self confidence and picking of humane virtues.
In this case except observing that State is under an obligation to implement the provision of ICCPR and Declaration, the Court did not say anything further. What is surprising is the understanding of the Court on the point of enforceability of “Declaration” and the language used in the judgment suggesting that “Declaration” was ratified. It is submitted that “Declaration” per se is not enforceable and is not subject of ratification by the States (Declaration does not contain ratification or accession clause and even they are not open for signature). The Court did not bother even to mention as to what Article 24 of ICCPR\textsuperscript{216} says and how is it violated. Thus what could be gathered from this is that the Court made a casual reference to the Declaration of the Rights of the Child, 1959,\textsuperscript{217} and Article 24 of ICCPR without any real intention to enforce the same.

In Mackinnon Mackenzie and Co. Ltd. v. Audrey D’Costa,\textsuperscript{218} the Supreme Court considered the case of a “confidential lady stenographer” who complained that she and other women stenographers who are in the service of the company were being paid lower emoluments than their male counterparts. The Court taking note of the fact that India is a Party to the International Convention concerning Equal Remuneration for Men and Women, 1951 (ILO Convention), adopted a principle embodied in the Convention to construe a law enacted by the Parliament, the Equal Remuneration Act, 1976 (ER Act 1976 in short) to grant relief to the complainant (Respondent no.1) by holding the action of the employer in contravention of Section 4 of the ER Act, 1976.

Though the Equal Remuneration Act, 1976 was not an enabling legislation to implement the ILO Convention of 1952 referred above, however the Court while interpreting the ER Act, 1976 took aid from the said Convention to which India is a Party.

In Daily Rated Casual Labour Employed under P & T Department v. Union of India,\textsuperscript{219} the petitioners sought Writ of Mandamus directing the Union of

\textsuperscript{216} Article 24 of ICCPR says that (1) Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. (2) Every child shall be registered immediately after birth and shall have a name. (3) Every child has the right to acquire a nationality.

\textsuperscript{217} Adopted by UN General Assembly Resolution 1386 (XIV) of 10 December 1959

\textsuperscript{218} AIR 1987 SC 1281. Decided on 26-03-1987. The Bench consisted of E.S. Venakataramaih and M.M. Dutt JJ.

\textsuperscript{219} AIR 1987 SC 2342. Decided on 27-10-1987. The Bench consisted of E.S. Venkataramaih and S. Ranganathan JJ.
India to regularize their services and payment on par with other employees of Post and Telegraph Department.\textsuperscript{220}

The Supreme Court disposed of the petition directing the Union of India to frame a policy within eight months regularizing the services of the petitioners. The Court said the classification of employees into casual employees and regular employees for the purpose of payment of salary/remuneration is violative of Article 14 of the Constitution and against the spirit of Article 7 of ICESCR that provides for equal pay for equal work, fair wages, safe and healthy working conditions and equal opportunity in promotion, rest, leisure and remuneration during public holidays.\textsuperscript{221}

\textbf{In Kubic Dariusz v. Union of India \& Others},\textsuperscript{222} an order of detention of Polish national under the Conservation of Foreign Exchange And Prevention of Smuggling Activities Act, 1974, (COFEPOSA Act in short) was challenged as violative of Article 22(5) of the Constitution\textsuperscript{223} on the grounds that, firstly, the petitioner did not understand the grounds of detention as he did not know English.

\textsuperscript{220} The petitioners, who were working as 'Daily Rated Casual Labors' in the Posts and Telegraphs Department, were categorized as unskilled, semi skilled and skilled workers. By Order dated 26-07-1984, they were further classified into (i) those who had not completed 720 days of service; (ii) those who had completed 720 days and not completed 1200 days of service, and (iii) those who had completed more than 1200 days of service, and were granted different rates of wages. Aggrieved by the order, the petitioners submitted a statement of demands through their federation to the authorities, claiming regularization, payment of interim relief and bonus, supply of dresses, leave and medical facilities etc. Not satisfied with the reply received by the Government/Department, the petitioners filed writ petitions, for the issue of a writ in the nature of mandamus to the Union of India and to direct it to pay them same salary, allowances, and other benefits as were being paid to regular and permanent employees of the Union of India in corresponding cadres and to regularize the service of the casual labor who had been in continuous service for more than 6 months. Their principal complaint was that even though many of them had been working for the last ten years as casual laborers, the wages paid to them were very low and far less than the salary and allowances paid to regular employees of the Posts and Telegraphs Department belonging to the equivalent categories and, secondly that no scheme had been prepared by the Union of India to absorb them regularly in its service and they had been denied the benefits of increments, pension, leave facilities etc. etc. which were enjoyed by those who had been recruited regularly.

\textsuperscript{221} Article 7 of ICESCR reads as: “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; (d ) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays”.

\textsuperscript{222} AIR 1990SC 605. Decided on 18-01-1990. The Bench consisted of B.C. Ray and K.N. Saikia JJ.

\textsuperscript{223} Article 22(5) reads as: “When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order”.
language and secondly, his representation to the Authority under the COFEPOSA Act was not at all considered.  

The Supreme Court held that non communication of grounds of arrest in a language understood by the detenue for knowledge of the grounds of arrest and non consideration of representation made by the detenue by the authority as contemplated under the COFEPOSA Act violate the protection guaranteed under Article 22(5) of the Constitution.

The **Kubic Dariusz** was preventive detention of a foreign national and considering this aspect of the matter the Supreme Court observed that:

“**Preventive detention of a foreign national who is not resident of the country involves an element of international law and human fights and the appropriate authorities ought not to be seen to have been oblivious of its international obligations in this regard.** The universal declaration of human fights include the right to life, liberty and security of person, freedom from arbitrary arrest and detention; the right to fair trial by an independent and impartial tribunal; and the right to presume to be an innocent man until proved guilty. 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 as was pointed out by Krishna Iyer, J. in **Jolly George Verghese v. The Bank of Cochin....**

*There is need for harmonisation whenever possible bearing in mind the spirit of the Covenants. In this context it may not be out of place to bear in mind that the fundamental rights guaranteed under our Constitution are in conforming line with those in the Declaration & The Covenant on Civil and Political Rights and the Covenant.*

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224 In this case Mr. Kubic Dariusz a Polish national was arrested on 29.4.89 by the Customs Department on the ground that he was in possession of foreign gold weighing about 70 tolas. On 30.4.89 he was produced before the Chief Judicial Magistrate who remanded him to jail custody till 15th May 89. His bail application was rejected by the Chief Judicial Magistrate. While still in custody he was served with the impugned Detention Order dated 16.5.89 under the COFEPOSA Act along-with the grounds of detention. On 24.5.89 he was granted bail by the Calcutta High Court but the same could not be availed of because of the detention order.
Economic, Social and Cultural Rights to which India has become a party by ratifying them.\textsuperscript{225}

It is indeed surprising as to what made the Court to make the above observation. It was a clear case of violation of the constitutional protection and mandate under Article 22(5) of the Constitution and it applies to citizens and non-citizens. Further, the Court did not refer any provision of the human rights treaties in its decision making process but went on to make observations as to the obligation of the State in protecting human rights. Needless to say the observations which are not the basis of the judgment but are made generally amount to \textit{obiter dicta} and have no binding effect. Further, the Court referred \textit{Jolly George} on the point of interpreting national laws in tune with India’s international obligations. It is submitted that there was no such conflict between Indian laws and India’s international obligations under any of human rights treaties in the above case. Even the petitioner also did not rely on any provisions of international human rights treaty, but the Court voluntarily made passing remarks which was uncalled for.

The significance of \textit{Sheela Barse, Mackinnon Mackenzie, Daily Rated Employees and Kubic Darusz} judgments is that the Court gradually started noting the obligations of the Government under international human rights treaties and their spirit at a time when \textit{Jolly George} was considered to be an authority on the point of non-enforceability of international human rights treaties at the instance of an individual in the domestic courts.

In \textit{Nilabati Behera v. State of Orissa},\textsuperscript{226} the Supreme Court referred Article 9(5) of the ICCPR\textsuperscript{227} for awarding compensation for illegal detention. At para 21 of the judgment, the Court said: “We may also refer to Article 9(5) of International Covenant on Civil and Political Rights, 1966 which indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right.” Though the Court did not expressly rely on Article 9(5) of ICCPR for awarding the

\textsuperscript{225} At para 21 of the judgment. Emphasis supplied.
\textsuperscript{226} AIR 1993 SC 1960. Decided on 24-03-1993. The Bench consisted of J.S. Verma, Dr.A.S.Anand and Venkatachala JJ. In this case the mother of the victim wrote a letter to the Supreme Court for awarding compensation on the death of her son at the hands of State police while in custody. The Letter was treated as Writ Petition and an enquiry was ordered to find out whether it was case of custodial death. Upon enquiry it was found that the victim died in the custody of police as a result of lathi blows. The Court awarded Rs. 1.5 lakhs compensation to the petitioner- mother.
\textsuperscript{227} Article 9(5) of ICCPR reads as- “Any one who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”
compensation but took aid from the ICCPR in evolving compensatory jurisdiction under Article 32 of the Constitution.

The significance of the judgment is that, while referring to Article 9(5) of ICCPR, the Court did not take into consideration India’s express reservation to Article 9(5). India has made it clear that there is no enforceable right of compensation for illegal arrest or detention under Indian law. Further, Article 32 does not expressly authorize the Court to award compensation for violation fundamental right. Surpassing all the barriers, the Supreme Court evolved a compensatory jurisdiction under Article 32 of the Constitution.229

However, in **D.K. Basu v. State of West of Bengal**,230 the Supreme Court dealt with the reservation made to Article 9(5) of ICCPR and has virtually made it redundant. The Division Bench consisting of Kuldip Singh and Dr. A.S. Anand JJ., while adjudicating on the modalities for awarding compensation to the victims for atrocities and to provide for accountability of the officers concerned held that:

“Article 9(5) of the International Covenant on Civil and Political Rights, 1966 (ICCRP) provides that anyone who has been the victim of unlawful arrest or detention shall have enforceable of compensation. Of course, the Government of India at time of its ratification (of ICCRP) in 1979 had made a specific reservation to the effect the Indian legal system does not recognize a right to compensation for victims of unlawful arrest or detention and thus become a party to covenant. That reservation, however, has now lost its relevance in view of law laid down by this Court in a number of cases awarding compensation this Court in number of cases awarding compensation for the infringement of the fundamental right to life of a citizen.”231

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228 The reservation reads as- “Article 9 shall be applied in consonance with Article 20(3) to (7) of the Indian Constitution and there is no enforceable right to compensation for unlawful arrest/ detention under Indian law.” (Emphasis supplied). See Appendix - Table 4 for a list of Reservations India made to ICCPR and other Treaties.

229 It is interesting to note that in the year 1983 itself the Supreme Court awarded compensation for violation of fundamental right under Article 32 of the Constitution. In **Rudal Shaw v. State of Bihar** AIR 1983 SC 1086, the Court awarded Rs.35,000/- to the victim who was detained in jail for 14 years though he was acquitted. However, in this case the Court did not discuss Article 9(5) of the ICCPR.


231 At para 43 of the Judgment. Emphasis supplied. In this case, the Executive Chairman, Legal Aid Services, West Bengal, a non-political organization registered under the Societies Registration Act, on
D.K. Basu consists of two parts, one dealing with preventive measures and the other compensatory measures. In the first part the Court issued guidelines to the police and other enforcement officials and in the second part dealt with liability of erring officials/wrong doer (State) to indemnify the victim by paying compensation. The Court relied on Niabati Behera while developing compensatory jurisdiction under public law remedy.\textsuperscript{232}

Though the Court did not expressly relied on Article 9(5) of ICCPR but in effect the Court applied the said provision even surpassing the reservation. In this context D.K. Basu raises two important issues in the area of domestic application of international human rights treaties in India. The first issue is that, if the Court was not placing reliance on the express provision of Article 9(5) of ICCPR, why did the Court refer to it? The second issue is that, if the Court was merely mentioning it or taking aid from it, why did the Court say that the “reservation” lost its significance?

At the international level “reservations” are strictly followed and there is no scope for deviation. For example, assuming that India acceded to the 1\textsuperscript{st} Optional Protocol to ICCPR and a complaint is made to the Committee on Civil and Political Rights (CCPR in short), established under ICCPR, to enforce the Article 9(5) of ICCPR, the complainant would not have succeeded against India in view of the express “reservation” made to it by India. The effect of Niabati Behera and D.K. Basu is that it offers effective remedy under Indian judicial system than before the CCPR.

People’s Union for Civil Liberties v. Union India,\textsuperscript{233} was a public interest litigation filed under Article 32 of the Constitution highlighting the incidents of 26th August, 1986 addressed a letter to the Chief Justice of India drawing his attention to certain news items published in the Telegraph dated 20, 21 and 22 of July, 1986 and in Statesman and Indian Express dated 17th August, 1986 regarding deaths in police lock-ups and custody. The Executive Chairman after reproducing the news items submitted that it was imperative to examine the issue in depth and to develop "custody jurisprudence" and formulate modalities for awarding compensation to the victim and/or family members of the victim for atrocities and death caused in police custody and to provide for accountability of the officers concerned. It was also stated in the letter that efforts are often made to hush up the matter of lock-up deaths and thus the crime goes unpunished and "flourishes". It was requested that the letter along with the news items be treated as a writ petition under "public interest litigation" category. Considering, the importance of the issue raised in the letter and being concerned by frequent complaints regarding custodial violence and deaths in police lock up, the letter was treated as a Writ Petition.

\textsuperscript{232} The influence of Niabati Behera was evident as Justice Dr. A.S. Anand was one of the Judges in that case.

\textsuperscript{233} AIR 1997 SC 568. Decided on 18-12-1996. The Bench consisted of Kuldip Singh and S.Saghir Ahmed JJ.
telephone tapping of politicians by the Central Bureau of Investigation (CBI). The petitioner has challenged the constitutional validity of Section 5(2) of the Indian Telegraph Act, 1885 (the Act), and in the alternative it was contended that the said provisions be suitably read-down to include procedural safeguards to rule out arbitrariness and to prevent the indiscriminate telephone-tapping.

The issue involved in the case was telephone tapping is an invasion of “right to privacy”- not expressly guaranteed under the Constitution. The petitioner relied heavily on Article 17 of the ICCPR234 which expressly recognize “right to privacy.” It was argued that Article 21 of the Constitution encompasses the “right to privacy” as envisaged under Article 17 of the ICCPR.

The Court referred to Article 51(c) of the Constitution and the dictum laid down by Sikri C.J. in Keshavananda Bharati and observed: “International law today is not confined to regulating the relations between the States. Scope continues to extend. Today matters of social concern, such as health, education and economics apart from human rights fall within the ambit of International Regulations. International law is more than ever aimed at individuals.” Accordingly the Court held that “Article 17 of the International Covenant does not go contrary to any part of our Municipal law. Article 21 of the Constitution has, therefore, been interpreted in conformity with the international law.”235

C. Masilamani Mudaliar v. Idol of Sri. Swaminathaswami236 and Madhu Kishwar v. State of Bihar237 need to be discussed together because of the commonality in their approach in respect of enforceability of international human rights treaties in India. In both the cases women’s right to inherit property was involved, one on the will and the other on the customary law.

In Masilamani the issue was whether a legatee (a woman in the case), having succeeded to limited estate under a will could alienate the property. The problem in this case was that the husband executed a will in the year 1950 in favor of his wife where the women had no absolute ownership over the property. However, by

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234 Article 17 reads as: (1) No one shall be subject to arbitrary or unlawful interference with his privacy, family, human or correspondence, nor to lawful attacks on his honour and reputation. (2) Every one has the right to the protection of the law against such interference or attacks.”
235 The Court referred ADM Jabhalpur and Jolly George cases (see supra) for harmonious construction of Article 21 of the Constitution with Article 17 of ICCPR.
236 AIR 1996 SC 1697. Decided on 30-01-1996. (hereinafter as Masilamani)
operation of law as per Section 14(1) of Hindu Succession Act, 1956 any property possessed by a female Hindu whether acquired before or after the commencement of the Act could hold by her as full owner. But Section 14(2) excluded properties which were acquired by way of will from the purview of Section 14(1). Therefore the issue before the Court was whether the legatee- a woman in the case- becomes absolute owner of the property acquired under a will. While answering the issue positively Justice K. K. Ramaswamy referred the provisions of CEDAW and Declaration of Right to Development and held that the same are enforceable in view of the definition of “Human Rights” provided under Section 2(d) the Protection of Human Rights Act, 1993(hereinafter as 1993 Act).

In Madhu Kishwar, the constitutionality of provisions of the Chota Nagpur Tenancy Act that excluded tribal women from inheritance of land or property of father, husband etc., based on the customary law operating in Bihar was challenged as violative of Articles 14, 15 and 21 of the Constitution of India. The Bench consisted of K. Ramaswamy, Kuldip Singh and Madan Mohan Punchi JJ. K. Ramaswamy J. delivered separate and detailed judgment. The other two judges partially dissented from K. Ramaswamy J. on only one point and that was on the interpretation of General Clauses Act i.e., as per the General Clauses Act male includes female and on this criteria females can inherit the property. On all other points the other two judges concurred with the judgment of K. Ramaswamy J.

K. Ramaswamy J. in his judgment referred to various provisions of the Constitution such as Articles 13(3), 14, 15(1) and 15(3), 39(a) (b) and 46 in order to hold that the tribal women cannot be discriminated. The learned judge then referred to UN Declaration on the Right to Development, UDHR and CEDAW and held that the same are enforceable in view of the definition of “Human Rights” provided under Section 2(d) of the 1993 Act.

It is important to note that the learned judge referred to the India’s Reservations and Declarations to Article 5(a) and 16(1) (h) of CEDAW. Article 5(a) of CEDAW mandates the State to take steps to modify customary and other

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238 The Bench consisted of K. Ramaswamy, Saghir Ahmad and G.B. Pattanaik JJ.
239 India’s Declarations to CEDAW: (1) With regard to articles 5 (a) and 16 (1) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.
practices which are based on the inferiority or the superiority of either of the sexes and Article 16(1) (h) relates to ownership, acquisition, management, administration, enjoyment and disposition of property.

Both the judgments were delivered by K. Ramaswamy J. in a span of 67 days and paras 16 to 24 of Masilamani judgment are virtually reproduced in paras 7 to 13 of Madhu Kishwar. The learned judge adopted a different yardstick to enforce international human rights treaties in India which was first of its kind. The learned judge invoked Section 2(d) of the 1993 Act to hold that CEDAW has become part of the Indian corpus juris. K. Ramaswamy J. observed:

“The Parliament has enacted the protection of Human Rights Act, 1993. Section 2(d) defines human rights to mean, “the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution, embodied in the international conventions and enforceable by courts in India.” Thereby the principles embodied in CEDAW and the concomitant Rights to Development became integral part of the Indian Constitution and the Human Rights Act and became enforceable. Section 12 of the Protection of the Human Rights Act charges the Commission with the duty of proper implementation as well as prevention of violation of human rights and fundamental freedom.”

On the point of India’s express Declarations on Article 5(a) and 16(1) (h), the learned judge used another provision of CEDAW, namely Article 2(f) to overcome the effect of India’s Declaration. The learned judge observed:

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240 Article 5- States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
241 Article 16 (1) States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: ..... (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.
242 At para 20 of Masilamani and at para 10 of Madhu Kishwar.
243 Article 2: States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: ..... (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;...
“Article 5(a) of CEDAW to which the Government of India expressed reservation does not stand in its way and in fact Article 2(f) denudes its effect and enjoins to implement Article 2(f) read with its obligation undertaken under Articles 3, 14 and 15 of the Convention vis-à-vis Articles 1, 3, 6 and 8 of the Declaration of Right to Development….By operation of Article 2(f) and other related Articles of CEDAW, the State should by appropriate measures including legislation, modify law and abolish gender based discrimination in the existing laws, regulations, customs and practices which constitute discrimination against women.”

The above observations of K. Ramaswamy J. on the enforceability of international human rights treaties in India pose more questions than answers as they suffer from two infirmities. One on the definition of “Human Rights” provided in Section 2(d) of Protection of Human Rights Act, 1993 and the other on the express “Declaration” made on Article 5(a) of CEDAW.

The definition of “Human Rights” under the 1993 Act has two parts. The first being the rights relating to life, liberty, equality and dignity of the individual guaranteed under the Constitution and the second part relates to the said rights embodied in the International Covenants and enforceable by courts in India. It is on this second part of the definition that K. Ramaswamy J. relied upon and said international human rights could be enforced. The second part of the definition has two inherent limitations which the learned judge failed to notice. The first limitation is “enforceable by courts in India”, that is, a right guaranteed in the International Covenants could be invoked by an individual only when they are “enforceable by courts in India”. Right from ADM Jabhalpur (pre 10th April 1979) and Jolly George (post 10th April 1979) the Supreme Court consistently held that international human rights treaties cannot be enforced directly without an enabling legislation by the Parliament. If that is so, the learned judge omitted to give any reasoning on this point as to how international treaty rights become enforceable by courts in India in the absence of an enabling legislation by the Parliament. It is true that Supreme Court is

244 At para 21 of Masilamani and at para 11 of Madhu Kishwar.
245 Section 2(d) of Protection of Human Rights Act, 1993 reads as-“human rights” means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.
not bound by its own decisions but there was no discussion on this point and accordingly no reasoning was assigned in the judgment. Further, the second limitation relates to the definition of “International Covenants” provided under Section 2(f) of the 1993 Act, which the learned judge completely lost sight of. Section 2(f) says that “International Conventions” mean only ICCPR and ICESCR. Thus CEDAW and Declaration on the Right to Development do not fit into the definition of International Conventions and accordingly cannot be the subject matter of enforcement under 1993 Act.

The second infirmity relates to express “Declarations” that India has made to Article 5(a) of CEDAW. The learned judge relying on Article 2(f) of CEDAW has virtually overruled the express Declaration. Article 2(f) relates to legislative obligations of the State to modify or abolish existing laws, customs and practices which constitute discrimination against women. India in its Declaration has said that it will follow the policy of non-interference in the personal affairs of any Community without its initiative and consent. There is a fundamental difference between Article 2 and Article 5. Article 2 relates to general obligation of State Parties to domesticate the treaty provisions and Article 5 relates to the obligation of State Parties to remove disparities based on customary and other practices - which is specific. It is submitted that if the interpretation of K. Ramaswamy J. is accepted there can be no reservations. It is an accepted principle that reservations are made on the specific areas and not on the general obligation.

It is submitted that the reasoning adopted by K. Ramaswamy J. in Masilamani and Madhu Kishwar on the “domestic application of international human rights treaties in India” was based on incorrect interpretation of the definition of “Human Rights” and also ignoring the definition of “International Conventions” provided under Section 2(d) and 2(f) of the 1993 Act respectively.

Justice K. Ramaswamy’s quest for enforcing international human rights treaties through the definition of “Human Rights” provided under Section 2(d) of

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246 Section 2(d) of Protection of Human Rights Act, 1993 reads as - “International Covenants” means the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights adopted by the General Assembly of the United Nations on the 16th December, 1966 and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify.” The definition is as amended by Amendment Act, 2006 and the amended version is shown in italics. Till date Central Government has not notified any other “International Convention” under this section.
1993 Act followed in *Gaurav Jain v. Union of India*\(^{247}\) in the form of precedent. In this case also Justice K. Ramaswamy delivered the judgment. The issue involved was what are the rights of fallen women and what scheme is to be evolved to eradicate prostitution. Justice K. Ramaswamy while answering theses issues referred various provisions of the Constitution, UDHR, Declaration of the Rights of the Child, UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules, 1985) and CEDAW and observed that:

“In Madhu Kishwar, this Court considered the provisions of CEDAW and held the same to be an integral scheme of fundamental rights and the Directive Principles of State Policy…”

The learned judge cited *Madhu Kishwar* and went on to issue directions to the Government not only for the rehabilitation of the children of prostitute but also for the eradication of prostitution. The other judge D.P. Wadhwa J., though agreed on the directions relating to the rehabilitation but did not agree with other directions as to the eradication of prostitution. K. Ramaswamy J. did not refer the matter to larger Bench as required under Article 145 of the Constitution but sought to enforce his Order through Article 142 of the Constitution. This aspect of the matter was considered by the Full Bench in a Review Petition later and held that the when two judges do not agree on a point the same should have been referred to a larger Bench as mandated under Article 145(5) and accordingly set aside the Order of K. Ramaswamy J. on the point of direction to the Government to eradicate prostitution. The Full Bench made it clear that its Order does not come in the way of Government policy towards eradication of prostitution.\(^{248}\) The controversy arose because the Writ Petition did not seek any directions for eradication of prostitution but was only on rehabilitation of children of prostitutes. It is submitted that Justice Wadhwa was too technical while disagreeing with Justice K. Ramaswamy on the point of eradication of prostitution in the country. Just because the issue was not part of the pleading in Writ Petition, does not mean that the Court cannot issue such directions. Justice K. Ramaswamy was looking at a larger issue which was the main cause.

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\(^{248}\) AIR 1998 SC 2848.
In *Samatha v. State of Andhra Pradesh and Others*, the issue of transfer of scheduled area to non-tribal persons and granting of mining leases to non-tribal persons in the Borra reserved forest by the State Government was challenged as violation of Andhra Pradesh Scheduled Area Land Transfer Regulation, 1959, Forest Conservation Act, 1980 and Environment Protection Act, 1986.

The Supreme Court, while holding that the grant of lands to non-tribal persons as illegal; went on to discuss the rights of tribal people and their “right to development”. In that process Justice K. Ramaswamy, who delivered the majority judgment referred to the U.N. Declaration on the Right to Development at para 74 of the judgment and observed that;

“Declaration of “Right to Development Convention” adopted by the United Nations and ratified by India, by Article 1 "right to development" became part of an inalienable human right”.

The learned judge further went on to refer the provisions of the Declaration on the Right to Development at para 75 and accordingly observed at para 76 that;

“India being an active participant in the successful declaration of the Convention on Right to Development and a party signatory thereto, it is its duty to formulate its policies, legislative or executive, accord equal attention to the promotion of and to protect the right to social, economic, civil and cultural rights of the people, in particular, the poor, the Dalits and Tribes as enjoined in Article 46 lead with Arts. 38, 39 and all other related Articles read with right to life guaranteed by Article 21 of the Constitution of India”.

The problem is not in referring to the said Declaration but the understanding of the nature of the International Instrument. The learned judge, Justice K.

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250 Borra Reserved Forest Area along with its environs consisting of 14 villages is the Notified Scheduled Area in Ananthagiri Mandal of Visakhapatnam District of Andhra Pradesh.
251 The majority judgment was delivered by Justice K. Ramaswamy for himself and for Justice S. Saghir Ahmad. Justice G.B. Pattanaik dissented on the interpretation of the term “persons”. According to the majority the term “persons” used in the A.P. Regulation includes State Government, whereas Justice G.B. Pattanaik held otherwise.
252 Declaration on the Right to Development was adopted by the U.N. General Assembly Resolution No. 41/128 of 4 December 1986.
253 Emphasis supplied.
Ramaswamy referred it as Convention and also said India ratified it which is incorrect. No State including India is a signatory party to it because Declarations do not have ratification or accession clause and “Declaration on the Right to Development” is not an exception. It is submitted that Declarations are not binding on States and importing any duty from it and construing it as binding is improper.

Peoples Union for Civil Liberties v. Union of India and Others\textsuperscript{254} offers great debate as to the enforceability of international human rights treaties in India. In this case PIL was filed seeking writ of mandamus for compensation to the families of victims who died in the custody of Manipur police. The petitioner relied on Article 9(5) of ICCPR and Article 21 of the Constitution for the grant of relief. The Court after dealing elaborately on the Australian case, namely, Minister for Immigration and Ethnic Affairs v. Teoh\textsuperscript{255} which dealt with the same issue, and also its own decision in Nilabati Behera\textsuperscript{256} came to the conclusion that the issue requires deeper scrutiny than has been possible in this case. However the Court held that:

“For the present, it would suffice to state that the provisions of the Covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by Courts as facets of those fundamental rights and hence, enforceable as such.\textsuperscript{257}

The significance of the judgment is the use of language by the Supreme Court on the enforceability of international human rights Covenants by Courts in India. The words “can certainly be relied upon by Courts” and “enforceable” indicate the positive reception of international human rights jurisprudence.

8.11.2 Judicial Efforts – Post Vishaka:

The decision in Vishaka v. State of Rajasthan\textsuperscript{258} is a step forward in the area of domestic application of international human rights in India. Till Vishaka, barring Masilamani and Madhu Kishwar, the Supreme was categorical in its approach that international human rights treaties can not form the basis of adjudication and at the least they can be used as aid for interpreting the fundamental rights provided under

\textsuperscript{254} AIR 1997 SC 1203. Decided on 05-02-1997. The Bench consisted of B.P. Jeevan Reddy and Suhas C. Sen JJ. The Court rejected the Government’s defense of sovereign immunity and held that Government of Manipur is liable to pay Rs.1 lakh each to the family of deceased.


\textsuperscript{256} AIR 1993 SC 1960

\textsuperscript{257} At para13 of the judgment.

\textsuperscript{258} AIR 1997 SC 3011. (Herein after referred as Vishaka). Decide on 13-08-1997.
the Constitution. Vishaka is a classic case where the relevant provisions of the Constitution relating to the implementation of international treaty are discussed and the Court laid down guidelines in the light of CEDAW to prevent sexual harassment of working women in all work places. The Court expressly ruled that the guidelines should be treated as law declared by the Court under Article 141 of the Constitution, till the Parliament enacts a law on the subject. It is in this context that Vishaka is hailed as one of the most significant judgment that used international human rights treaties as a base for adjudication.

Vishaka was a Public Interest Litigation (PIL in short) filed in the year 1992 under Article 32 of the Constitution for the enforcement of fundamental rights guaranteed under Article 14, 19(1) (g) and 21 and more particularly “in finding suitable methods for realization of the true concept of ‘gender equality’ and to prevent sexual harassment of working women in all work places through judicial process, to fill the vacuum in existing legislation.” The case was premised on the fact that one Bhanwari Devi, a sathin, was subjected to gang rape and humiliation as she attempted to stop child marriage.

259 AIR 1997 SC 3011 at para 16.
260 The Vishaka petition was filed in 1992 in the names of five Rajasthan and New Delhi-based NGOs that focus on women’s rights—Vishaka, Mahila Purnvas Samou, Rajasthan Voluntary Health Association, Kali for Women, and Jagori— against the State of Rajasthan, its Women and Child Welfare Department, its Department of Social Welfare, and the Union of India.
261 AIR 1997 SC 3011 at page 3017.
262 The Back Ground of the Vishaka: Bhanwari Devi, a member of a group of women called sathins who are trained by the local government to do village-level social work for honorarium compensation. As part of a governmental campaign against child marriage, Bhanwari Devi attempted to stop the marriage of a one-year-old girl. Members of the local community retaliated by harassing her with threats and imposing a socio-economic boycott on her family—refusing to sell them milk or to buy the earthen pots they sold for income. On September 22, 1992, five men raped Bhanwari Devi in the presence of her husband. Bhanwari Devi faced numerous obstacles when she attempted to seek justice: the police publicly disclaimed her complaint and were reluctant to record her statement or carry out an investigation, and doctors at two government health facilities refused to conduct a proper medical examination. Upon hearing about the case, the National Commission on Women (NCW) initiated a detailed inquiry and issued an independent report finding that the “all evidence proved beyond any doubt that the victim…was gang raped.” However, the state criminal court acquitted the five accused of the rape charge because, inter alia, the judge did not find it credible that upper caste men would rape a lower caste woman.

Naina Kapur, a New Delhi-based lawyer who was asked to attend the criminal trial to fulfill the requirement of a female lawyer presence, described it as a deeply disturbing experience because of “the way it was handled, the humiliation and violation of the court process [for the victim]…it was a farce; it was ridiculous what they put her through.” Frustrated by the criminal justice system’s inability to provide tangible remedies, restore the dignity of the victim, address systemic issues, or create social change, Kapur decided to “focus on the big picture” by initiating a PIL in the Supreme Court. She and a local Rajasthani lawyer called a meeting of sathins to discuss when they experience sexual harassment, where they feel it needs to be addressed, and how it could be prevented. The women’s description of the rights violations they experienced and the remedies they desired mirrored the
It was brought to the notice of the Court that there is no specific law curbing the menace of sexual harassment women at work place. The Court’s attention was drawn to various provisions of CEDAW that specifically addressed this issue. In addressing this plea, the Supreme Court referred to Articles 11\(^{263}\) and 24\(^{264}\) of the CEDAW which India had ratified by then,\(^{265}\) and to the General Recommendations of the United Nations Committee on the Elimination of Discrimination against Women in respect of Article 11.\(^{266}\) The Court also noted the official commitment made by the Government of India at the Fourth World Conference on Women in Beijing, *inter alia*, “to formulate and operationalize a national level and in every sector; to set up a commission for Women’s Rights at every level and in every sector, to set up a commission for Women’s Rights to act as a public defender of women’s human rights; and to institutionalize a national level mechanism to monitor the implementation of the Platform of Action.\(^{267}\)

provisions of the CEDAW Committee’s General Recommendation 19 on violence against women, which defines sexual harassment as including “such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions,” and calls upon states parties to take “effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including sexual harassment in the workplace.” Kapur worked with other lawyers to develop the PIL petition based on the feedback she received from the sathins. For example, even though the petition addressed sexual harassment in the workplace, it did not include a definition of workplace because women who work in rural areas, like the sathins, cannot define their workplace. See Avani Mehta Sood, “Litigating Reproductive Rights: Using Public Interest Litigation and International Law to Promote Gender Justice in India.” Full publication/Report available at http://reproductiverights.org/sites/default/files/documents/media_bo_India1215.pdf Last visited on 17-07-2012 at 11.51 p.m.

\(^{263}\) Article 11(1) provides: “States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to work as an inalienable right of all human beings . . .(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.”

\(^{264}\) Article 24 provides: “States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.”

\(^{265}\) When *Vishaka* PIL was filed, India had not yet ratified the CEDAW. However, on 9\(^{th}\) July 1993, India ratified CEDAW.

\(^{266}\) These recommendations were: 17. Equality in employment can be seriously impaired when women are subjected to gender specific violence, such as a sexual harassment in the workplace. 18. Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the women has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment. 24...(i) Effective complaints procedures and remedies, including compensation should be provided; (j) States parties should include in their reports information on sexual harassment, and on measures to protect women from sexual harassment and other forms of violence or coercion in the workplace.”

\(^{267}\) AIR 1997 SC 3011 at page 3017.
The Court, in response, rendered most progressive and resounding decision. Considering the absence of specific law dealing with the issue of sexual harassment of women at work places, the Court had “no hesitation” in placing reliance on the above said international initiatives for the purpose of construing the nature and ambit of the constitutional guarantee of gender equality in the Constitution. J.S. Verma C.J. observed:268

“In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of 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 sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Article 51(c) and enabling power of the Parliament to enact laws for implementing the International Conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. Article 73 also is relevant. It provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive power of the Union is, therefore, available till the parliament enacts legislation to expressly provide measures needed to curb the evil.”269

A careful analysis of the language of the above paragraph in the judgment represents a classic case of judicial incorporation of international human rights law in India given the obscurity prevailing under the Constitution as far as implementation of international treaties in India. The Court evolved three mechanisms270 for this: 1) the

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268 The bench consisted of J.S. Verma, Mrs. Sujata Manohar and B.N. Kripal JJ.
absence of law or gap in the law, 2) what kinds of international rules can be accessed, and 3) how, the process by which international rules can be internalized in India.

1) **The absence of law or gap in the law**: The Court noted the lack of legislation on the subject of sexual harassment and said: “In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places…” Thus the Court takes note of this “gap” and further said that the gap must be filled by formulating guidelines. The Court did not leave this job to the Parliament, instead filled the legislative vacuum by framing certain guidelines to check the evil of sexual harassment of women at work places.

2) **What kinds of international rules can be accessed?**: On this point the Court said “the contents of *International Conventions and norms* are significant for the purpose of 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 sexual harassment implicit therein. *Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions* to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.” The mandate is clear, *any international conventions* and *norms* that are not in conflict with the fundamental rights could be read into the content of fundamental rights to do justice. Needless to say the Supreme Court has always interpreted national laws in harmony with the international law unless it is inevitable. By saying *Norms*, the Court indeed has enlarged the scope of the vast category of international norms and principles that occupy the field of human rights including UDHR. This is indeed debatable as to how these norms and principles, which are non binding in nature under international law, could be applied for enforcing fundamental rights. It is submitted that international norms or principles are not enforceable *per se* and they are only directive in nature.

3) **What is the process by which international rules can be internalized in India?**: This is the most crucial issue that *Vishaka* judgment dealt with. Justice J.S. Verma relied on Articles 51(c), 73, 253 read with Entry 14 of List 1 in VII Schedule as a justification for domesticating international rules. Based on Article 73, which states that the executive power of the Union extends to the matters in which Parliament has

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271 This is the rule envisaged and applied in *Keshavananda Bharati* and *Jolly George*- discussed above.
power to make law, the learned judge was of the view that the executive power of the Union is there till Parliament enacts legislation to expressly provide measures needed to curb this evil. Another important issue that Vishaka clarifies is that the Supreme Court’s ability to access and internalize international human rights jurisprudence. The Court particularly invoked Article 51(c) for this end when it said “it is implicit from Article 51(c)...” for its source of power to access and internalize international law. Further the Court referred to the Beijing Statement of the Principles of Independence of Judiciary in LAWASIA region, which lay down that one of the objectives of the judiciary is to ensure that all persons are able to live securely under the Rule of Law and to observe and attain the human rights.272

It is for these reasons that Vishaka assumes pivotal place in the area of domestic application of international human rights law in India. The Court particularly said “**We have no hesitation in placing reliance...**” for relying on international conventions and principles. Thus for the first time, the Supreme Court expressly relied on international human rights convention while deciding a case and virtually filled the legislative vacuum in the area of curbing sexual harassment of women at work place.

It is submitted that, though the Supreme Court has not referred to the Bangalore Principles on the Domestic Application of International Human Rights Norms, 1988, but in effect followed one of the Principles. One of the Bangalore Principles declared that; “it is within the proper nature of the judicial process and well established judicial functions for national courts to have regard to international obligations which a country undertakes to – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation, or common law”.

The enforcement of Vishaka guidelines was considered by the Supreme Court in **Apparel Export Promotion Council v. A.K. Chopra**.273 In this case a female clerk cum typist, Miss X, made a complaint to the council’s personnel director alleging sexual harassment by the secretary to the chairman of the council. The

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272 The objectives of the judiciary mentioned in the Beijing Statement are: Objectives of the Judiciary:
The objectives and functions of the Judiciary include the following: (a) to ensure that all persons are able to live securely under the Rule of Law; (b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and (c) to administer the law impartially among persons and between persons and the State.

matter was referred to an inquiry officer, who concluded that the secretary had molested Miss X and had tried to touch her person with ulterior motives despite her objections. The personnel director agreed with the enquiry officer’s report and dismissed the secretary. The secretary appealed to the staff committee, an internal appellate body, which concluded that the order terminating the secretary’s employment was legal, proper and valid. The secretary filed a Writ Petition in the High Court for judicial review of the staff committee’s decision. A single judge allowed the Writ Petition observing that the secretary though had tried to molest, but had not in fact molested Miss X, and made an order directing reinstatement of the secretary. Affirming that decision, the Divisional Bench of the High Court found that on the evidence it was not even possible to conclude that there was an attempt to molest, since there had been no physical contact.

On Appeal, the Supreme Court reversed the High Court decision. Dr. A.S. Anand C.J. who delivered the judgment observed that: “It appears that the High Court re-appreciated the evidence while exercising the power of judicial review and gave meaning to the expression ‘molestation’ as if it was dealing with a finding in a criminal trial.” The learned judge added that each incident of sexual harassment at the place of work resulted in a violation of the fundamental right to gender equality.

Dr. A.S. Anand C.J. observed that the “message of international instruments such as the Convention on the Elimination of All Forms of Discrimination against Women 1979 and the Beijing Declaration which directs all state parties to take appropriate measures to prevent discrimination of all forms against women, besides taking steps to protect the honour and dignity of women, is loud and clear.” He referred also to Article 7 of the International Covenant on Economic, Social and Cultural Rights, and expressed the view that these international instruments cast an obligation on the Indian state to gender sensitize its laws. The learned judge emphasized that:

“The courts are under an obligation to see that the message of the international instruments is not allowed to be drowned out. This court has in numerous cases emphasized that while discussing constitutional requirements, court and counsel must never forget the core principle

274 The Bench consisted of Dr. A. S. Anand C.J., and V. N. Khare J.
275 At para 28 of the judgment.
embodied in the international conventions and instruments and as far as possible give effect to the principles contained in those international instruments. The courts are under an obligation to give due regard to international conventions and norms for construing domestic laws, more so when there is no inconsistency between them and there is a void in domestic law… In cases involving violation of human rights, the courts must forever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field. In the instant case, the High Court appears to have totally ignored the intent and content of International Conventions and Norms while dealing with the case.”276

The language employed in the above paragraph of the judgment leave no doubt that the Supreme Court was leaning more and more towards monist approach. The effect of Vishaka was very much visible and was no surprise because Dr.A.S. Anand shared the Bench in Vishaka. The learned judge was emphatic when he said: “In cases involving violation of human rights, the courts must forever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field,” and, in the end, accused the High Court for ignoring international Conventions and Norms.

In Githa Hariharan v. Reserve Bank of India,277 the constitutional validity of Section 6(a) of Hindu Minority and Guardianship Act, 1956 read with Section 19(b) of Guardian and Wards Act, 1890 were challenged as violative of Article 14 and 15 of the Constitution. The impugned provisions provide for treating father of minor child as the natural guardian (in person and property) and after him the mother. The word after was alleged to suggest that “mother” is discriminated solely on the


ground of sex. It was argued that the “mother” of the minor child is relegated to an inferior position on the ground of “sex” alone, and since her right, as a natural guardian of the minor, is made cognizable only “after” the father.

Chief Justice Dr. A.S. Anand (for himself and Justice M.Srinivansan) relied upon the CEDAW and the Beijing Declaration, which directs all State parties to take appropriate measures to prevent discrimination of all forms against women is quite clear. The learned Chief Justice cited his own judgment in Apparel Export and observed that the domestic courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws when there is no inconsistency between them.

However, the Court did not strike down the impugned provisions, though the plain reading of the provisions would render it as unconstitutional. The Court adopted a harmonious construction by reading section 4 of the Act along with section 6(a) which defines “guardian” as a person having the custody of the child and who take care of the child which included natural guardian mentioned in section 6(a). The Court held that: “in all situations where the father is not in actual charge of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of minor (oral or written) and the minor is in the exclusive care and custody of the mother or father for any of other reason is unable to take care of the minor because of his physical and/or mental incapacity, the mother, can act as natural guardian of the minor and all her actions would be valid even during the lifetime of the father, who would be deemed to ‘absent’ for the purpose of Section 6(a) of the HMG Act and Section 19(a) of GW Act”.

The significance of the judgment is that the Court came to such a conclusion based upon the principles enunciated under CEDAW and Beijing Declaration against Women.

Chairman, Railway Board v. Chandrima Das was an Appeal against the Order of the Calcutta High Court. A petition was filed in the Calcutta High Court by an advocate practicing in the same Court against the Chairman of the Railway Board.

278 Justice U.C. Banerjee delivered separate judgment but was concurrent.
279 At para 14 of the judgment.
280 AIR 2000 SC 988. Decided on 28-01-2000. The Bench consisted of R.P. Sethi and S. Saghir Ahmad JJ. The Supreme Court dismissed the Appeal and confirmed the Order of Calcutta High Court that directed Railway Board to pay Rs.10 lakhs as compensation to the victim.
and several other railway and police officials, claiming compensation for a Bangladeshi national who had been gang-raped by several railway employees in a room at a railway station and later in a rented flat. The Railway Board argued, *inter alia*, that it was not liable to pay compensation to the victim since she was a foreigner and not an Indian national and hence she is not entitled to the fundamental right to life guaranteed under Article 21 of the Constitution. The Supreme Court referred to the UDHR and ICCPR for the purpose of determining whether the right to life in Article 21 of the Constitution could be invoked by a non-citizen.

The Court specifically referred to UDHR and Declaration on the Elimination of Violence against Women (DEVAW in short) by the General Assembly of the UN to construe the meaning of “LIFE” and its scope. The Court referred to the Preamble and Articles 1, 2, 3, 5, 7, and 9 of the UDHR and Articles 1 to 3 of the DEVAW and noted that the provisions of UDHR and DEVAW recognized the right of “everyone” to life, liberty and security of person, and that no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, and that women are entitled to the equal protection of “human rights”. Accordingly, Saghir Ahmad J. held that:

“On this principle, even those who are not citizens of this country and come here merely as tourists or in any other capacity will be entitled to the protection of their lives in accordance with constitutional provisions. They also have a right to ‘life’ in this country. Thus, they also have the right to live, so long as they are here, with human dignity. Just as the State is under an obligation to protect the life of every citizen in this country, so also the State is under an obligation to protect the life of the persons who are not citizens”.

The significance of the judgment is that the Court specifically observed that: “The International Covenants and Declarations as adopted by the United Nations have to be respected by all signatory States and the meaning given to the above words in those Declarations and Covenants have to be such as would help in effective implementation of those Rights. The applicability of the Universal Declaration of

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281 Article 21 reads as- “No person shall be deprived of his life and personal liberty except according to procedure established by law.”

282 At para 35 of the judgment.
Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence.” The learned judge then quoted the observation of Lord Diplock in *Salomon v. Commissioners of Customs and Excise*,\(^{283}\) “that there is a, prima facie, presumption that Parliament does not intend to act in breach of international law, including specific treaty obligations”, and Lord Bridge in *Brind v. Secretary of State for the Home Department*\(^{284}\), “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.”\(^{285}\)

Further, the Supreme Court recalled the duty of the judiciary to interpret and apply national Constitutions with international human rights treaties which was recognized and affirmed in the Bangalore Principles evolved at the Judicial Colloquium on the Domestic Application of International Human Rights Norms held at Bangalore, 1988.

Chandrima Das will be remembered for its reliance on UDHR and DEVAW for expanding the meaning and scope of “Right to Life” and making it available to non-citizen. However, it is indeed surprising that the Court invoked UDHR and DEVAW in detail rather than ICCPR and CEDAW. It is because; UDHR and DEVAW are non binding in nature whereas ICCPR and CEDAW are binding on India as both the treaties were acceded/ratified by India by then. Though the content of the provisions are same, legally speaking, the Court should have referred ICCPR and CEDAW.

In *Municipal Corporation of Delhi v. Female Workers (Muster Roll) and Another*,\(^{286}\) the issue involved was, whether having regard to the provisions contained in Maternity Benefit Act, 1961, women engaged on casual basis or on muster roll basis on daily wages (not in regular employment) were eligible for maternity leave? The Court while upholding the right of the female workers to get maternity leave relied upon the doctrine of social justice as embodied in UDHR and

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\(^{283}\) [1996] 3 All ER 871  
\(^{284}\) (1991) 1 All ER 720  
\(^{285}\) At para 25 of the judgment  
\(^{286}\) AIR 2000 SC 1274. Decided on 08-03-2000. The Bench consisted of S. Saghir Ahmad and D.P. Wadhwa JJ.
Article 11 of the CEDAW\textsuperscript{287} held that the provisions of the same must be read into the service contracts of Municipal Corporation. Justice S. Saghir Ahmad, who delivered the judgment observed that:

“These principles which are contained in Article 11, reproduced above, have to be read into the contract of service between Municipal Corporation of Delhi and the women employees (muster roll); and so read these employees immediately become entitled to all the benefits conceived under the Maternity Benefit Act, 1961”\textsuperscript{288}

In \textit{Kapila Hingorani v. State of Bihar},\textsuperscript{289} several Government companies and public sector undertakings did not pay salary to their workmen and other employees for a long time, resulting in the death of several persons and distress to a large number of families in the State of Bihar. The core issue involved in the Writ Petition was; to what extent the Government of the State of Bihar is vicariously liable for payment of arrears of salaries to the employees of the State owned corporations, public sector undertakings or the statutory bodies?

\textsuperscript{287} Article 11 of CEDAW reads as: (1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular; (a) The right to work as an inalienable right of all human beings; (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment; (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training; (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, ‘as well as equality of treatment in the evaluation of the quality of work; (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave; (f) The right to protection of health and to satisfy in working conditions, including the, safeguarding of the function of reproduction. (2) In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work. States Parties shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status; (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances; (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of childcare facilities; (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them. (3) Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.”

\textsuperscript{288} At para 35 of the judgment. The learned judge noted at para 34 that: “Delhi is the capital of India. No other City or Corporation would be more conscious than the City of Delhi that India is a signatory to various International covenants and treaties. The Universal Declaration of Human Rights, adopted by the United Nations on 10th of December, 1948. set in motion the universal thinking that human rights are supreme and ought to be preserved at all costs. This was followed by a series of Conventions. On 18th of December, 1979, the United Nations adopted the "Convention on the Elimination of all forms of discrimination against women".\textsuperscript{288} (2003) 6 SCC 1. Decided on 09-05-2003. The Bench consisted of V.N. Khare C.J. and S.B. Sinha J.
The Respondent – State of Bihar expressed its financial difficulties in not paying arrears. The Court while interpreting “right to life” guaranteed under Article 21 of the Constitution came heavily on the Government and held that “financial stringency may not be a ground for not issuing requisite directions when the question of violation of human rights arises”, further the Court held that the State cannot escape its liability when a human rights problem “of such a magnitude involving the starvation, deaths and/or suicide by the employees has taken place by reason of non-payment of salary to the employees of Public Sector Undertakings for such a long time”. The Court did not lay down a general law but restricted it to the cases of violation of human rights and held that State of Bihar is vicariously liable and directed to deposit Rs.50 crores (ad hoc arrangement) with the High Court of Bihar for disbursement of salaries to the employees.

The significance of the judgment is that, the court relied on the provisions of UDHR, ICCPR, ICESCR and its own precedents (Chandrima Das) for giving wider interpretation to “right to life” under Article 21 of the Constitution.

In John Vallamattom and another v. Union of India, the constitutional validity of Section 118 of Indian Succession Act, 1925, was challenged on the ground that it violates Article 14, 15, 25 and 26 of the Constitution. It was also argued that the said provision is violative of Article 1 of the Vienna Declaration on the Right to Development adopted by the World Conference on Human Rights of 1993 and Article 18 of the ICCPR.

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290 AIR 2003 SC 2902. Decided on 21-07-2003. The Bench consisted of V.N. Khare C.J., S.B. Sinha and Dr. A.S Lakshmanan JJ.

291 Section 118 reads as: “Bequest to religious or charitable uses - No man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the will of living person.”

The said provision, thus, postulates that a person having a nephew or niece or any nearer relative cannot bequeath his property for religious or charitable use unless: (i) the will is executed not less than twelve months before the death of testator; (ii) it is deposited within six months from its execution in some place provided by law for the safe custody of the will of living person; and (iii) it remains in such deposit till the death of the testator. The section plainly means that to the extent to which the bequest is for religious or charitable uses, the application of this section is attracted despite the fact that the bequest may be for only a part of the property or some interest in the property.

292 Article 1 reads as: “The right to development is an inalienable human right by virtue of which every human person and all people are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedom can be fully realized.”

293 Article 18 reads as: (1) “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and
On this submission that the *vires* of Section 118 should also be tested under the above said provisions of international law, the Court observed that:

“The impugned provision must, therefore, also be judged having regard to the aforementioned treaties and covenants. It is trite that having regard to Article 13(1) of the Constitution, the constitutionality of the impugned legislation is required to be considered on the basis of laws existing on 26th January 1950, but while doing so the court is not precluded from taking into consideration the subsequent events which have taken place thereafter. It is further trite that the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation”.

Further, the Court quoted Justice Cardoze and Albert Campus and rendered one of the most progressive and authoritative decision on the issue of judging the *vires* of an Act on the provisions of international human rights treaties. V.N. Khare C.J. held that:

“In any view of the matter even if a provision was not unconstitutional on the day on which it was enacted or the Constitution came into force, by reason of facts emerging out thereafter, the same may be rendered unconstitutional. The world has witnessed a sea-change. The right of equality of women vis-a-vis their male counterpart is accepted worldwide. It will be immoral to discriminate a woman on the ground of sex. It is forbidden both in our domestic law as also international law. Even right of women to derive interest in a property by way of inheritance, gift or bequeath is statutorily accepted by reason of Hindu Succession Act, 1956 and other enactments. This court, therefore, while considering constitutionality of Section 118 of the Indian freedom, either individually or in community with others and in public or private, to manifest his religion or belief or belief in worship, observance, practice and teaching.”

294 At para 32 and 33 of the judgment.
295 “The law has its epochs of ebb and flow; the flood tides are on us. The old order may change yielding place to new; but the transition is never an easy process”. At para 34 of the judgment.
296 “The wheel turns, history changes”. Stability and change are the two sides of the same law-coin. In their pure form they are antagonistic poles; without stability the law becomes not a chart of conduct, but a gore of chance: with only stability the law is as the still waters in which there is only stagnation and death.” At para 35 of the judgment.
Succession Act, is entitled to take those facts also into consideration”. 297

The Court struck down Section 118 of the Indian Succession Act, 1925, saying that it offends Article 14 of the Constitution. The Court further said that Articles 15, 25 and 26 are not attracted.

In Sakshi v. Union of India and others, 298 the main issue involved was whether by a process of judicial interpretation the provisions of section 375 of Indian Pena Code (IPC) 299 can be so altered so as to include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vagina and finger/anal penetration and object/vaginal penetration within its ambit. 300

In this connection, petitioner referred to CEDAW and in particular Article 17(e) and 19 of CRC to which India is a Party 301 and argued that the Government of

297 At para 36 of the judgment. Emphasis supplied.
299 Section 375 reads as: Rape—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—First.— Against her will. Secondly.—Without her consent. Thirdly.— With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt. Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly.— With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. Sixthly— With or without her consent, when she is under sixteen years of age. Explanation—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Exception.—Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.
300 Sakshi, an organization, filed a writ petition under Article 32 of the Constitution, by way of public interest litigation (PIL) seeking to enlarge the scope of the term “sexual intercourse” without limiting it to only penile/vaginal penetration. It was argued that the narrow understanding and application of rape under Section 375/376 IPC only to the cases of penile/vaginal penetration runs contrary to the existing contemporary understanding of rape as an intent to humiliate, violate and degrade a woman or child sexually and, therefore, adversely affects the sexual integrity and autonomy of women and children in violation of Article 21 of the Constitution. Further, it was contended that a plain reading of Section 375 would make it apparent that the term "sexual intercourse" has not been defined and is, therefore, subject to and is capable of judicial interpretation. Further the explanation to Section 375 IPC does not in any way limit the term penetration to mean penile/vaginal penetration. The definition of the term rape as contained in the Code is extremely wide and takes within its sweep various forms of sexual offenses.
301 Article 17 -States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall…. (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of Articles 13 and 18.
India by ratifying these Conventions has created a legitimate expectation that it will adhere to the commitments set out in the Conventions. Petitioner also referred the judgments rendered on 10-12-1998 and 22-02-2001 of International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, in which the term “rape” was given wider interpretation to include the above said types of penetrations.

Surprisingly, the Court did not refer to the CEDAW or CRC, however, with regard to Tribunal Judgments; the Court said they are not applicable to the case since domestic penal law was not applied and that the Tribunal was concerned with serious violations of international humanitarian law. The Court disposed of the petition with certain directions but did not grant the main relief. It is submitted that none of the provisions in the CEDAW or CRC provide for definition of “rape”, instead they generally refer to the physical or mental abuse of women/children respectively. This may be the reason for the Court for not referring the CEDAW and CRC provisions in its judgment. However, the point mooted by the petitioner as to the use of doctrine of legitimate expectation to enforce the treaty obligation was not considered much less debated by the Supreme Court.

In PUCL v. Union of India and Another, the appointment of a police officer, who retired as Director General of Central Bureau of Investigation (CBI), as a

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Article 19 (1)- States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other persons who has the care of the child. (2) Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

302 At para 21 of the judgment.

303 The writ petition was disposed of with the following directions: (1) The provisions of Sub-section (2) of Section 327 Cr.P.C. shall, in addition to the offences mentioned in the sub-section, would also apply in inquiry or trial of offences under Sections 354 and 377 IPC. (2) In holding trial of child sex abuse or rape: (i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused; (ii) the questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident should be given in writing to the Presiding Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing; (iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

Member of NHRC was challenged as violative of Paris Principles, 1991, and Section 3 (2) (d) of 1993 Act. The issue was about the interpretation of Section 3(2) (d), which stipulates that the Commission shall consist of two members to be appointed from, amongst persons having “knowledge of, or practical experience in, matters relating to human rights”. The fundamental question is whether a Police officer would fall in the category stipulated under this provision and whether appointment of such a person is consistent with the language of the section and the true intendment of the Act.

Justice Y.K. Sabharwal virtually relied on Paris Principles, 1991, and for this, the learned judge referred precedents of the Supreme Court and held that:

“Thus, international treaties have influenced interpretation of Indian law in several ways. This Court has relied upon them for statutory interpretation, where the terms of any legislation are not clear or are reasonably capable of more than one meaning. In such cases, the courts have relied upon the meaning which is in consonance with the treaties, for there is a prima facie presumption that Parliament did not intend to act in breach of international law, including State treaty obligations. It is also well accepted that in construing any provision in

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305 In the year 1991, the United Nations sponsored meetings of representatives of National Institutions in Paris wherein a detailed set of principles on the status of National Human Rights Institutions was developed. The principles developed therein are commonly known as 'Paris principles'. Paris principles were subsequently endorsed by the United Nations Commission on Human Rights and the United Nations General Assembly. The six criteria of National Human Rights Institutions under Paris principles are: “(a) Independence guaranteed by the Statute or constitution, (b) Autonomy from Government, (c) Pluralism in membership, (d) Broad mandate based on human rights standards, (e) Adequate power of State, (f) Sufficient resources”.

The Paris principles set out the principles relating to the status and functioning of National Institutions for protection and promotion of human rights. In respect of composition and guarantees of independence and pluralism, it provides that: “The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representative of: non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists; Trends in philosophical or religious thought; Universities and qualified experts; Parliament; Government departments (if they are included, these representatives should participate in the deliberations only in an advisory capacity)”. In regard to structure of such institutions, the guidelines, inter alia, recommended that they would be so designed as to reflect in their composition, wide cross sections of the nation thereby bringing all part of that population into the decision making process in regard to the human rights.

domestic legislation which is ambiguous, in the sense that it is capable of more than one meaning, the meaning which conforms most closely to the provisions of any international instrument is to be preferred, in the absence of any domestic law to the contrary. *In this view, Section 3(2) (d) is to be read keeping in view Paris Principles.* Further, the proposal to appoint police officers on two earlier occasions was dropped when Chairperson of NHRC expressed his opinion against appointments of such persons. Thus, construing Section 3(2) (d) of the Act, police officer would be ineligible to be appointed as a member of NHRC.” 307

However, Justice D.M. Dharmadhikari did not agree with Justice Y.K. Sabharwal and the matter was referred to larger Bench. 308

The above matter came up for consideration before larger Bench consisting of N. Santosh Hegde, B.P. Singh and S.B. Sinha JJ., in **PUCL v. Union of India and Another**. 309 Justice N. Santosh Hegde, who delivered the judgment did not agree with Justice Y.K Sabharwal but agreed with the views of Justice D.M. Dharmadhikari. The learned judge N. Santosh Hegde, on the point of status of Paris Principles and its binding ness on Indian Courts, observed that:

“In arriving at his decision Hon. Sabharwal, J. has treated the Paris Principles and the U.N. General Assembly Resolutions as covenants. Thereafter, he has applied the law applicable to international covenants and imported the obligations under the Paris Principles and the U.N. General Assembly Resolution as if they are binding as legal obligations on India even in the municipal context. While doing so he has relied upon the judgments of this Hon'ble Court in Mackinon Mackenzie v. Audrey D’Costa AIR 1987 SC 1281; Sheela Barse v. Secretary, Children’s Aid Society, (1987) 3 SCC 50; PUCL v. UoI, (1997) 3 SCC 433; Vishaka v. state of Rajasthan, (1997) 6 SCC 241. Having noted the above we would with respect like to point out that

307 At para 41 of the judgment.
308 Justice D.M. Dharmadhikari dissented on the ground that, to be eligible for appointment as Member of NHRC, one should have blemish less record and high esteem apart from having experience in the field of human rights and in the case on hand the police officer had not single black spot in his entire service.
neither the Paris Principles nor the subsequent U.N. General Assembly Resolution can be exalted to the status of a covenant in international law. Therefore merely because India is a party to these documents does not cast any binding legal obligation on it. Further, all the above cases which Hon. Sabharwal, J. has relied upon deal with the obligations of the Indian State pursuant to its being a party to a covenant/treaty or a convention and not merely a declaration in the international fora or a U.N. General Assembly Resolution.\textsuperscript{310}

These two \textit{PUCL} cases though not directly related with human rights issues but are significant in understanding the legal status of international human rights Covenants, Declarations and Principles in India. Justice N. Santosh Hegde was right in saying that Paris Principles are not binding on India as it is not a Covenant. However the learned judge lost sight of the fact that the genesis of NHRC in India was a result of Paris Principles, 1991. NHRCs or National Institutions are devised to provide alternative mechanisms to protect and enforce human rights in their respective territories. Under the Paris Principles, a police officer cannot be appointed as a Member of NHRC. However, Justice N. Santosh Hegde observed that “the constitution of the NHRC is covered by an Act of the Indian Parliament, it follows that neither the Paris Principles nor the U.N. General Assembly Resolution can override the express provisions of the Act”.\textsuperscript{311} With due respect to the learned judge, a harmonious interpretation was needed to check the intrusion of police officers into the orbit of NHRC, a noble and independent institution headed by retired Chief Justice of India, since majority of complaints before NHRC are filed against police. It is also surprising to note here is that Justice S.B. Sinha, one of the judges on the Bench, who has always been forefront in importing International Declarations, Principles and Covenants in interpreting Indian laws did not whisper a word.\textsuperscript{312}

\textsuperscript{310} At para 17 and 18 of the judgment (Emphasis supplied).
\textsuperscript{311} At para 19 of the judgment.
\textsuperscript{312} One such example of Justice S.B. Sinha’s keenness to import International Declarations and Principles in the interpretation of Indian laws is to be found in \textbf{P.T. Munichikkanna v. Revamma and Others}, (AIR 2007 SC 1753 – Decided on 24-04-2007- The Bench consisted of S.B. Sinha and Markandey katju J.J.). The learned judge referred European Convention on Human Rights, 1950, and the Strasbourg Court jurisprudence (European Court on Human Rights) on the emerging trend to protect person’s right to property and accordingly observed that right to property is a human right, and held that: “it is important to take into account before stripping somebody of his lawful title, whether there is an adverse possessor worthy and exhibiting more urgent and genuine desire to dispossess and step into the shoes of the paper owner of the property”.

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In Sarbananda Sonowal v. Union of India and another\textsuperscript{313}, a Writ Petition under Article 32 of the Constitution of India was filed by way of public interest litigation for declaring certain provisions of the Illegal Migrants (Determination by Tribunals) Act, 1983 (IMDT Act in short) as \textit{ultra vires} of the Constitution of India, and consequent declaration that the Foreigners Act, 1946 and the Rules made there under shall apply to the State of Assam.

The grievance of the petitioner was that the IMDT Act has completely failed to detect and deport foreigners illegally residing in the State of Assam. Under the IMDT Act, if an illegal migrant takes the plea that he is an Indian, the burden of proving that he is not a citizen of India shifts on the prosecution. This and among other provisions were alleged as unconstitutional since the Union of India or State are overburdened to prove a fact that is completely within the knowledge of the accused illegal migrant. It was argued that this burden on prosecution of proving an illegal migrant as non-citizen of India comes in the way of protecting the security of the nation and its border. It is in this background that PIL was filed.

The Supreme Court struck down the IMDT Act as unconstitutional and issued certain directions to the Union of India. While doing so the Supreme Court dealt with the issue of rights of aliens who have legally entered into India. After referring to the juristic writings of Oppenheim’s “International law” (p.400, 401, and 413) and J.G Starke’s “Introduction to International Law” (p.351) and a specific reference to Article 13 of ICCPR, the Supreme Court held that in respect of an alien who is lawfully in India under a valid passport and visa, is entitled to have an opportunity to represent before an order of expulsion is passed. The Supreme Court observed in paragraph 49 that:

“Like the power to refuse admission this is regarded as an incident of the State's territorial sovereignty. International law does not prohibit the expulsion en masse of aliens. Reference has also been made to Article 13 of the International Covenant of 1966 on Civil and Political Rights which provides that an alien lawfully in the territory of a State party to the Covenant may be expelled only pursuant to a decision reached by law and except where compelling reasons of national

security otherwise require, is to be allowed to submit the reasons against his expulsion and to have his case reviewed by and to be represented for the purpose before the competent authority. It is important to note that this Covenant of 1966 would apply provided an alien is lawfully in India, namely, with valid passport, visa, etc., and not to those who have entered illegally or unlawfully. 

_Having regard to Article 13 of the International Covenant on Civil and Political Rights, 1966, an alien lawfully in a State's territory may be expelled only in pursuance of a decision reached in accordance with law._

The significance of the above paragraph in the judgment is that in a similar case, the Constitution Bench of the Supreme Court in 1955 in _Hans Muller of Nuremberg v. Superintendent Presidency Jail, Calcutta and others_ held that the Central government has unfettered powers to expel an alien under the Foreigners Act, 1946, though entered lawfully into India. The _Hans Muller_ judgment was made when ICCPR was not even adopted much less in force. However, _Sarbananda Sonawal_ was decided in 2005 and by that time ICCPR came into force and India had already acceded to it. Hence, the _Hans Muller_ judgment though rendered by a Constitutional Bench of Five Judges is not binding on the lesser Bench of the Supreme Court because of the changes in the position of law in the passage of time.

It is submitted that _Sarbananda Sonawal_ virtually incorporated the ICCPR into the _corpus juris_ of India. In _Hasan Ali Raihany v. Union of India and others_, while dealing with an identical question, a Division Bench of the Supreme Court has taken a similar view. Further, following _Sarbananda Sonawal_ and _Hasan Ali_, the Madras High Court in _R. I. Jeharaj v. Union of India_, held the same view that, once the foreigner enters India on a valid passport and visa, he cannot be

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314 AIR 1955 SC 367. Decided on 23-02-1955. The Bench consisted of B.K. Mukherjee C.J., Jagannadhadas, P.N. Bhagwati, Sudhir Ranjan Das and Vivian Bose JJ. In this case the petitioner/appellant challenged his arrest under the Preventive Detention Act, for overstaying in India. He also challenged Section 3(1) (b) of Preventive Detention Act, 1950 and Section 3(2)(c) of Foreigners Act, 1946, as violative Articles 14, 21 and 22 of Constitution. The Court upheld the constitutional validity of the provisions saying that neither Act impinges on the other.

315 AIR 2006 SC 1714. Decided on 09-03-2006. The bench consisted of B.P. Singh and Altamas Kabir JJ.

expelled arbitrarily unless there are compelling reasons like threat to national security, etc.

**Aloke Nath Dutta v. State of West Bengal** and **Swamy Sharaddanand v. State of Karnataka** need to be discussed together as both the cases dealt with the abolition of death penalty. Further, in both the cases Justice S.B. Sinha was present on the Bench.

In **Aloke Nath**, the appellant was sentenced to death for conspiring and committing murder. On the issue of death penalty, Justice S.B. Sinha, referring to the second Optional Protocol to the ICCPR (OP2-ICCPR in short) observed that there is growing demand for the abolition of death penalty. Though the learned judge did not specifically rely on the second OP2-ICCPR but converted the death sentence into life imprisonment based on precedents and evidence in the case.

In **Swamy Sharaddanand**, the appellant was convicted and sentenced to death for murdering his wife at their residential house. The appellant was convicted solely on the basis of circumstantial evidence (dead body was found in the backyard of the house and the autopsy revealed that the deceased was poisoned). Justice S.B. Sinha again referred to second OP-ICCPR but did not rely on it for converting the death sentence into life imprisonment. The learned judge relied on the precedents of the Court that propounded the theory of “rarest of rare” case for awarding death penalty and said that the case does not fall within the “rarest of rare” case for awarding death penalty. However, Justice Markandey Katju did not agree with Justice S.B. Sinha and the case was referred to larger bench of the Supreme Court for consideration.

Surprisingly in these two cases Justice S.B. Sinha referred to the OP2-ICCPR to which India is not a party. Needless to say international treaties are binding only when States ratify/accede. Though Justice S.B. Sinha relied on Court’s precedents but it was evident that OP2-ICCPR played a role in his decision making process that led to converting death sentence into life imprisonment. On the other hand Justice

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Markandey Katju did not even bother to make a reference to it and relied heavily on clinching evidence in the case and the conduct of the accused to express his dissent.320

In Ashoka Kumar Thakur v. Union of India,321 the constitutional validity of Central Educational Institutions (Reservation in Admission) Act, 2006 (Act No.5 of 2007), (Act 2006 in short) was challenged.322 The Act 2006 provides for 15, 7.5 and 27 per cent of reservation of seats in admissions for Scheduled Castes (SCs), Scheduled Tribes (STs) and Other Backward Classes (OBCs) respectively in certain educational institutions established, maintained or aided by the Centre from the academic year 2007.323 The Court referred the matter to the larger Bench. While doing so the Court framed certain issues and one of the issues was “whether the Act is in violation of Article 26 of the Universal Declaration of Human Rights which postulates technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit?”324

It is submitted that it was for the first time that the Supreme Court expressly framed an issue judging the validity of an Act on the touchstone of an international norm.

The Constitutional Bench of Five Judges examined the issues framed in Ashoka Kumar Thakur. The Bench upheld the Constitutional validity of the Act 2006.325 However, the learned judges hardly made any effort in exploring the issue as to whether the Act, 2006 violates Article 26 of UDHR? The majority opinion was rendered by K.G. Balakrishnan C.J., and the learned judge observed that: “The

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322 The Act 2006 was result of 93rd Amendment-2005 to the Constitution that inserted new Clause (5) to Article 15 which reads as: “Nothing in this Article or in Clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. In so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institution referred to in clause (1) of Article 30.”
323 Section 3 and 6 of the Act 2006.
324 Article 26(1) reads as: “Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.”
contention that the Ninety-Third Constitutional Amendment is against the Universal Declaration of Human Rights is also not tenable. Right to Equality of Opportunity operates at every level and it is being provided for a particular level either by a legislative or an executive action. The merit has to be interpreted in the context of egalitarian equality and not formal equality”.

Justice Dalveer Bhandari in his dissenting opinion observed that UDHR is not a treaty and is not legally binding. The learned judge observed that: “Article 26(1) of the Universal Declaration of Human Rights made free and compulsory education a lofty if not enforceable goal. While many states consider it an authoritative interpretation of the United Nations Charter, the Declaration is not a treaty and is not intended to be legally binding”.

Justice Dalveer Bhandari was absolutely right in saying that UDHR is not a treaty and hence it is not binding. A fact needs to be placed on record that UDHR being Declaration, question of ratification/accession to it by a State does not arise and that no State can ever be a Party to it. What made Justice Arijit Pasayat to frame an issue of that nature is beyond anybody’s imagination.

What is surprising is Article 13 of ICESCR that contains a similar right envisaged under 26 of UDHR was not at all considered. ICESCR is a treaty and India is a Party to it. However no argument was advanced on Article 13 of ICESCR and accordingly the Court did not refer to it.

Anuj Garg v. Hotel Association of India, was an Appeal against the Order of the Delhi High Court before which the constitutional validity of Section 30 of the Punjab Excise Act, 1914, a pre-constitutional Statute, was challenged. The impugned Section prohibits employment of any man under the age of 25 years, or any

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326 Para 58 of the judgment.
327 At para 84 of the judgment.
328 Article 13 of ICESCR reads as: (1) The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace. (2) The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
woman in any part of premises in which liquor or an intoxicating drug is consumed by the public. It was evident that the Act was enacted in pre independence era and on societal conditions prevailing at that time. The Delhi High Court held it unconstitutional as violative of Article 14, 15 and 19 of the Constitution to the extent it prohibits employment of any woman in any part of such premises, in which liquor or intoxicating drugs are consumed by the public.

Appellants, residents of Delhi, challenged the Delhi High Court Order on the ground that no body has fundamental right to deal in liquor, being “res extra commercium”, and the restrictions imposed by the law are reasonable considering the nature of employment.

In this case also Justice S.B. Sinha was on the Bench. Delivering the judgment, the learned judge referred to various international treaties to estimate what the Court called “societal changes” in society and held that the Section 30 is unconstitutional. The learned judge supported his reasoning by referring to a number of precedents of Supreme Court of India in which the provisions of Constitution of International Labour Organisation (ILO), UDHR, ICCPR, CEDAW and European Convention on Human Rights were referred. At the end the learned judge premised his judgment on the notion of gender discrimination and right to employment.

In Noor Aga v. State of Punjab and another, was an Appeal against the judgment of the Punjab and Haryana High Court involving several questions of grave importance including the constitutional validity of Section 35 and 54 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act in short) was under challenge. The main issue was the standard and extent of burden of proof on the

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330 At para 53 and 54 of the judgment Justice S.B. Sinha said: “In the instant case the end result is an invidious discrimination perpetrating sexual differences. Young men who take a degree or diploma in Hotel Management enter into service at the age of 22 years or 23 years. It, thus, cannot prohibit employment of men below 25 years. Such a restriction keeping in view a citizen's right to be considered for employment, which is a facet of the right to livelihood do not stand judicial scrutiny”.
332 Sections 35 and 54 of NDPS Act read as: Section 35. Presumption of culpable mental state. (1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defense for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. Explanation.-In this section “culpable mental state” includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact. (2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.
prosecution \textit{visa a vis} accused. Section 35 of the Act provides for presumption of culpable mental state. It also provides that an accused may prove that he had no such mental state with respect to the act charged as an offence under the prosecution. Section 54 of the Act places the burden of proof on the accused as regards possession of the contraband to account for the same satisfactorily. In all the provisions provide for “reverse burden of proof” and “reverse presumption”.

One of the contentions urged before the Court was that the provisions of Sections 35 and 54 of the NDPS Act being draconian in nature imposing reverse burden on an accused and, thus, being contrary to Article 14 (2) of the ICCPR\textsuperscript{333} providing for “an accused to be innocent until proved guilty” must be held to be ultravirus of Articles 14 and 21 of the Constitution of India.

The Court held that: “Presumption of innocence is a human right as envisaged under Article 14(2) of the International Covenant on Civil and Political Rights. It, however, cannot \textit{per se} be equated with the fundamental right and liberty adumbrated in Article 21 of the Constitution of India. It having regard to the extent thereof would not militate against other statutory provisions (which, of course, must be read in the light of the constitutional guarantees as adumbrated in Articles 20 and 21 of the Constitution of India). The Act contains draconian provisions. It must, however, be borne in mind that the Act was enacted having regard to the mandate contained in International Conventions on Narcotic Drugs and Psychotropic Substances. Only because the burden of proof under certain circumstances is placed on the accused, the same, by itself, in our opinion, would not render the impugned provisions unconstitutional”.\textsuperscript{334}

Thus the Court did not strike down Sections 35 and 54 of NDPS Act. However, the Court said the general principle to prove beyond all reasonable doubts

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\textsuperscript{333} Article 14(2) of ICCPR reads as: Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

\textsuperscript{334} At para 44 and 45 of the judgment.
applies to prosecution whereas for accused it is preponderance of probability. Accordingly, the prosecution has to first establish the “element of possession of contraband” beyond all reasonable doubts and it is then the burden shifts on the accused.335

The significance of the case is that an issue was raised as to constitutional validity of provisions of statute being contrary to international human rights treaty, namely Article 14(2) of ICCPR.

In Smt. Selvi and others v. State of Karnataka,336 the involuntary administration of certain scientific techniques, namely Narco analysis, Polygraph examination and the Brain Electrical Activation Profile (BEAP) test for the purpose of improving investigation efforts in criminal cases was challenged as violative of Article 20(3) and 21 of the Constitution.337

Further, the attention of the Court was drawn to Article 5 of UDHR,338 Article 7 of ICCPR339 and Articles 1 and 16 of Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT in short)340 and U.N.
General Assembly Resolution on Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the U.N. General Assembly.

The Court framed the following important issues that arise for consideration and they are:

1) Whether the involuntary administration of the impugned techniques violates the ‘right against self-incrimination' enumerated in Article 20(3) of the Constitution?

1- A. Whether the investigative use of the impugned techniques creates a likelihood of incrimination for the subject?

1- B. Whether the results derived from the impugned techniques amount to “testimonial compulsion” thereby attracting the bar of Article 20(3)?

1. Whether the involuntary administration of the impugned techniques is a reasonable restriction on “personal liberty” as understood in the context of Article 21 of the Constitution?

Chief Justice K.G. Balakrishnan, who delivered the judgment, answered all the above questions in the affirmative. However, he clarified that voluntary tests are not prohibited.

However, the observation of learned Chief Justice on the application/enforceability of international human rights treaties in India was a shocker. At para 199 of the judgment the learned judge observed:

“Having surveyed these materials, it is necessary to clarify that we are not absolutely bound by the contents of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (Hereinafter ‘Torture Convention’). This is so because even though India is a signatory to this Convention, it has not been ratified by Parliament in the manner provided under Article 253 of the Constitution and neither do we have a national legislation which has provisions analogous to those of the Torture Convention. However,

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341 GA Res. 43/173, 76th plenary meeting, 9 December 1988. Principles 1, 6 and 21 were brought to the attention of the Court.
these materials do hold significant persuasive value since they represent an evolving international consensus on the nature and specific contents of human rights norms”.

It is understandable that CAT is not binding on India since it has not yet been ratified by India. However, the reasoning given by him for non-bindingness of CAT is incorrect. Article 253 is not a ratification clause; it is only a clarification provision that empowers the Parliament to enact laws for the implementation of treaties though the subject of the treaty falls within the State List. Further, the learned judge omits to mention the status of ICCPR to which India is a Party. The Court rendered international human rights Conventions to mere persuasive value.

Further, the Court did not even bother to cite Vishaka, Apparel Export, John Vallamattom, Sarbananda Sonawala, its own precedents on the point of enforcement of international human rights Conventions in India, which is disappointing.

In Mohd. Hussain @ Julfikar Ali v. The State (Govt. of NCT) Delhi, the appellant, a Pakistani national, challenged his conviction and sentence to death on the ground that a “fair trial” was not conducted. His main grievance was that he was not represented by a lawyer when evidence was recorded and witnesses were not cross examined. Thus, the issue before the Court was whether the assistance of a lawyer was necessary for a fair trial?

The Court referred Article 14 (2) and (3) of ICCPR and Article 11 of UDHR. Article 14 (3) (d) of ICCPR entitles the person facing the criminal charge

342 See supra page no.
343 2012 (1) SCALE 145. Decided on 11-01-2012. The Bench consisted of H.L.Dattu and Chandramauli Kr. Prasad JJ.
344 Out of 65 Prosecution Witnesses, only one witness, PW-1 (Darshan Kumar), was cross examined that too after the prosecution argument was concluded.
345 Article 14 (2) reads as: Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”. Article 14 (3) reads as: “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it........”
346 Article 11(1) of UDHR reads as: “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the
either to defend himself in person or through the assistance of a counsel of his choice and if he does not have legal assistance, to be informed of his right and provide him the legal assistance without payment in case he does not have sufficient means to pay for it. It is in this context the Court observed that:

“These salutary features forming part of the International Covenants and Universal Declaration on Human Rights are deep rooted in our constitutional scheme. Article 21 of the Constitution of India commands in emphatic terms that no person shall be deprived of his life or personal liberty except according to the procedure established by law and Article 22 (1) thereof confers on the person charged to be defended by a legal practitioner of his choice. Article 39 A of the Constitution of India casts duty on the State to ensure that justice is not denied by reason of economic or other disabilities in the legal system and to provide free legal aid to every citizen with economic or other disabilities”.

In fact, Section 303 and 304 of Cr.P.C. is very clear on the issue that, the accused must be given legal assistance of his choice and if he is poor, the State must provide him legal aid free of cost. The significance of the judgment is that the court read international human rights covenants into the fundamental rights and other guarantees necessary for his defense”.

Article 11(2) reads as “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed”.

At para 33 of the judgment. The Court also referred to Section 303 of the Code of Criminal Procedure gives right to any person accused of an offence before a criminal court to be defended by a pleader of his choice. Section 304 of the Code of Criminal Procedure contemplates legal aid to accused facing charge in a case triable by Court of Sessions at State expense.

Section 303 reads as: **Right of Person against whom proceedings are instituted to be defended**- Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code, may of right be defended by a pleader of his choice.

Section 304 reads as: **Legal aid to accused at State expense in certain cases**-(1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the court that the accused has not sufficient means to engage a pleader, the court shall assign a pleader for his defense at the expense of the State. (2) The High Court may, with the previous approval of the State Government make rule providing for- (a) The mode of selecting pleaders for defence under sub-section (2); (b) The facilities to be allowed to such pleaders by the courts; (c) The fee payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-section (1). (3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials before other courts in the State as they apply in relation to trials before the Courts of Session.
statutory provisions and set aside the conviction and sentence and further directed the deportation of the appellant to Pakistan.

**Nizam @ Titto… A-4 v. State**,\(^{350}\) though it is a High Court judgment but is of great importance in view of the decision by International Court of Justice (ICJ) in **Federal Republic of Germany v. United States**\(^{351}\) (La Granda Brothers Case), on identical facts and issues.

In this case, the Delhi High Court was called upon to set aside conviction and sentence to life imprisonment on the ground that Article 36(1) (b) of Vienna Convention on Consular Relations, 1963, to which India is a Party, was not complied with by the prosecution.\(^{352}\) The said provision provides for right of Consular Office assistance to a foreign national who is accused in a crime. The appellant was a Bangladeshi national and the said proviso was not complied with in the case and his conviction and sentence to life imprisonment was challenged on that ground.

The High Court after referring Supreme Court’s precedents on the point held that there was no procedural irregularity in the trial. The Court said the object of Article 36(1) (b) is to ensure that the foreign national who has been arrested or detained is not denied his basic human rights since the appellant was provided legal assistance in the trial.

On the point of enforcement of international treaties in India, the High Court said:

“It can therefore be seen that there is no automatic acceptance of an international treaty, even post ratification, as domestic law in India. *It only becomes binding as law once Parliament has indicated its acceptance of the ratified treaty through enabling legislation. Since no such legislation exists, this treaty is not binding, and therefore, non-*

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\(^{351}\) Judgment Dated 27-06-2001. In this case ICJ held that Article 36(1) (b) of Vienna Convention on Consular Relations, 1963, confers an enforceable “right” to an individual. Full text of the judgment is available at www.icj-cij.org/icjwww/idocket/igus/igusframe.htm

\(^{352}\) Article 36 (1) (b) reads as: “if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph”.

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compliance with its provisions does not result in a violation of the procedure established by law. The only rider is that if the standard postulated in the covenant or international treaty is consistent with Indian law, the same can be considered as an aid to interpretation of the relevant provision of municipal law.”.

This case is significant in the context of recent ICJ decision on Article 36(1) (b) of Vienna Convention on Consular Relation, 1963, wherein the ICJ held that Article 36(1) (b) confers an enforceable “right”.

In *Naz Foundation v. Government of NCT of Delhi and others*, a PIL was filed challenging the constitutional validity of Section 377 of the Indian Penal Code, 1860 (IPC), which criminally penalizes what is described as "unnatural offences", to the extent the said provision criminalizes consensual sexual acts between adults in private. The challenge was founded on the plea that Section 377 IPC, on account of it covering sexual acts between consenting adults in private infringes the fundamental rights guaranteed under Articles 14, 15, 19 & 21 of the Constitution of India. Limiting its plea, the petitioner submitted that Section 377 IPC should apply only to non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors.

It was argued that the section 377 of IPC violates right to privacy and the petitioner relied on Article 12 of the UDHR and Article 17 of the ICCPR.

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353 Emphasis supplied.
354 La Granda Brothers Case (Federal Republic of Germany v. United States of America), see Chapter 5 for facts and decision.
356 Section 377 of IPC reads as: **Unnatural Offences** - Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.
357 The background of the case- Previously, the Writ Petition was dismissed by the Delhi High Court in 2004 on the ground that there is no cause of action in favour of the petitioner and that such a petition cannot be entertained to examine the academic challenge to the constitutionality of the legislation. The Supreme Court vide order dated 03.02.2006 in Civil Appeal No.952/2006 set aside the said order of the Delhi High Court observing that the matter does require consideration and is not of a nature which could have been dismissed on the aforesaid ground. The matter was remitted to the Delhi High Court for fresh decision.
358 Article 11 of UDHR reads as: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

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Further, it was brought to the notice of the High Court that in *Toonen v. Australia*,\(^{360}\) the CCPR (Committee on Civil and Political Rights - ICCPR treaty monitoring body) held that the continuous existence of Tasmanian sodomy laws violates Article 17 of ICCPR. The CCPR observed: “The Committee considers that sections 122(a) and (c) and 123 of the Tasmanian Criminal Code "interfere" with the author's privacy, even if these provisions have not been enforced for a decade. In this context, it notes that the policy of the Department of Public Prosecutions not to initiate criminal proceedings in respect of private homosexual conduct does not amount to a guarantee that no actions will be brought against homosexuals in the future, particularly in the light of undisputed statements of the Director of Public Prosecutions of Tasmania in 1988 and those of members of the Tasmanian Parliament. The continued existence of the challenged provisions therefore continuously and directly "interferes" with the author's privacy.”

The Delhi High Court declared that Section 377 IPC, insofar it criminalizes consensual sexual acts of adults\(^{361}\) in private, is violative of Articles 14, 15 and 21 of the Constitution. The High Court clarified that provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors.

The significance of the judgment is that for the first time CCPR judgment was cited before the Court. It is submitted that the CCPR judgments on the interpretation of ICCPR provisions represents a body of universal human rights jurisprudence. Though the Delhi High Court did not follow UDHR and ICCPR provisions on right to privacy (because such a right is included in Article 21 of the Constitution) and the CCPR judgment but they played very important role in the adjudicating process.

At present, against this judgment an Appeal is pending before the Supreme Court.

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\(^{359}\) Article 17 of ICCPR reads as: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation.”


\(^{361}\) The Court clarified that “adult” means everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to a sexual act.
In **Associated Management of Primary and Secondary Schools in Karnataka v. The State of Karnataka and others**,362 one of the issues involved in the case was the fundamental right of the children to study in the medium of instruction of their choice or mode of education *interalia* the right of the parents to choose the medium of instructions or mode of education for their children. The issue arose out of a Karnataka Government Circular making it compulsory for all students from standards 1 to 4 to have primary education in their mother tongue.

The High Court of Karnataka referred Article 26 of UDHR,363 Article 19 of ICCPR364 and Articles 13, 14 and 27 of CRC365 and Article 10 of European Convention on Human Rights366 while forming an opinion that parents have a right to choose mode of education for their children. Though the High Court did not rely directly on these provisions but they played important role in the adjudication process of the matter.

8.12 Evaluation of Judicial Efforts:

The saga of enforcement of “international human rights Covenants” before the Supreme Court of India began with **Jolly George**367 and was *vetoed* by Justice

362 ILR 2008 Kar 2895. Decided 02-07-2008. The Bench consisted of Cyriac Joseph CJ., Manjula Chellur and N. Kumar JJ.

363 Article 26(3) of UDHR reads as: “Parents have a prior right to choose the kind of education that shall be given to their children”.

364 Article 19(2) of ICCPR reads as: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”.

365 Article 13(1) of CRC reads as: “The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice”. Article 14 reads as: (1) States Parties shall respect the right of the child to freedom of thought, conscience and religion. (2) States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. Article 27 reads as: (1) States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. (2) The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

366 Article 10 (1) of the European Convention on Human Rights, 1950 reads as: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...”

367 As far as nine core UN human rights treaties is concerned India became Party to ICESCR and ICCPR in 1979 and prior to this India was Party to ICERD. There was no case prior to **Jolly George** wherein ICERD was pressed into before the Supreme Court. Further, prior to **Jolly George**, though UDHR was referred to by the Supreme Court (in *A.K.Gopalan v. State of Madras* AIR 1950 SC 27 and *A.D.M.Jabalpur v. Shivakant Shukla*, AIR 1976 SC 1207), UDHR being a Declaration is not binding *per se* on States.
Krishna Iyer. The reasoning adopted by the learned judge was not convincing. The theory of positive law, juristic writing and his own judgment in Xavier which was decided in 1969 when he was judge of Kerala High Court- much before ICCPR coming into force – plagued the march of domestication of international human rights Covenants/Conventions in India. Though the learned judge adopted harmonious interpretation to avoid any conflict between Indian law and ICCPR, but his categorical statement that remedy for breach of international law can not be found in the domestic courts halted the process of enforcement of international human rights treaties before the Courts.

**Jolly George** haunted the Supreme Court for some time. However, frequent references to international human rights treaties before the Supreme Court changed the perception of the Court. Thus the decision in **Sheela Barse, Mackinnon Mackenzie, Daily Rated Employees** and **Kubic Darusz** reflects the change in the thinking of the Supreme Court wherein it gradually started noting the obligations of the Government under international human rights treaties and their spirit.

**Vishaka** has been a path breaking decision on the point of enforcement of international human rights treaties in India at a time when **Jolly George** was still considered to be an authority on this point. The Supreme Court adopted altogether a different approach in what could be said as an *innovative* and first of its kind in the area of domestication of international human rights law. The Court evolved new mechanism, namely, *if there is vacuum/gap in domestic law on the subject in question before the Court, international human rights law can be relied upon to fill the vacuum/gap in the domestic law.*

The judgment in **Masilamani** and **Madhu Kishwar** do not reflect the correct position of the law as far as domestication of international human rights treaties is concerned. The invocation of 1993 Act especially the definition of “Human Rights” provided in section 2(d) as the basis for the enforcement of CEDAW ignoring the limitation set out in section 2(f) of the 1993 Act on the term “International Covenant” is *per in curium* and holds no water in law. However, these two cases have been

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368 Interestingly, **Jolly George** was not at all referred to in the **Vishaka** judgment. The only judgment of the Supreme Court referred to was **Nilabati**.
referred to by the Supreme Court as an authority in subsequent cases especially where CEDAW was cited. It is submitted that Masilamani and Madhu Kishwar were decided on incorrect considerations on the point of internalizing international human rights treaties in India and as such can not be used an authority on the point.

Further, in most of the cases, whenever an issue of domestic enforcement of international human rights treaty was agitated before the Supreme Court, it mechanically referred its previous decisions on the point and reached the conclusion without independently probing the issue. Further, some of the judgments reveal lack of understanding of the basic tenets of international law, for example, saying Declaration to be binding, ratifying the Declaration, signatory to the Declaration and in particular whether the treaty is in force or not.

Most of the decisions further reveal that after referring to human rights treaties, the Supreme Court instead of relying on them, based its judgment by referring to either Article 14 or 21 of the Constitution and thereby rendered their reference to human rights treaties to mere obiter or academic.

Further, the above analyses of judicial efforts reveal that there was no clear rationale adopted by the Supreme Court for distinguishing international human rights treaties. This is because the decisions largely depend upon how the individual judges interpret international human rights norms. In other words, it is the perception of an individual judge on the point of enforceability of international human rights at the domestic level was the determinant factor. For example, the presence of Justice K. Ramaswamy in Masilamani, Madhu Kishwar and Samatha made all the difference in the outcome of the decisions. The learned judge in enthusiasm to do justice relied on the definition on “Human Rights” under section 2(d) of 1993 Act to enforce CEDAW without noticing the limitations set out in the section 2(f) of the 1993 Act on

\[\text{369 Gaurav Jain v. Union of India AIR 1997 SC 3021. See supra for a discussion on this case.} \]
\[\text{Gaddam Ramakrishnreddy and others v. Rami Reddy AIR 2011 SC 179,} \]
the term “International Covenants” (Masilamani and Madhu Kishwar) and has gone to the extent of saying International Declaration as binding (Samatha). In Aloke Nath Dutta and Swamy Sharaddanand, Justice S.B. Sinha was in favor of abolition of death penalty after referring to OP2-ICCPR but Justice Markandey Katju was in favor of death penalty and did not even bother to refer OP2-ICCPR. The approach of the judges in these two cases was individual centric. Justice S.B. Sinha was successful in converting the death penalty into life sentence in the former case as the other judge on the Bench agreed with him. Whereas in the latter case Justice S.B. Sinha sat with Justice Markandey Katju and both differ on the point and the matter was referred to larger Bench.

Nilabati Behara and D.K.Basu have assumed distinct place in the web of judicial decisions on the point of enforcement of international human rights treaties in India. The Supreme Court while awarding compensation for unlawful detention, snubbed the express reservation made by India to ICCPR that India does not recognize an enforceable right to compensation for unlawful detention. Legally speaking an individual is not entitled to compensation for unlawful arrest because of India’s express reservation in this regard, however Supreme Court overruled the reservation and evolved compensatory jurisdiction under Article 32 of the Constitution.

Among all the judgments of the Supreme Court on the enforcement of international human rights treaties in India, Sarbananda Sonowal assumes pivotal place. Sarbananda Sonowal has not been noticed by the legal fraternity (Bar and Bench) and the academicians and accordingly has not been cited more and used in a way it should be. It virtually enforced Article 13 of ICCPR when the Supreme Court said “Having regard to Article 13 of the International Covenant on Civil and Political Rights, 1966, an alien lawfully in a State's territory may be expelled only in pursuance of a decision reached in accordance with law”. The Court distinguished its own Constitutional Bench judgment in Hans Muller of Nuremberg v. Superintendent Presidency Jail, Calcutta and others373 and rightly reasoned that ICCPR was not in force when the Hans Muller was decided.

373 AIR 1955 SC 367. Decided on 23-02-1955. The Bench consisted of B.K. Mukherjee C.J., Jagannadhadas, P.N. Bhagwati, Sudhir Ranjan Das and Vivian Bose J.J. In this case the petitioner/appellant challenged his arrest under the Preventive Detention Act, for overstaying in India.
It is worth to note here that the reasoning adopted in Sarbananda Sonowal was missing in Xavier and Jolly George, namely an international treaty binds a State Party when it actually comes into force. It is this point that renders Xavier and Jolly George decisions *per incurium* as they failed to notice the legal basis for enforcement of international treaty.

**Selvi** was a great disappointment as far as enforcement of international human rights treaties. It is indeed surprising that Justice K.G. Balakrishnan interpreted Article 253 as a ratification clause and held that *“Torture Convention has not been ratified by Parliament in the manner provided under Article 253 of the Constitution and neither do we have a national legislation which has provisions analogous to those of the Torture Convention”*. The Supreme Court way back in 1969 itself in *Maganbhai Ishwarkhali Patel v. Union of India*\(^ {374}\) clarified that Article 253 is only an exception to the legislative competence of State Legislatures and that it is the Parliament that can pass a law for implementing an international treaty though the subject of the treaty falls within the State List under the VII Schedule. Thus **Selvi** lost cite of the true status of Article 253 under the Constitution and incorrectly held that Torture Convention\(^ {375}\) has not been ratified by Parliament. In fact the Constitution does not contemplate any ratification procedure. What the Supreme Court should have said was India is not a Party to the Torture Convention as it is only a signatory to it and has not yet ratified.\(^ {376}\)

There are instances wherein it was agitated before the Supreme Court that an Act of Parliament is violative of International Human Rights Treaty and a declaration to that was sought for. For example, in **John Vallamattom** it was argued that section 118 of Indian Succession Act, 1925 is violative of Article 18 of ICCPR. Though Supreme Court did not rely on Article 18 of ICCPR but said the developments in the field international human rights area can not be ignored. Similarly in **Ashoka Kumar Thakur**, one of the issues before the Supreme Court was whether the Central Educational Institutions (Reservation in Admission) Act, 2006, (Act 2006 in short) is

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375 The term *Torture Convention* is used by the Supreme Court and is referred as CAT in the research study.
376 As of 18-09-2012 India not yet ratified CAT.
in violation of Article 26 of the UDHR. The majority did not express any view on this issue, however Justice Dalveer Bhandari in his dissenting opinion observed that UDHR is not a treaty and is not legally binding. In this case the Supreme Court did not take note of its own observation in John Vallamattom and secondly Article 13 of ICCPR which contains similar provision on the line of Article 18 of UDHR was completely ignored.

The analysis of judicial pronouncements reveals that during pre-Vishaka period the Supreme Court has largely been influenced by the traditional common law practice (dualist view) in respect of domestic application of international human rights law, though in recent years the common law has underwent significant changes in this regard in United Kingdom owing to its Membership of European Human Rights Convention, 1950, and the enactment of Human Rights Act, 1998. The common law influence has to large extent undermined the noble Directive under Article 51(c) of the Constitution and reduced it into an interpretative tool for harmonizing the Indian laws with international law whenever there is a conflict between the two while laying the rule that if the conflict is inevitable the Indian law will prevail.377

The post Vishaka period is encouraging (although here and there Jolly George crept in) and one could see that the Supreme Court is tilting towards monism and in this process the Court evolved new ways in domesticating the international human rights treaties.

Thus the “judicial efforts” to enforce international human rights treaties in India is a complex web of dualism and monism. Jolly George leads the case law on dualism and Sarbanada Sonowal represents monism. PUCL378 was a balancing act saying international human rights treaties that go on to effectuate Part III of the Constitution can be relied upon. Vishaka carved an exception and evolved a new mechanism saying international human rights treaties can be relied upon when there is no municipal law governing the case in hand. What is missing in the approach of the Supreme Court towards domestication of international human rights law is the consistency in it decisions. Selvi (decided in 2008) is one such example wherein the Supreme Court almost returned to Jolly George (decided in 1980). The Supreme did not bother to take note of its own decisions on the point of domestication of

377 See discussion on Jolly George above.
378 AIR 1997 SC 1203 at 1208.
international human rights treaties and was completely mislead itself on the nature and scope of Article 253 and treating the same as “ratification” clause which is incorrect. Further, Article 51(c) of the Constitution has not been utilized in a way it should have been by the judiciary to augment the cause of internalizing the international human rights law in India. The Supreme Court rendered Article 51(c) into a mere interpretative tool for harmonizing the Indian Law and International Law rather than as a device to enforce the international human rights treaties.

_Chandrima Das_ is the only case where the Judicial Colloquium on the Domestic Application of International Human Rights Norms, held at Bangalore 1988, popularly known as Bangalore Principles, was referred, highlighting that the Bangalore Principles affirmed that it was the vital duty of the independent judiciary to interpret and apply national Constitutions in the light of those principles. But the fact remains is that, Bangalore Principles did not challenge the dualist doctrine which is, in any case, some what different in the United States than in Commonwealth countries. They simply recognized a “growing tendency” for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether, constitutional, statutory or common law – was uncertain or incomplete. They accepted that, where municipal law was clear and inconsistent with the international obligations of the State concerned, national courts were required to give full effect to the local law, although they might draw the discrepancy to notice. Thus, the Bangalore Principles did not undermine dualism. Nor did they purport to authorize judicial incorporation of treaty or customary international law by the backdoor. They simply noted that occasionally, municipal courts might find assistance for their own intellectual tasks by having regard to the growing body of international law, particularly as that law expresses universal principles of human rights.379

Further, _an issue as to whether mere ratification of an international human rights treaty by the Executive gives rise to legitimate expectation has never been considered by the Supreme Court._

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This is because the doctrine of legitimate expectation\(^{380}\) has received much attention in recent times in the area of public law as against the doctrine of estoppel that is in vogue in civil law. The theory of Legitimate Expectation is a branch of Administrative Law and is a concept fashioned by the Courts for the review of administrative actions. The theory of Legitimate Expectation marches into operation when there is an express promise from any Public Authority/Official that there is a regular practice of a certain thing, which the claimant can reasonably expect to continue. In other words, it consists of either inculcating anticipation in the citizen, or assuring him that under certain rules and schemes he would continue to reap certain benefits of which he would not be deprived unless there is some overriding public interest.

What is at stake here is that, when a State ratifies/accedes to an international human rights treaty expressing its willingness to be bound by the terms of the treaty but fails to pass an enabling legislation in that direction, whether the doctrine of legitimate expectation could be applied in enforcing the rights guaranteed in the international human rights treaty? In other words, whether mere ratification of an International Treaty by the Government creates legitimate expectation among beneficiaries of rights (individuals) and on that premise whether treaty rights could be enforced against the Government and its agencies?

The Supreme Court in Vishaka case made a mention of Australian High Court judgment in Minister for Immigration and Ethnic Affairs vs. Teoh\(^{381}\) judgment in which the doctrine of legitimate expectation was used to enforce the obligation of Australia under CRC by pointing out that “The High Court of Australia in Minister for Immigration and Ethnic Affairs vs. Teoh (128 ALR 535), has recognised the concept of legitimate expectation of its observance in the absence of contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia”. But, no where in the judgment the Supreme Court discussed the application of the doctrine in the area of enforcement of treaty rights or obligation of

\(^{380}\) The doctrine of legitimate expectation has been described in the following words: “A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. See Union of India and others vs. Hindustan Development Corporation and other, 1993 (3) SCC 499.

the Government of India upon the ratification of CEDAW. Rather the Supreme Court invented new mechanism to enforce the treaty rights by saying “if there is gap in the domestic law in a given case the international human rights treaties could be relied upon to fill the gap”.

Further, in *Sakshi* case, the Supreme Court merely made a mention of the petitioner’s contention on the use of the doctrine of legitimate expectation to enforce the CRC and CEDAW obligations of the Government of India. The petitioner argued that the Government of India by ratifying CRC and CEDAW has created a legitimate expectation that it will adhere to its international commitments as set out under the respective Conventions and accordingly sought for interpretation of the term “rape” as per the provisions of the CRC and CEDAW.

It is submitted that in India, mere ratification of an International Treaty by the executive does not give rise to a legitimate expectation for the following reasons: *First*, the concept of legitimate expectation is inapplicable in the context of the scheme of the Constitution of India governing the implementation of International (human rights) Treaties as discussed above. On the International plane, ratification is an act of willingness to be bound by the terms of a treaty, however, at the domestic level its implication and implementation is governed by the Constitution of the State. When and how the terms of the treaty or obligations under the treaty is to be given effect in India is essentially a matter falling within the scheme of the Constitution and that it is established that in India a treaty has no force in domestic law and is incapable of operating as a direct source of rights or obligations.\(^{382}\) This is evident from the discussions made in the Constituent Assembly Debates (CAD) that treaties will be tabled before the Parliament, the Statement made by Jawaharlal Nehru in the Parliament to the said effect, Government of India’s statement in the Third Periodic Report (1997) before the CCPR and the opening line of Article 73 -“subject to the provisions of the Constitution”- make it abundantly clear that ratification does not constitute a representation or undertaking operating on the plane of domestic law to perform obligations under the treaty. For example, assuming that India ratifies OP2-ICCPR that seeks abolition of death penalty, would this create legitimate expectation that no death penalty will be awarded or executed in cases where it is already awarded by the Courts? It is clear that unless suitable amendments are made the existing law

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\(^{382}\) Union of India v. Azadi Bachao Andolan, AIR 2004 SC 1107.
governing the death penalty,\textsuperscript{383} ratification of OP2-ICCPR and the resultant obligation there under can not be given effect and enforced on the premise of legitimate obligation. Secondly, if it is accepted that ratification of an international treaty gives rise to legitimate expectation and will be applied and enforced on that premise, it would amount to clothing the Executive to create new laws and also amend the laws in force in India. The above example of OP2-ICCPR holds good here that it would amount to amending various provisions of I.P.C. and Cr.P.C.\textsuperscript{384} and it would be tantamount to the indirect (back door) enforcement of treaty obligations.

8.13 Conclusion:

The absence of specific provision on the Status of International Law under the Constitution of India and the non-enactment of a law by Parliament on Entry 13 and 14 of List 1 in VII Schedule created more problems than solutions. Further, the Constitution does not make any distinction between commercial treaties and human rights treaties and also does not specify as to what type of treaties do need an enabling legislation for their domestic enforcement. Article 51(c) is the only specific provision in the Constitution that deals with International Law and Treaties. Surprisingly, Article 51(c) makes a distinction between International Law and Treaties without demarcating and defining the same elsewhere in the Constitution. It is also surprising to note that till date the Parliament has made no efforts to enact a law on Entry 14 of List 1 in VII Schedule.

Based on the above analysis of constitutional provisions relating to Executive, Legislative and Judicial powers to implement international human rights treaties and the efforts made by these three organs of the State in that direction, the following propositions are formulated:

1. The Union Executive cannot implement a treaty of its own if the subject upon which the treaty is entered into is also a subject upon which the Constitution expressly provides for making of a law by Parliament or State.\textsuperscript{385}

\textsuperscript{383} Sections 121, 132, 194, 302, 305, 307 and 396 of I.P.C. provide for death sentence on committing the acts defined in the respective sections and Section 354 (3) of Cr.P.C. provides for imposing death sentence.

\textsuperscript{384} Ibid.

\textsuperscript{385} Article 73 (1) (a) of the Constitution.
2. Similarly, the Union Executive cannot implement a treaty of its own if it is in the nature of modifying or amending the Constitution or Statutes.\textsuperscript{386}

3. Making of law by the Parliament is necessary only when international treaty or agreement operates to restrict the rights of persons or modifies the laws in force in India. If the international treaty or agreement does not affect the rights of persons, it can be given effect without an enabling legislation by Parliament in that direction.\textsuperscript{387}

4. The provisions of the human rights Covenant, which elucidate and go on to effectuate the fundamental rights guaranteed by the Constitution, can certainly be relied upon by Courts as facets of those fundamental rights and hence, enforceable as such.\textsuperscript{388}

5. Article 253 is not a ratification clause.\textsuperscript{389} The argument that the power to make or implement a treaty, agreement or Convention can only be exercised under the authority of law proceeds upon misreading of Article 253. The effect of Article 253 is that if a treaty, agreement or Convention with a foreign State deals with a subject matter within the competence of the State Legislature; the Parliament alone has, notwithstanding Article 246 (3), power to make laws in order to implement the treaty, agreement or Convention.

6. International human rights treaties can be accommodated into the municipal law even in the absence of an enabling legislation provided they do not conflict with the Constitution or Statutes. However, if the conflict is inevitable the former has to yield before the latter and the Courts being the creature of the Constitution/municipal law are under the duty to apply the municipal law.\textsuperscript{390}

\textsuperscript{386} \textit{Union of India v. Azadi Bachao Andolan}, AIR 2004 SC 1107 at para 18.

\textsuperscript{387} \textit{Ibid.}

\textsuperscript{388} \textit{Peoples Union for Civil Liberties v. Union of India}, AIR 1997 SC 1203 at para 13.

\textsuperscript{389} \textit{Maganbhai Ishwarbhai Patel v. Union of India}, AIR 1969 SC 783 at para 80 (per J.C. Shaw J.). Thus, Article 253 provides an exception to the legislative competence of State Legislatures. That is, if the subject of an international treaty, agreement, convention or decision taken at international conference falls within the State List (List II) of Seventh Schedule, only Parliament has power to legislate with respect to implementation of such treaty, agreement, convention and decision and not State Legislatures.

\textsuperscript{390} \textit{Gramaphone Company of India Ltd v. Birendra Bahadur Pandey and others}, AIR 1984 SC 667.
7. It is an accepted proposition of law that Parliament never intends to act contrary to State’s international obligations and accordingly the municipal laws must be interpreted in accordance with international obligations/laws to avoid any conflict between the two.  

8. The Courts can rely on international human rights treaty even in the absence of an enabling legislation when there is vacuum/gap in the municipal law, provided such an exercise does not run in conflict with the Constitution or Statutes.

9. Having ratified the International Human Rights Treaties, it is an obligation of the Government of India as also the State machinery to implement the same in the proper way. If there is any deficiency in the constitutional system it has to be removed and the State must equip itself with the necessary power to that effect.

10. That under the scheme of the Constitution mere ratification of an international treaty by the executive does not give rise to legitimate expectation among individuals to enforce treaty obligations/ rights against the State.

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393 *Sheela Barse v. Secretary, Children’s Aid Society*, AIR 1987 SC 656 at para 5.