ABSTRACT

Domestication or incorporation of international human rights law within the State’s legal system has always been subject of great debate. When we look at the philosophy of international human rights treaties, undisputedly it mandates States parties to undertake necessary measures, including the legislative, administrative and judicial, to implement treaty rights in accordance with their Constitutional process. If the State party incorporates the Convention rights within its legal system by enacting a suitable legislation, then there is no problem- it is for the domestic courts to interpret and apply the municipal law that incorporated the Convention rights. However, the problem would arise when the State Party fails to incorporate the Convention rights within its legal system by enacting a law or fails to take necessary administrative measures. The most crucial issue then would be, whether the domestic courts can apply and enforce Convention rights in the absence of domestic legislation incorporating the Convention rights?, or direct the executive to initiate administrative measures?, or declare an action of the executive ultra virus of human rights Convention? The answer to these questions depends upon the constitutional provisions of State party that determine the legal status of International Law within the legal system of a State or in the absence of such a provision in the State’s Constitution, the practice of State party in this regard.

India is a Party to six of the UN Nine Core Human Rights Treaties and has also signed two of the three except ICRMW. It has been said that India being a Commonwealth country follows dualist view, that is, an enabling legislation by Parliament is necessary to enforce international treaties. However, one has to test this statement on the touchstone of Constitutional Provisions that whether the Constitution mandates an enabling legislation to implement international treaties?

In this context, the researcher has discussed “Constitutional Requirements” for conclusion and implementation of International Treaties in India. That is, which organ of the State has requisite power to conclude international treaties and which of the three organs of the State - Legislature, Executive and Judiciary - has requisite source of power under the Constitution to give effect or implement International Treaties including Human Rights Treaties in India. 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.

The researcher has examined the Constitutional Provisions dealing with implementation of international treaties are Article 51(c), 73, 253 and Entry 14 of List 1 in VII Schedule. 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”. 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 and conventions with foreign countries by exercising its executive power under Article 73(1) (a) read with Entry 14 of List-1 in the VII Schedule. In this background, the researcher has examined whether the Union Executive has power to implement the treaties concluded with other countries?

The finding is that, Article 73(1) opens 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. In this regard the researcher has discussed Re Berubari and Maganbhai cases. To substantiate this the researcher has used two examples that, if the Union Executive enters into a Convention agreeing not to discriminate persons on any 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 citizen on grounds only of religion, race, caste, sex, place of birth or any of them. 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. Further, 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? The researcher submitted that, if one says 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. The researcher concludes that the Union Executive cannot encroach upon the legislative powers of the Parliament via treaties.

Further, the researcher examined the efforts made by the Parliament of India in incorporating the treaty rights in to the corpus juris of India. There are Nine legislations that are specifically enacted and Four Bills are pending before the Parliament to fulfill India’s obligations under the human rights treaties. The Researcher critically examines the intent and content of the Protection of Human Rights Act, 1993. The Researcher concludes that the 1993 Act imposes serious restrictions on the enforceability of international human rights Conventions in India through narrow definition on “Human Rights” and “International Covenants”.

With regard to the judicial efforts, the Researcher discussed the approach of the Supreme Court in two phases: Pre-Vishaka and Post Vishaka. In pre-Vishaka cases the approach of the Supreme Court was negative. It was held in Jolly George case that international human rights treaties cannot be enforced without Parliamentary intervention by an enabling legislation. However, in 1997, in Vishaka case the Supreme Court in a path breaking judgment held that in the absence of domestic law governing the case in hand, Court can rely upon International Human Rights Treaties.

Considering the significance of international human rights treaties, the obligations India incurred, and the obscurity prevailing in the Constitution as far as implementation of international human rights treaties, the efforts made by Indian Parliament and Judiciary in implementation of such treaties, the researcher has made certain suggestions/recommendations, like; (i) A specific law on Entry 13 and 14 of List 1 in VII Schedule should be enacted, (ii) An independent National Committee on International Treaties (NCIT) should be constituted and (iii) Section 2(d) and 2(f) of Protection of Human Rights Act, 1993 be amended forthwith.