IMPACT OF INTERNATIONAL NORMS ON CRIMINAL JUSTICE ADMINISTRATION

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PREFACE

The topic under consideration here had caught my imagination over a decade ago when I was graduating in law. This area of law is of interest as it is one that is ever evolving more conspicuously than the other areas and the theoretical foundations are being attempted. Rather than dividing the society into various nations, it is encouraging to work for a single world society, the inherent limitations notwithstanding.

Though I had initially envisaged to study the implication of international norms in the field of municipal law generally, my revered teacher, with the benefit of his depth and experience, in foresight, suggested that I confine my study to its effect on criminal justice administration. This was because all the possible theories of application could be examined in this area and its implication in this area is undoubtedly the most relevant to any system. I feel obliged at this stage for, even from this small area from among the ocean of laws, I was able to gather only a few drops of information.

This is a modest attempt to understand the concepts under the topic being considered and their implication in our country. We have borrowed the system from the English, and the principles that are reflected in these international norms are largely of European descent. Probably it explains why we are more or less in tune with them. However, there are areas for improvement. The initial application of international norms is looked from the general point of view and it is later that the specifics of criminal justice administration have been gone into.

I am indebted to my teacher and my guide for all the aid and advice extended to me and leading me through the quagmire of these laws holding my hand and helping me complete the work. I have burdened him at the most inappropriate times and he has been ever helpful for which I shall be ever grateful.

My parents have always inspired me and provided me with the opportunities to strive hard to achieve larger goals. I acknowledge the support and inspiration of my wife who also helped me with the manuscript. I dedicate this work to them for their unstinted support.

I acknowledge with gratitude the advantages enjoyed by me from the other senior teachers, non teaching staff and especially those at the library, at the School of Legal Studies while completing this work.

I am indebted to me friends and well wishers who have inspired me to undertake this work.

CONTENTS

INTRODUCTION

This study is an attempt to look at the impact of international norms on the criminal justice administration in India. It has been confined to the criminal justice administration since it is here that the concept of sovereignty is affected the most. India, like any other country, cannot remain isolated from the developments unfolding around it. The concept for the protection of human rights shared by the humanity as a whole did not leave the criminal justice administration untouched. To ensure a safer world it had become necessary to protect these rights within any system as every system is interrelated to the other.

The work refers to norms, a word having a wide connotation, primarily to accommodate all the international developments directly having a bearing to the issue. It is not intended to confine to those legal principles that have been accepted as having the authority of international law proper. These may be generated by the recognised international bodies or by other organs. The criteria adopted are only to see that they are relevant and important for the protection of human rights.

The term State similarly refers to a country in the study and not the provinces unless the context requires it to be understood so. It is basically the interrelationship of States that are relevant in international relations. But then, when it relates to criminal justice administration, it is the rights of the individuals that have been emphasised.

The study attempts to retrace the path treaded by the international community for the purpose of bringing about international cooperation in the relations that exist. To begin with, the development of the concept of sovereignty is looked at. The theories formulated to apply to the relations

between the sovereign and the binding nature of the obligations undertaken by the sovereign is also subjected to study.

The nature of obligations is dependent on the creation of norms within the international community. The sanctity attached to each norm varies according to the different factors which are considered to understand them. It is not just that the norms are created, the issue of their implementation is equally important. For the purpose, the approaches adopted by various systems are studied. The approaches expected by the international bodies from the States are also considered. With the recent developments in Europe being important for a better understanding of these different concepts, they have become a subject of deep consideration for considering the possibilities of extending its experiences to the world stage.

The immediate reference material to comprehend the implementation mechanisms has been the constitutions of different States. For the purpose various constitutional provisions have been looked at and their impact is also studied. The sanctity attached by each country towards their international obligations and the manner of their domestic implementation have also been studied.

Along with the documents, it was also felt necessary to view how the law is being applied for which the decisions of various supranational and municipal courts have been gone into. The most important among them at the supranational level being the European Court of Justice and the relevance of its judgments for the European Community States. The municipal courts have also thrown adequate light upon the approaches of States and various systems.

But as mentioned earlier, this study is confined to the impact of international norms on criminal justice administration in India. The information gained from the above study can be safely applied to the situation prevalent in India as well as in other countries.

The position of law in India and the requirements under international norms with respect to criminal justice administration have been studied by considering the same at three stages – pre trial, trial and post trial stages.

The pre trial stage studies include the standards that have been set under the international norms on the aspects of arrest and detention. One of the major areas of development at the international level has been on custodial violence which has been subject to some detailed study. This has gained relevance due to some uncomfortable experiences with terrorism and other specific offences. India has also been constrained to take some drastic steps to counter the same. The provisions enacted for the same have deviated from the conventional ones. The question as to whether they comply with the international standards and the approaches of the court has been inquired into in this study.

The time tested principles on self incrimination and confessions have come under some strict scrutiny recently. So also are of interest, the new experiences like the disappearance cases which have been studied. Other rights like that of a counsel and bail along with other means of curtailment of liberty, like handcuffing, are also analysed.

On the trial side, the basic principles of burden of proof and presumption of innocence have been subject to some seemingly negative developments which are looked at. So also with the concept of *actus non facit reum nisi mens sit rea*. One of the major changes for the better is the demand for witness protection requirements which have also been examined in this study.

On the post trial stage there is a lot of decisional jurisprudence from the courts in the context of post *Maneka* developments, especially with regard to prisoners' rights. Though this has been subject of various studies it is revisited from the point of view of the guidelines under the international context. The pulls witnessed in the international context with regard to the necessity of abolition of death penalty are also reflected in the Indian context, as seen later.

The concept of remedial measures for violations of human rights has gained relevance in the recent years what with the Supreme Court declaring it as

an essential human right. There have also been certain recommendations for the same to be given statutory recognition. The area is studied to understand the position. Another related area is justice to victims other than monetary compensation like participation in trials and their right to bring in evidence rather than forgetting about these unfortunate persons.

One area that has not seen any improvement is that of recognition of non custodial measures for infractions of criminal law. The international norms have formulated many such choices. It is looked at for the purpose of bringing to light the options available to the legislature to bring this area in tune with the rehabilitative and reformatory principles recommended by the international community.

The study is intended to give a fair idea as to the position India holds in the matter of implementation of international norms in the area of criminal justice administration and the areas that require urgent attention.

The study has been arranged in six chapters.

Conclusions and suggestions have also been given in a separate chapter.

CHAPTER – I

INTERNATIONAL NORMS *VIS-À-VIS* MUNICIPAL LAW

The World is getting Smaller day by day!

This statement, in the present world order, may evoke little protest. Though this is more patent in terms of means of communication and transportation, it is hardly now confined in public view to such areas. As is perceived and witnessed by citizens of this country, trade issues have been the uppermost in the minds of lawmakers and law takers in the scenario of various deadlines, fixed by transnational bodies, getting closer and external forces tightening their grips through the recognised modes of coercion. Indeed, despite the warnings against globalisation usually administered by political pressure groups, the developing societies have been showing the tendency of moving with the times taking in their strides new developmental concepts, controls and procedures so as to have a feel of 'at home' in the new environment. The initial inhibitions and inertia are easily overcome by compulsions created by the international community by way of persuasion, direct and indirect. A review of what is happening in areas like non-proliferation, labour standards, intellectual property rights, economy, criminal jurisprudence, foreign relations etc. would prove the point.

An area of major thrust has of course been that of human rights.[1] In essence, the struggle for human rights that began two hundred years ago was initially an upshot of the Western Enlightenment and of the democratic revolutions in North America and Western Eurpoe. In the last two centuries, however, such a wide range of human rights concepts have been invoked that no

[1] The term human right was used first by Franklin D Roosevelt in his famous message to US Congress in January 1941 calling for a world found upon four essential freedoms. Kanan Gahrana, "Human Rights: A Conceptual Perspective", 29 Ind. J. Intl. L. 367 (1989), 367 quoting Maurice Cranston, *What are Human Rights?*, London p. 1. It is presumed to be the twentieth century name for what has been traditionally known as natural rights or the rights of man

particular culture or political camp can claim that its understanding and interpretation of those guarantees is exclusively the 'right one'.[2]

Traditional concepts and practices evolved in the criminal justice administration system with emphasis on crime control came to be interrogated by the new concepts of human rights jurisprudence which stresses on justice rather than crime control.

The instinctual urge for universalisation of human rights made the nations to bring in human rights issues in areas like trade, economy and labour standards which have important role to play in an independent territorial, political and sovereign existence of a community. More so, in the case of the developing and underdeveloped countries since they are unable to call the shots, nay even have an audible voice, in the formulation of international norms.[3] This has considerably contributed to what is commonly termed as hegemonism by the developed countries of the west. This is resisted by the developing and under developed countries, at times by way of questioning even the fundamental conceptions of human rights norms. Still, it is felt that the international community could achieve some success in universalising human rights.

Before this development is analysed, it may be worthwhile to examine as to what is meant by 'order', international or national.

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[2] Winfried Brugger, "The Image of the Person in the Human Rights Concept", 18 Hum. Rts. Q. 594 (1996), 596. The author has divided the history of human rights to three main phases. Human rights of the first phase were declared in the great democratic revolutions at the end of the eighteenth century in the United States and France focussing on individual civil and political rights with the goal to prevent governmental violations of life, liberty, and property. The second phase arose during the nineteenth century when the focus shifted to social rights as a result of problems encountered in the industrial revolution. And the third phase developed during the twentieth century adding the dimensions of universalisation of human rights after the Second World War (e.g. Universal Declaration of Human Rights) and the generation of collective rights at the instance of representatives of the third world countries and ethnic minority groups harping on the 'common heritage of mankind'

[3] As to how the decision making and activities of the United Nations and other international organisations can be influenced by economic coercion see Muchkund Dubey, "Financing the United Nations", 35 Ind. J. Int'l. L. 157 (1995)

Order

'International law' first appeared in Bentham's influential *An Introduction to the Principles of Morals and Legislations.*[4] The new term was formed in the part on the 'political equality' of laws and was set in counterpoise to 'internal law'.

Blackstone defines of law of nations thus –

> "The law of nations is a system of rules, deductible by natural reason, and established by universal consent among the civilised inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent States, and the individuals belonging to each."[5]

Dickinson has noted the position of Law of Nations in its early days thus –

> "The law of nations in the eighteenth century embraced a good deal more than the body of practice and agreement which came later to be called public international law. In the *De Jure Belli ac Pacis* of Hugo Grotius and in the treatises of his successors, it has been expounded as a universal law binding upon all mankind. In countries of the common law, at least, arbitrary distinctions between private and public right or duty were still far in future. The universal law was law for individuals no less than for

[4] M. W. Janis, "Jeremy Bentham and the Fashioning of International Law", 78 Am. J. Int'l. L. 405 (1984), 408

[5] W. Blackstone, *Commentaries on Laws of England*, Univ. of Chicago Ed., 1979, p. 66. See generally Ian Brownlie, *Principles of Public International* Law, 6th edn., Oxford University Press, 2003, pp. 289 – 300. See further Malcolm N. Shaw, *International Law*, 4th edn., Cambridge University Press, UK, 1997; J.G. Starke, *Introduction to International Law*, 10th edn., Aditya Books, New Delhi, 1994, (Reprint of Butterworths, 1989, Kent UK; Paul Sieghart, *The International Law of Human Rights*, Clarendon Press, Oxford, 1984; H. Lauterpacht, *International Law and Human Rights*, Stevens and Sons, London, 1950; W. Friedmann, *The Changing Structure of International Law*, Columbia University for a supranational order

states. As such, it was concerned somewhat indiscriminately with matters between individuals, between individual and States, and between States."[6]

Sovereign

We have come a long way from looking for a Salmond's 'determinate human superior', who would command habitual obedience from the bulk of a given society without himself being required to obey a like superior, to call him a sovereign.[7] Sovereignty, in today's understanding, is not identifiable and is diffuse even in a politico-territorial community. For example in our country, we have a tendency to call the Constitution the sovereign or if pressed further to call the electorate, who gave Constitution to themselves, as sovereign. It cannot be any further diffused. This sounds well for those who argue that international law is not the vanishing point of jurisprudence but, in fact, is true law.

It may not be difficult to understand the present state of international law. A parallel drawn with any civilised society of the present day would make us realise that both have similar genesis, albeit at different points of time. Examination of the development of any national system would take us to an era where the maintenance of 'order' was not incumbent upon any identifiable persons or group of persons.

In the words of Kelsen, it was decentralised,[8] people being required to fend for themselves. An era when some argued that might was right. Those who were wronged against could and would take upon themselves to undo the wrong or punish the wrongdoer. As societies developed, they recognised the need for creation of an authority who may be a person or group of persons on

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[6] 101 U. PA. L. REV. 26, 26 – 27 (1952)

[7] John Salmond, *On Jurisprudence*, 11th edn., G. Williams, London, 1957. See for a shift in position, Salmond, *On Jurisprudence*, 12th edn., P. J. Fitzgerald, London, 1966

[8] The concept of self help in the context of sanction, Hans Kelsen, *Principles of International Law*, Revised and edited by R.W. Tucker, 2nd edn., Holt, Rinehart and Winston Inc., New York, 1967

whom, by way of social contract,[9] the right to react may be conferred on and who could undo any wrong or punish the wrongdoer in their representative capacity. In other words, maintenance of 'order' was becoming centralised.[10] Though the role of 'State', which was created for the maintenance of such 'order', was confined to a few areas of human activity in the beginning, it steadily increased its dominion to reach a situation where most of the day to day affairs of persons who constituted the community came to be regulated by it. It is from these developments that the concept of sovereign emerged. A sovereign could pass laws that were required for the community and could prohibit violation by threat of sanctions. This may not be acceptable to the Austinians,[11] who consider the position of sovereign to be accepted *a priori*. However, it cannot be lost sight of the fact that a given sovereign could remain so only till the bulk of the community accepted his reign over them. When this sovereign was challenged, or if overthrown, a new sovereign could emerge who again had to command the respect and obedience of the society.

The concept of inalienability of sovereignty was a central tenet of the medieval theory of the kingdom. As early as the 13th century, if not earlier, Roman and canonical lawyers considered the king not as the *dominus*, but as a

[9] The theory of Rousseau – See Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law*, Revised ed. 1974, Universal Law Publishing Co., New Delhi, Indian Reprint 2001. See extract of J.J. Rousseau, The Social Contract in *Lloyds' Introduction to Jurisprudence*, Lord Lloyd of Hampstead and MDA Freeman, 5th edn., Stevens & Sons, London, 1985, pp. 160 – 164; R. Dias, Jurisprudence, 5th edn., Butterworths, UK, 1985.

[10] See for law as a coercive order, Hans Kelsen, *General Theory of Law and State*, 1946. See for a base of the concept of norms H. Kelsen, "Pure Theory of Law", 50 LQR 474 (1934) translated by Charles H. Wilson and Hans Kelsen, *Pure Theory of Law*, translated by Max Knight, University of California Press, Berkeley, 1970. It is a characteristic of a technically more developed legal order that the execution of sanction is centralised. To have a right under such a centralised legal order means to have a legal possibility of instituting a lawsuit, that is, of putting in motion by an action brought before a competent tribunal, the procedure which ultimately leads to the execution of the sanction

[11] HLA Hart, *The Concept of Law*, Oxford, 1961; J. Raz, "The Institutional Nature of Law", 38 MLR 489 (1975); J. Raz, *The Concept of a Legal System*, Clarendon Press, Oxford, 1970

guardian, curator and usufructory of his office.[12] As such, he could not 'alienate' the essential functions of his office to the prejudice of the state.

The concept of sovereignty is sometimes blamed for giving absolute powers of the state *vis-à-vis* the individual and at the same time becoming responsible for the development of practicable means for limiting the powers of the state. It is observed that it is the legal vehicle for controlling the powers of the state came that came to be known as 'due process of law'.[13] A system of rights was required which could put some curbs on the unlimited political authority of the rulers, so that people could feel secure against the onslaughts of despots.

As early as in 1909, it was argued –

> "Sovereignty in the modern organization of the state is merely the focal point at which the political energies of the nation converge. It represents the strongest social purposes to which at certain times all other social purposes may have to yield. At present the paramount social purpose in the civilized world is still the maintenance of national power. It is the national organization upon which the safety of the material and moral interests of the world still reposes. But there are always large groups of interests which will not be dominated directly by the sovereign state, and whose activities are independent of the latter. The sovereign power, while it may eventually dominate does not by any means at all times include all other social purposes".[14]

It has been observed by the United States Supreme Court –

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[12] Theodor Meron, "The Authority to Make Treaties in the Middle Ages", 89 Am. J. Int'l. L. 1 (1995), 3

[13] John T. Wright, "Human Rights in the West: Political Liberties and the Rule of Law", in *Human Rights: Cultural and Ideological Perspectives*, Adamantia Pollis and Peter Schwab (Eds.), Lynne Rienner Publishers Inc., New York, 1979, p. 99. See also Gahrana, *supra* n. 1, 368

[14] Paul S. Reinsch, "International Administrative Law and National Sovereignty", 3 Am. J. Int'l. L. 1 (1909), 11

> "The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other and by interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation, in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.... This consent may in some instances, be tested by common usage, and by common opinion growing out of that usage."[15]

Prof. Hart considers "Sovereignty" unnecessary to neo-positivism, as there is a more illuminating tool of analysis, which he labels as "the rule of recognition." By this he means the rule or rules in a society, which confer power upon lawmakers. The rule of recognition is more fundamental than the notion of sovereignty since it tells who the sovereign is and how his power can be transferred. Prof. Hart holds the view that there is no proper sense of "sovereignty" in international law other than "independence". He considers international law as still primitive; it is a set of rules, not a system. Yet, it is no less 'law', since there is a great range of principles, concepts and methods which are common to both municipal and international law and which makes a lawyer's technique freely transferable from one to the other. In his view, if multilateral treaties were to be generally recognised as binding upon states that are not parties to them, such treaties would become legislative enactments and thus international law would be provided with a distinctive criterion of validity of its rules.[16] He believes that advent of such a rule of recognition would lay to rest the skeptic's last doubt that international law is really law. This argument is

[15] Marshall CJ in *The Schooner "Exchange"* v. *M' Faddon et. al.* USSC, 1812, 7 Cranch, 116 analysed in X, "Judicial Decisions Involving Questions of International Law", 3 Am. J. Int'l .L. 224, 229 (1909)

[16] See for a detailed analysis of the Neo Positivist position Anthony D' Amato, "The Neo Positivist Concept of International Law", Notes and Comments, 59 Am. J. Int'l. L. 321 (1965)

criticised on the ground that it may suggest that international law is basically incomplete and thus deserving less respect on the part of states than ordinary municipal law.[17]

It was once decried that traditional treatment of international law had almost, if not wholly, dissociated it from constitutional law as it had been conceived as concerned only with abstractions known as States having their existence in a world apart, inhabited only by other abstraction such as sovereignty, independence and equality with the extent of States, the character of its people, or its form of government being of no concern of international law.[18]

Individual

On the question of position of individuals in the international arena, Henkin has stated that it should be borne in mind that the adoption of the United Nations (UN) Charter announced the new international law of human rights. The new law buried the old dogma that the individual is not "subject" of international politics and law and that a government's behaviour towards its nationals is a matter of domestic, and not of international concern. It penetrated national frontiers and the veil of sovereignty. It removed the exclusive identification of an individual with his government. It gives him a part in international politics and rights in international law, independently of his government.[19] In fact, it has been argued that the recognition of human rights by a State is not an act of grace, but rather a constitutive element of State, regulated

[17] *Ibid.* See also for further criticism of the "rule of recognition" as also an question of avoiding morality aspects in treaties and the principles of *pacta sunt servanda* or claim of *clausula rebus sic stantibus* as Prof. Hart suggests that a state may adhere to an onerous treaty because of a long term interest in preserving confidence in treaties or because it considers that, having received the benefits of a treaty, it is likewise obliged to accept its present burdens.

[18] Quincy Wright, "International Law in its Relation to Constitutional Law", 17 Am. J. Int'l. L. 234 (1923)

[19] Louis Henkin, *The Rights of Man Today*, Stevens and Sons, London, 1979, p. 94.

by a contract between the State and the individual. The individual recognises the State as legitimate if the Sate recognises human rights.[20]

A journey through the debates will make it clear that the modern 'State' is the result of gradual development of a decentralised system to a more centralised one. It is possible to look at today's world order as a decentralised one. It is moving, albeit slowly, towards a centralised form. The difficulty, however, is that the relationship that has to emerge is between independent sovereigns. If and when a centralised order does come into existence, the State, like individuals in a community would have to surrender some of their powers and rights, or in other words their sovereignty, to a higher authority. As long as the need for a world order remains unimpressive, it is difficult to expect surrender of any sovereignty. A further corollary may be found in the federal system of governance where some of the areas are centralised and others decentralised. This is at a higher level than that of a centralisation in a society. It, therefore, becomes clear that if the conditions become conducive, it is not impossible to have a common world order since we would not be looking for a sovereign to dictate terms and to react to violations by way of sanctions.[21]

Norm

If a world order is possible, it should also be possible to evolve 'norms' to regulate the world order. A norm prescribes or permits a certain human behaviour. A set of norms that form a unit is called normative order. The law is a normative order, and since legal norms provide for coercive acts as sanction, law is a coercive order.[22] A norm is generally an 'ought'. Legal norms did not

[20] Rolf Kunnemann, "A Coherent Approach to Human Rights", 17 Hum. Rts. Q. 323 (1995), 342

[21] Take the case of the EU today as it has developed from its earlier positions of the EEC and is still enlarging its powers. See Kelsen *supra* n. 8, 11 – 15.

[22] Kelsen, *supra* n. 8, 5. See generally Henry J. Steiner and Philip Alston, *International Human Rights in Context – Law, Politics and Morals*, Clarendon Press, Oxford, 1996 on Norms of the

simply exist but they were manifested in a continuous process of evolution and have emanated from several different sources.[23]

When one regards custom as a source of law, one believes the principle that the individuals ought to behave in the manner as they customarily behave. When one considers legislation (in the wider sense) as a source of law, one assumes that the individuals ought to behave in the manner ordained by the acts of special organs authorised to create law, or as the individuals themselves agree to behave. Legislation, in the usual narrower sense, is only a special case of statutory creation of law, namely, the creation of a general norm by a special organ. But, an individual norm may also have the force of statutory – in contradistinction to customary – law, as for instance, a judicial decision or a norm created by contract or treaty.[24]

The decision of international court may consist of norms of international law, and so also are certain decisions of the General Assembly or the Security Council of the United Nations which bind the members of the organisation and these are analogous to statutes of national law. Nothing prevents the creation by treaty of a collegiate international organ that is competent to pass majority resolutions binding upon the states parties to the treaty. If the centralisation effected by the treaty does not go too far, such decisions would still be norms of international law, according to Kelsen. It is not clear as to what he means by too far. It is not impossible to say that norms can even be created by specialised agencies not having the backing of States, of course, with the support of bulk of the population which could be taken as an 'ought', the ultimate standard to be attained by States of the world. The binding nature of such norms would, of

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Universal Human Rights system and cultural relativism; Edward MsWhinney, *United Nations' Law Making*, Holmes & Meier Publishers, New York, 1984 for a philosophical approach to creation of norms

[23] D. P. Verma, "Rethinking About New International Law Making Process", 29 Ind. J. Intl. L. 38 (1989), 42 quoting Mc Dougall

[24] Kelsen *supra* n. 8, 437. D. Johnson, "Effect of Resolutions of the General Assembly of the UN", 32 BYIL 97 (1955 – 6). On treaties, see *Oppenheim's International Law*, 9th edn., Ed. Robert Jennings and Arthur Watts, Vol. 1, Parts 2 to 4, 1996, Universal Law Publishing Co. Pvt. Ltd., Indian Reprint, 2003

course, be doubted and implementation would be difficult. But that does not mean that the 'ought' specified loses its moral authority. Like a minority contra opinion in a judgment of a collegiate court, it can always be expected to become an acceptable norm and turned to be a binding one on any future day. And in international law, as also in national, a peremptory norm has its validity only till such time as it is replaced by another norm of the same kind.

The answer for the sources of international law lies in the recognition of the normative idea of law. Any rule of law, in whatever form it may arise, remains under the influence of normative conception of law and this is true as well with the works of international bodies and the decisions of some of these organisations. The fundamental importance of the new phenomenon is to impress the normative idea of law for international relations and thus through influencing the law making process to make their impact felt.[25]

Therefore, norms, in their widest sense, could take into its ambit the present day customary and other binding norms and those that have the potential to be accepted as a binding one in future. As the international arena gets more and more centralised, we may witness creation and acceptance of new norms as prescribed or permitted human behaviour.

Multilateral Treaties

The international instruments, which are the major sources of law, are generally in the form of multilateral treaties. Like the world community, the regional communities are also laying down norms for the member states, especially in the area of human rights. The regional endeavours, at times, are more practical since the states in a region would not have much difference culturally, morally and economically. The experiences in the regions like Europe, America and Africa indicate that regional efforts, in fact, enhance the efforts of the United Nations and other agencies.

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[25] *Supra* n. 3, 48

It is argued that human rights treaties like International Covenant on Civil and Political Rights[26] have a dual nature. They are in part *law* – a single legal text designed to establish international obligations among all the countries in the world. And they are in part *aspirations* – broad, universalistic norms designed to change national and individual attitude towards human rights in the face of substantive variations in culture, political systems, moral commitment and the like.[27]

The United Nations human rights regime has been classified into three kinds by an author – (1) Declaratory regime which are not binding but are morally and politically very influential and subsequently may become part of customary international law e.g. Universal Declaration of Human Rights[28] which is considered as the first *Magna Carta* of mankind, influencing drafting of many Constitution, inspiring Conventions on Human Rights with its provisions being cited in UN resolution and decision of national and international courts; (2) Promotional Regime – which do not contain any implementation mechanism leaving the responsibility to the state parties concerned with Reporting, Communication or Public exposure Procedures e.g. Genocide Convention[29]; and (3) Implementation Regime with monitoring mechanisms which is useful in prompting domestic public debate and governmental action.[30] More and more of the rules governing international conduct are being drawn up in conventional form, with treaties assuming some features of "legislation". The analogy is by no means perfect, but it appears true enough to be of significance, especially for the subject of sanctions, for, with international law developing as treaty law, it

[26] General Assembly Resolution 2200A (XXI) UN doc. A/6316 (1966) entered into force on 23 March 1976

[27] Curtis A. Bradley and Jack L. Goldsmith, "Treaties, Human Rights, and Conditional Consent", 149 U. Pa. L. R. 399 (2000), 457

[28] UN doc. A/811, 10 December 1948

[29] Convention on Prevention and Punishment of Genocide 1948, GA Res. 260A (II) of 9 December 1948, entered into force on 12 January 1951, 78 UNTS 277

[30] Abdulrahim P. Vijapur, "No Distant Millenium: The United Nations Human Rights Instruments and the Problem of Domestic Jurisdiction", 35 Ind. J. Intl. L. 51, 58

becomes possible to insert definite penalties into the law, something that was not possible as long as it existed as mere unenacted custom.[31]

Once a norm is created and is 'accepted' by a State party, it could be said to have become binding on it. However, the binding force of a norm of international dimension has its limitations. Though a State party is a signatory to a norm creating treaty, confusion persists as to the practical binding effect of such a norm. It is pertinent to note that the approach of jurists differ as to the relation between international law and municipal law. The theories are mainly divided into two – dualism (or pluralism) and monism.

Dualism

The theorists in dualism are of the opinion that international law and municipal law are independent of each other. They disagree with the view of monism that municipal law could, by any stretch, be considered as a facet of international law. According to them, they are mutually independent legal orders that regulate quite different matters and have quite different sources. In other words, the area of application, nature and validity of these two orders are distinct. This is based on the factual situation of existence of numerous national legal orders. They are mainly supported by positivists who look for a sovereign power who could formulate legal orders. As international legal order lacks it, they find it difficult to give it any credibility or sanctity. It is in this context that it is claimed that international law is the vanishing point of jurisprudence or that it is not a true law but only a positive morality.[32]

But, it is difficult to perceive that the international and national legal orders are mutually independent. Both exist for the benefit of mankind. If

[31] Treaty sanction is defined as the means of inducing observance of a treaty and preventing its infringement. Treaties have been sanctioned by either one of two methods or by both – by treating the agreement as municipal and enforcing its penalties through international agencies, or by enforcement through international agencies. See for Treaty sanctions Payson J. Wild Jr., "Treaty Sanctions", 26 Am. J. Int'l. L. 488

[32] See Brownlie, *supra* n. 5, 31 – 36

international law has no role to play in the affairs of human beings, which if are controlled exclusively by municipal law, there is absolutely no meaning in nations trying to achieve the standards set by international norms, which is a common phenomenon.

Monism

The approach of those who propound monism is more persuasive. They argue that it is not possible to confine the two into separate watertight compartments since both reigns the same field *viz.* the human kind. Among the supporters of this group, Lauterpacht asserts that international law is supreme even within the municipal sphere.[33] International law is seen as the best available moderator of human affairs that gives credibility to the existence of States. This is an extreme situation where even the existence of a legal and valid national order has to be recognised and certified by international law.

Kelsen, on the other hand, argues that international and municipal laws are part of the same system of norms. They receive their validity and content from a grund norm, which is that "the States ought to behave as they have customarily behaved." Though he sees the two systems at par, it is not clear whether he considers only customary international law, and not the other sources of international norms, as a grund norm. That would be a restricted approach to the emerging norms of present international order, at least in terms of the contents, if not validity. Validity can still be accommodated in his basic norm. However, he confines to state that these are interdependent.

The naturalists among the propounders of monism are of the view that both the orders, international and national, are subordinate to a higher legal order, the 'ought', which is superior to both and is capable of determining their

[33] H. Lauterpacht, *International Law and Human Rights*, Archon Books, Cambridge, 1968. See also H. Lauterpacht, *International Law: Collected Papers*, 1970

spheres respectively. The orders have to conform to the higher standards of general principles of law for their validity.

Then there are other theorists like Fitzmaurice who did not like to fall into any of the above categories.[34] They deny the premise that the international and municipal laws have a common field of operation and can have any conflict as between them. Each is supreme in its own field. The international law only obligates the State party to conform to the norms set by it. It does not refer to the obligation of State parties at their domestic level. A contradictory norm of international law would not, therefore, make the internal law invalid *per se*. Rousseau, on other hand, maintains that international law is only a law of co-ordination.[35]

Depending upon the theory one wishes to follow, the approach that is taken by the municipal law in their response to international norms created varies. It has been described by various terminologies such as incorporation, transformation, adoption etc. Though there is not much difference in the terms used, the courts have been attempting to infuse subtle differences in these terms.

Binding Nature of a Legal Norm

At a different, but related, level the binding nature of a legal norm formulated and promoted at international stage has been subject of heated debate. Especially so, due to the fact that a largely accepted theory of law of nations is that the sovereign independent states have consented to surrender some of their rights or powers in order to create an understanding and co-operation at the international level. It is a germane question as to whether an international norm so created would lose its force once the consent is withdrawn or if the original consent is defective. To accept such a proposition would be to

[34] 92 *Hague Recueil* 68 (1957 I); 92 *Hague Recueil* 89 (1957 II)
[35] 93 *Hague Recueil* 473 (1958 I)

open a Pandora's Box since there would be virtual anarchy at the international scene when governments get changed at national level with different policies to pursue. Similarly, the well-accepted principle of international law, that of *pacta sunt servanda*, that treaty obligation must be fulfilled in good faith, would become redundant.[36] If the other proposition, that once consent is granted it can never be withdrawn, is accepted, it may be against some of the prevalent practices as regards applicability of certain treaties.

Another extreme of the situation, as recommended by certain jurists, is to the effect that the concept of a sovereign state is one extended by the international community on a given association of persons for the benefit of dealing with them. In their consideration, a matter is exclusively within a State's domestic jurisdiction only when it is not a matter of international law. 'Domestic jurisdiction' itself is a residual concept, it is simply another way of saying that international law does not apply.[37] They consider human rights violators in a position similar to that of a pirate – *hostis humani generis* – an enemy of all mankind. And jurisdiction to punish him is considered universal.[38]

In other words, the sovereign of a state can exercise only such of those powers that the international community have found it suitable and necessary to be granted to him. This automatically places the sovereign of a state in a position subordinate to the international community. At the same time, it also enables the international community to test all actions of the sovereign with the norms prevalent at the international level. This would go a long way in enabling the monists to ensure strict compliance with what is already identified at the international level since in case of any failure to subscribe to the same view strict sanction can be resorted to with a greater moral force.

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[36] See with benefit *US Nationals in Morocco Case* 1952 ICJ 176

[37] Henkin L., "Human Rights and 'Domestic Jurisdiction", in *Human Rights, International Law and the Helsinki Accord*, 21 – 40, T. Buergenthal, Ed., 1977

[38] Anthony D' Amato, "The Concept of Human Rights in International Law", 82 Colum. L. Rev. 1110 (1982), 1126

The human rights provisions in the Charter, supplemented by the Universal Declaration of Human Rights and other human rights instruments came to be accepted as defining the basic human rights obligations the Member States of the United Nations had accepted by ratifying the Charter. Once it was acknowledged that the Charter, a multilateral treaty, had created some human rights obligations for the Member States, it followed as a matter of international law that human rights had, to that extent, been internationalised and removed from the protective domain of a subject that previously was essentially within their domestic jurisdiction.[39] The entry into force of each new treaty has further internationalised the subject of human rights as between parties to them. Individuals have been conferred with international legal rights. And the state practice prompted by the vast network of human rights treaties continues to create a growing body of customary international law.[40]

The continued relevance of the obligation of a state under the international law gains significance in the context of succession.[41] It is pointed out that there are generally three major theories of state succession to treaties – (1) treaty obligations run with the government; (2) treaty obligations run with the land and (3) at least some treaty obligations, particularly those arising from human rights treaties, run with the people.[42]

The Human Rights Committee under the ICCPR, while dealing with the cases of dismemberment of state parties has taken the view that –

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[39] Thomas Buergenthal, "The Normative and Institutional Evolution of International Human Rights", 19 Hum. Rts. Q. 703 (1997), 704

[40] See generally Yoram Dinstein, "Collective Human Rights of Peoples and Minorities", 25 Intl. & Comp. L. Q. 102 (1976)

[41] The question came up while sovereignty of Hong Kong was handed over by UK to China in 1997. UK had ratified ICCPR and extended it to Hong Kong and was submitting Periodic Reports to the Human Rights Committee but China was not a party to ICCPR. However there was a Joint Declaration by UK and China in 1984 where it was stated that ICCPR as applied to Hong Kong shall remain in force in Hong Kong after 1997. (Article 13 of Annexure 1 to the Joint Declaration) Johannes Chan, "State Succession to Human Rights Treaties: Hong Kong and the ICCPR", 45 ICLQ 928 (1996), 928

[42] *Id.*, 929

"Human rights treaty devolves with territory, and that states continue to be bound by the obligations under the Covenant entered by the predecessor State. Once the people living in the territory find themselves under the protection of the ICCPR, such protection cannot be denied to them by virtue of the mere dismemberment of that territory or its coming within the jurisdiction of another state or of more than one state."[43]

According to it, unlike other international treaties, human rights treaties, which are of a specified nature, confer a "vested right" in the people concerned and once conferred, the same cannot be divested by a mere change of sovereignty over the territory in which the people reside. Recent practices of various human rights treaty bodies are more consistent with a presumption of continuity of human rights treaty obligations upon state succession than a principle of mandatory succession to human rights treaty obligations.[44] But, one must remember, the only sanction that the Human Rights Committee can impose in case a State party fails to submit its report is to mention this failure in the Committee's Annual Report to the General Assembly. The growing list of States Parties that have failed to report in time shows that states do not regard this to be a major embarassment.[45] In other words, it does not serve the purpose for which it was provided.

[43] Statement by Chairman of the Human Rights Committee on behalf of the Committee (1995) 3 (2) IHRR 410 referred to in Chan, *supra* n. 41, 934

[44] Chan, *supra* n. 41, 937

[45] Ineke Boerefijn, "Towards a Strong System of Supervision: The Human Rights Committee's Role in Reforming the Reporting Procedure under Article 40 of the Covenant on Civil and Political Rights", 17 Hum. Rts. Q. 766 (1995), fn 5. See also for the drafting history of the reporting procedure. See further for the activities of the Human Rights Committee, Torkel Opsahl, "The Human Rights Committee" in *The United Nations and Human Rights : A Critical Appraisal*, Philip Alston Ed., 1992, 369

Creation of a Norm

The innumerable permutations and combinations worked out at formal and informal levels in the international fora are evidence of the fact that the pulls with regard to creation of international norms are working in different directions. If the workings of international bodies are taken as an example, the nuances would become clear. For a large body as the United Nations, it is but natural that there would invariably be participants with varying interests. In the context of efforts by the international community of his time, Abraham Lincoln once said –

> "They [the international community] meant simply to declare the right, so that enforcement of it might follow as fast as circumstances should permit... They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly laboured for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence and augmenting the happiness and value of life to all people of all colors everywhere".[46]

International law did recognise some forms of international human rights protection prior to the entry into force of the United Nations Charter, but the internationalisation of human rights and the humanisation of the international law begin with the establishment of the United Nations.[47] The Charter ushered in a worldwide movement in which States, intergovernmental, and non-governmental organisations are the principal players in an ongoing struggle over

[46] Quoted in Myres S. McDougal and Gerhard Bebr, "Human Rights in the United Nations", 58 Am. J. Int'l. L. 603 (1964)

[47] See Louis B. Sohn, "How American International Lawyers Prepared for the San Francisco Bill of Rights", 89 Am. J. Int'l. L. 540 (1995) and Jan Herman Burgers, "The Road to San Francisco: The Revival of the Human Right Idea of the Twentieth Century", 14 Hum. Rts. Q. 447 (1992)

the role the international community should play in promoting and protecting human rights.[48] The protection of human rights knows no international boundaries and the international community has an obligation to ensure that governments guarantee and protect human rights. Many governments, which still violate human rights are increasingly being forced by a variety of external and internal factors to respond for their behaviour to the international community.

The recognition and protection of human rights is a dynamic and ongoing process that has its normative basis in the Charter of the United Nations. The Charter has given rise to a vast body of international and regional human rights law and the establishment of numerous international institutions and mechanisms designed to promote and supervise its implementation.[49]

The international community, as represented in the United Nations, generally deliberates on any area intended to be identified for working towards international norms. The cultural and ideological differences are the major points of conflict from where they generally start. During the period of Cold War, the two blocs were neatly divided, with varying thrusts, as regards the nature and content of international norms to be recognised. However, it must not be lost sight of the fact that in spite of such great ideological differences, an international body like the United Nations was able to continuously generate a plethora of instruments as regards recognition of international norms.

At the outset, it must be made clear what one understands by a treaty. The term has been defined in a number of ways. Initially, the making of treaties was regarded as essentially an exercise of sovereign power or independent states. Now, owing to the requirements of international life and the progressive increase

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[48] Buergenthal, *supra* n. 39, 703

[49] *Id.*, 704. The author divides the evolution of human rights over the years of the United Nations into a number of stages, overlapping each other at times but providing useful guideposts in tracing the evolution of modern international human rights – 1) the normative foundation – where consolidation of international human rights law took place; 2) institution building; 3) implementation in the post - cold war era; and 4) individual criminal responsibility, minority rights and collective humanitarian intervention.

in the collective activities of sovereign states, entities that are not sovereign states are also participating in treaty making. Similarly, the subject matter of treaties, which were confined historically to matters exclusively of international concern, are today infinitely broader owing to a more radical and flexible approach to the role and function of treaties in the international societies.[50]

It has been confirmed by decisions that the international law does not prescribe any form for the conclusion of international agreements.[51] The question is whether the parties have undertaken that international rights and obligations would flow from them. Even unilateral declarations, if accepted by the states in whose favour it was made, can create binding agreements, of course, subject to the intention of the declarant.[52]

At the United Nations deliberations, the informal levels are the first steps towards the final object. It is very much impractical for such diverse sovereign nations to come to terms with the varying points of view as they set out. But, since the common goal is to reach some common ground, which the parties would tread, consensus is thrashed out to a certain extent so as to come out with a Declaration or a Resolution. Such a Declaration or Resolution is nothing more than a pious hope that the independent sovereign nations would strive towards the objects referred thereto. No serious opposition is generated in coming out

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[50] See for the problems in defining the term 'treaty', K. I. Igweike, "The Definition and Scope of 'Treaty' Under International Law", 28 Ind. J. Int'l. L. 249 (1988). The deliberations that preceded the adoption of a definition for 'treaty' in Article 2 of the Vienna Convention on the Law of Treaties, 1968 UN Doc. A/Conf. 39/27, and the usage of different terms in the United Nations Charter can also be studied. Instruments dealing with international agreements are called by various names like treaty, convention, protocol, declaration, charter, pact, act, statute, agreement, *modus vivendi*, memorandum of agreement, agreed minutes, memorandum of understanding etc. including for the formal and the less formal agreements. See further D. P. Hynes, "The Nature and Scope of Treaties", 51 Am. J. Int'l. L. 576 (1957)

[51] By the PCIJ in *Austro – German Customs Regime* case PCIJ Reports Series A/B No. 41 37 (1931) and by the ICJ in *South West Africa Cases (Preliminary)* ICJ Reports 1962 p. 331 where it was emphasised that the terminology is not a determinant factor as to the character of an international agreement or undertaking

[52] *Free Zones Case* PCIJ Reports, 1932, Series A/B No. 46, 145 as confirmed by the ICJ in *South West Africa Case (Legal Consequences)*, 1950 ICJ Reports 134 and the *Nuclear Tests Case*, 1974 ICJ Reports 253

with such a document since it does not have any binding effect on the parties thereto, unlike a treaty.

The next step is to work out the details as to how these declarations or resolutions are to be further developed so as to ensure that a nation adhering to it can be tied down to honour the commitments made to the international community. It is here that most of the differences raise their hood. Nothing can serve as a better example than the effort of the United Nations towards recognising basic human rights.[53]

After the Second World War, nations were at such a loss of words and deeds that an urgent need was felt to lay down some principles that would become non-derogable for all nations, irrespective of the cultural and ideological differences. The efforts, which started before the War through League of Nations, continued after the War through the United Nations. It was the urgent necessity of such steps that manifested in the Universal Declaration of Human Rights adopted on the 10th December 1948.

Though a mere Declaration, it sowed the seeds for a concerted effort on the part of nations to come and put their heads together to achieve minimal rights for all human beings in this world. Though the provisions are general in nature, they are pregnant with meaning as can be deduced from the development that has followed world over. While the Universal Declaration was easy to achieve, the subsequent working out of its details proved difficult for the international community. It took almost two decades for the UN to come out with Covenants detailing the principles enunciated in the Declaration. And here the differences came to the fore to a great extent. While the largely Western blocs were ready to recognise the Civil and Political rights as essential human rights, the Soviet bloc

[53] Incidentally, as regards the place of human rights in international law, D'Amato suggests some propositions - a 'nation' is a collection of interests and entitlements – avoiding the phraseology rights and obligations; all nations have the same set of entitlements – though in any treaty regime, the contracting parties may have differential entitlements *vis-à-vis* each other or as against non-contracting parties, the general customary international law, including the entitlements regarding the entering into and validity of treaties, know no such differentiation;

insisted that Civil and Political rights would have no meaning unless the equally important Social, Cultural and Economic rights are recognised forming part of the group, rendering justice to the communist ideology which believes in economic empowerment.

The role of group of Afro Asian delegation was also prominent. India, for example, took up the position that it would be most unrealistic to provide by a stroke of pen not only for the receipt of reports from States but also for the admission of complaints between States and petitions by individuals against their own States. It believed that a cautious step by step approach was called for. Four stages were proposed by the Indian delegation in the implementation of human rights so far as international arrangements were considered – (1) the creation of international machinery; (2) the establishment of a reporting system; (3) provision for state to state complaints and conciliation machinery; and (4) establishment of an international authority to receive and act on complaints by individuals against their own or other States. It was argued that the time then was ripe only for the first two stages. The Covenant was, however, to be treated as a living instrument capable of growing with changing time and conditions.[54]

It resulted in the international community adopting two separate Covenants in 1966, *viz.*, The International Covenant of Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[55] It is however asserted in some quarters that the fact that there are two such covenants is not due to any essential difference between them. The common preamble of the Covenants sees in 'the principle of human dignity inherent in all human beings' the common source of all human rights. Their common aim is the ideal of a human being free from all fear and want."[56] Moreover, ironically, the more

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and if human rights are part of international law they are entitlements, that too Universal Entitlements, Amato, *supra* n. 38, 1113

[54] Egon Schwelb, "Civil and Political Rights: The International Measures of Implementation", 62 Am. J. Int'l. L. 827 (1968)

[55] GA res. 2200A (XXI), UN doc. A/6316 (1966)

[56] Kunnemann, *supra* n. 20, 326. The author considers that the Covenants have always been seen as only one step in the process of implementation of human rights. In his words, they

each side to the ideological conflict and the non-aligned nations sought to exploit human rights for their own political and propagandistic ends, the more the idea of an effective international system for the protection of human rights captured the imagination of mankind.

The effect of the end of the cold war can be seen reflected in the text of the 1993 Vienna Declaration on Human Rights[57] which addresses most of the modern human rights concerns in a politically balanced and serious manner. The Declaration demonstrates that there are a few, if any, human rights issues today that are not of international concern.[58] It takes away the artificial distinction between domestic and international human rights concerns and cultural relativism.[59]

The adoption of Covenants gives a structure to the norms generated and recognised by the community. Those nations which become party to them have to ensure that the obligations cast upon them by these Covenants have to be fulfilled. No wonder that countries were reluctant to adhere to the Covenants. However, the opinion created at the international level cannot be lightly wished away by the States and they are bound to adhere to the instruments sooner or later. This is so because no State would like to be pointed at for their failure to adhere to some of the noble convictions enunciated in these instruments. Though some people tend to discard international opinion as toothless, it is hard to envisage a State daring to intimidate other States to blame it for such omissions. At another level, even the traditional rules of recognition of states and governments appear to be changing, in that observance of basic human rights is increasingly required as an additional precondition to recognition of a

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capture the process of concretisation and implementing human rights at a certain point of history. He considers that the ICCPR and the ICESR emphasise different parts of the same spectrum *Id.*, at 330. He argues further that though the indivisibility and mutual interdependence of different sets of human rights is a basic principle of the United Nations concerning human right, the UN separated it into two covenants and concentrated on some sets of rights while neglecting the development of others, *Id.*, at 337

[57] Vienna Declaration and Programme of Action, UN GAOR, World Conference on Human Rights, 48th Session, 22nd Plen. Mtg., UN Doc. A/CONF.157/24 (Part I) (1993)

[58] Buergenthal, *supra* n. 39, 713

State.[60] There are various modes adopted for the prompt implementation of the norms in such instruments.[61]

The political organs of the UN provide a clear forum for the practice of the States. The organs themselves have tasks to perform which also contributes to the clarification and development of law. The reluctance to concede a law creating role to the political organs of the UN have been partly due to the continuing emphasis on state sovereignty (reluctance to attribute indirect law developing roles to the international bodies) and partly because of the Charter distinctions between "decisions" and "recommendations".[62] It has been observed by the International Court of Justice (ICJ) in *Status of South West Africa Case*[63] in 1950 –

> "Interpretation placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative

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[59] Paragraphs 4 and 5 read together

[60] Eric Stein, "International Law in Internal Law: Towards Internationalization of Central – Eastern European Constitutions", 88 Am. J. Int'l. L. 427 (1994), 448

[61] For example, the Human Rights Committee is the pre-eminent international organ created under the ICCPR for its implementation. It has 18 individuals serving in their personal capacity. It oversees each of the three distinct measures of implementation envisaged by the Covenant – (1) study the reports submitted by the State parties and to transmit its reports and such general comments as it may consider appropriate to the State parties and may also transmit it to ECOSOC of the UN. This is the sole enforcement measure which is automatically binding on the State as soon as they become parties to the Covenant; (2) it is competent to consider communications from a State party which considers that another State party is not giving effect to the provisions of the Covenant – but then, only if both the states have declared; and (3) with respect to the state parties to the Optional Protocol, the Committee is competent to receive and consider communications from individuals who claim to be victims of a violation by a State which is a party both to the Covenant and to the Optional Protocol of any of the rights stipulated in the Covenant. It is the further duty of the Committee to forward its view to the State party concerned and to the individual. P. R. Gandhi, "The Human Rights Committee and Article 6 of the International Covenant on Civil and Political Rights", 29 Ind. J. Intl. L. 326 (1989), 326

[62] Rosalyn Higgins, "The Development of International Law by the Political Organs of the United Nations", 1965 Proc. of 59th Am. Soc. Int'l. L. 116, 117. The principle of *opinio juris* can have its bearing here also as in the case of ascertaining custom. The collective processes in a UN organ help to focus attention upon the need for mutual observance of the rules. The blurring of the UN system of sources, which have traditionally been separate, namely, treaty and custom, has lead to some important results

[63] 1950 ICJ Reports 134

value when they contain recognition by a party of its own obligation under the instrument."

And for this the courts have frequently referred to and taken note of the practice of the UN organs.[64] This practice ultimately leads to evolution of customary law. The methods by which international law is clarified and developed in the political organs of the UN are many – in some cases, a decision acquiesced to by sufficient number of States over a period of time may form 'Charter law'; organs may seek to pass resolutions declaratory or confirmatory of existing law; a declaration may set to rest a competing claim; it may by resolution recommend by adoption new rules of law; and the organs (especially the Security Council) may be required to make decisions applying specific rules to particular situations and may act as a fertile area for legal development.[65] The requirement of registration of agreements under Article 102[66] as well as the depository function of the Secretary General has been emerging as a rich practice of forming a customary law. The methods by which States come to be bound by the developing norms are a mixture of constitutional techniques, public opinion and psychology.

Article 55 of the UN Charter provides in part that –

"... the UN shall promote ... (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

Article 56 contains a pledge by the Member States

[64] See Higgins, *supra* n. 62, 118
[65] *Id.*, 121-23
[66] Article 102 of the UN Charter states 1) Every treaty and every international agreement entered into by any member of the UN after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it; 2) No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the UN.

"to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55."

These provisions, together with Articles 13 (1) (b) and 62 (2) and the Purposes and Principles of the Charter, require the States to co-operate with and authorise the Organisation to engage in studies, collect information, pass resolutions, issue declarations, draft covenants and conventions, and provide service relating to the promotion of human rights and fundamental freedoms.[67]

There has been a proliferation of treaties such that treaty making has now eclipsed custom as the primary mode of international law making. Many treaties take the form of detailed multilateral instruments negotiated and drafted at international conferences. These treaties resemble and are designed to operate as international 'legislation' binding on much of the world.[68] While many treaties deal with matters traditionally viewed as international in nature, numerous others deal with matters that in the past countries would have addressed wholly domestically. This has been most evident in the area of international human rights law, which purports to regulate the relationship between nations and their own citizens. As treaties now regulate matters that countries traditionally have considered internal, there is an increasing likelihood of overlap, and conflict, with domestic law. This is particularly so because, in certain important respects, international human rights norms are more protective than the corresponding domestic law standards.[69]

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[67] Thomas Buergenthal, "The United Nations and the Development of Rules Relating to Human Rights", 1965 Proc. of 59th Am. Soc. Int'l. L. 132, 133. Unfortunately, one argument goes that, in the light of objections that can be based on Article 2(7) of the Charter, a pattern of discriminatory treatment has to be shown to exist for the General Assembly or the Security Council to appeal to a particular State to conform to its obligations under Articles 55 and 56 and the Universal Declaration. Even the earliest position of the UN Commission on Human Rights as enunciated in 1947 was that 'it has no power to take action in regard to any complaint concerning human rights'. Economic and Social Council Res. 75 (v), August 5, 1947; reaffirmed, Res. 728 F (XXVIII), July 30, 1959

[68] Curtis A. Bradley, "The Treaty Power and American Federalism", 97 Mich. L. Rev. 390 (1998 - 99), 396

[69] *Id.*, 397

Due to the difference in the areas of interest, it is a common feature of all such binding international instruments to include a provision for the nation states to specify the restrictions, understandings and declarations, which they would like to make with regard to the provisions which they do not wholeheartedly support. This enables them to adopt and ratify the international instruments since they are not required to accept or reject an international instrument *in toto*. But, it is argued that reservations to, and derogation from, treaty usually allow State parties to accept a regime of asymmetrical treaty obligations with relation to those who ratify it without reservations.[70] The sovereign power of a state is limited to the extent that the scope and extent of treaty reservations or derogation cannot simply result in erosion or nullification of the objects and purpose of the treaty. This limitation has now come to acquire the status of *jus cogens* or a peremptory norm of international law under the Vienna Convention on the Law of Treaties, non compliance of which would amount to violation of international law.[71]

Once the Covenants are accepted and they come into force, the endeavour of the international community is to further specify the details of each provision and what it likes to be fixed as norms of binding nature. In the context of the instruments mentioned above, the Optional Protocols that have been adopted later are examples of further work being done in the specific areas. For example, the Second Optional Protocol[72] to the ICCPR specifically deals with concerted move towards abolition of death penalty throughout the world. Since the instruments are drafted and adopted in the widest possible language so as to cover all possible situations under its ambit, it becomes a matter of practice to

[70] Upendra Baxi, "A Work in Progress?" The US Report to the United Nations Human Rights Committee", 36 Ind. J. Intl. L. 34 (1996), 38. For example, it is charged that by adhering to human rights conventions subject to reservations, the US is pretending to assume international obligations but in fact is undertaking nothing. It is further seeking the benefits of participation in the convention without assuming any obligations or burdens. Louis Henkin, "U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker", 89 Am. J. Int'l. L. 341 (1995), 344

[71] Baxi, *supra* n. 70, 39

interpret these provisions in order to apply them to a given situation. The development of emerging international concepts is sometimes termed as the synthesis of a thesis and antithesis, which evolves further.[73]

It is to be noted that the international community, despite its restrictive moorings, has been able to come out with a large number of instruments so as to lay down norms in varying fields. Treaties play a crucial role in creation of the human rights norms, but not just through the usual method of creating strictly defined obligations that restrict the ratifying parties. More importantly, it is believed that treaties containing generalisable principles of international law generate rules of customary international law that bind even non-signatories.[74] As stated earlier, UN Charter, as a treaty, contains a pledge in Article 56 that members will take action to achieve the purposes set forth in Article 55, including 'universal respect for, and observance of, human rights.' Article 13 of the UN Charter requires that the General Assembly make recommendations for the purpose of assisting in the realisation of human rights and freedoms. The many resolutions of the General Assembly adopted over the years may be claimed to constitute an implementation of these treaty provisions and hence are binding upon the member states. Some human rights have become part of customary international law e.g. genocide, torture and slavery. These Conventions themselves constitute customary international law. But then not all treaties lead to this result. If a treaty is a norm creating one, then it can, *ipso facto*, become customary international law even without subsequent 'practice' or 'hardening'.[75]

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[72] GA Res. 44/128, 15 December 1989, UN doc. A/44/49 (1989) entered into force on 11 July 1991

[73] R. R. Baxter (Judge), "International Law in "Her Infinite Variety", 29 Intl. & Comp. L. Q. 549 (1980)

[74] Amato, *supra* n. 38, 1127

[75] *Id.*, 1128. It is argued here that – 'A' is an "international" of State Y just as he is a "national" of State X. If international law provides for 'implementation and compliance' for A as X's national, it provides, the same sanctions for A as Y's international in those areas secured by the customary international law of human rights. Entitlements need not always generate interest, but that does not mean what is not protested against is not illegal

It has been conventional to associate law making with the sources enumerated under Article 38 of the Statute of International Court of Justice.[76] This is a positivist approach that requires some tangible proof of a State's consent. In the present world order of different cultural backgrounds, ideological leanings and moral considerations, international law has to function in a different and complex atmosphere with the result that law making has become cumbersome.[77] It has to strike a balance between the need for stability on the one hand and the necessity to keep pace with the changes in societal relations on the other. It is more problematic in the international society where a legislature, a court with compulsory jurisdiction and a centrally organised system of sanctions are lacking.[78]

While a normative perspective of law is pursued, it may be kept in mind that sovereign independence has been and is still the most basic characteristic of international society and, therefore, nothing can become the basis of the obligatory character of international law until that has not been generally accepted by the community of states.[79]

It may not be advisable to rationalise all law making process exclusively in the words of Article 38 of the ICJ Statute. The resolutions adopted by the General Assembly are a case in point. The scheme of ascribing this competence to General Assembly resolutions denotes a mid point between the assertion of legislative status and a denial of law creating function.[80] Though it is not a formal source of law within the categories mentioned in Article 38 of the ICJ Statute, it has a formative impact on the advancement of international law. This is so because when all the States in the United Nations proclaim that a particular

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[76] Under Article 38 the source mentioned are, international conventions, general or particular, expressly recognised; international custom; general principles of law recognised by civilised nations; and judicial decisions and teachings as subsidiary means of determination of rules of law

[77] Verma, *supra* n. 23

[78] *Id.*, 39

[79] The manifestation of consent of states are characterised here into five categories – abstract declaration, *travaux preparatories*, text, follow up and subsequent actions.

[80] Verma, *supra* n. 23, 44

rule is legally binding, this decision cannot be easily reduced to the status of a mere non-binding recommendation only because of the fact that it is made by the General Assembly. Some jurists consider that the General Assembly resolution reflect *opinio juris* of the international community and not a recommendation. If, *opinio juris*, as founded in the resolution is itself sufficient, new law may be created by agreement of States on their acceptance of a law declaring resolution. This has been termed as 'instant custom'.[81]

Discussing as to how to effect changes in the contents of the Charter, an author suggests a theory of 'legislation by unanimous practice of Members' wherein he observes that whether a unanimous resolution of the General Assembly of the UN may be taken to establish an understanding of a binding interpretation must be determined in each particular case and depends, *inter alia*, upon the number and the nature of the abstentions and absences.[82] The practice of States in a given context may have its starting point in majority resolutions and may lead to the creation of customary law (both facilitating and accelerating the creation), a sort of pressure cooked customary law which the UN organs help to create as 'midwives'.[83]

Though this argument seems persuasive, it is hard to consider that General Assembly resolution can be bestowed with such a legal effect as a vote for a resolution does not mean a concurrence on the legal strength of a declared norm since States consider them only recommendatory. But the declaratory nature of some of the General Assembly resolutions is undoubtedly recognised. They proclaim norms that have been acknowledged as an important part of international custom. Thus, declaration can complete the development of an immature custom by formulating it, and then trying to develop the inchoate custom from its evolutionary stages to the middle portion of its advancement.[84]

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[81] *Id.*, 45
[82] Salo Engel, "Procedure for the *De facto* Revision of the Charter", 1965 Proc. of 59th Am. Soc. Int'l. L. 108
[83] *Ibid.*
[84] Verma, *supra* n. 23, 47

Soft Law

But then, as we saw, the exact legal character of the different nature of resolutions yet remains unresolved. While speaking of sources like the General Assembly resolutions, it must be realised that there are many grey areas of uncertainty as regards their legal effect and scope and hence are called as 'soft law'.[85] This soft law can influence the areas of law and can clarify in greater details as to the extent to which it can have legal effect.

Broadly, soft law consists of general norms or principles, not rules, which are more open textured or general in their content and wording, which may be non-binding to begin with and which may not be readily enforceable through a binding dispute resolution mechanism. In many cases, a distinction between a treaty and soft law may not be clear cut as some may prefer to see. A treaty may be both hard and soft and in several different sense at once.

Soft law, as a part of law making process, may take different forms including declarations of inter governmental conferences, resolutions of UN General Assembly, or codes of conduct, guidelines and recommendations of international organisations. While the legal effect of these soft law instruments is not necessarily the same, it is characteristic of all of them that they are carefully negotiated, and often meticulously drafted statements, which are in some cases intended to have some normative significance despite their non-binding, non treaty form. There is at least an element of good faith commitment, and in many cases, a desire to influence state practice and an element of law-making intention and progressive development. Soft law instruments enable States to agree to more detailed and precise provisions because their legal commitment and consequence of any non-compliance are more limited. They are normally easier to amend or replace than treaties and may provide for more immediate evidence of international support and consensus than a treaty whose

[85] *Id.*, 51

impact is heavily qualified by reservations. Although a treaty basis may be required when creating new international organisations or institutions, or for dispute settlement purposes, soft law instruments appear to be just as useful a means of codifying international law as treaties.[86]

A treaty runs the risk of securing only a relatively small number of parties' consent. Soft law may work well even for new law if they can help generate widespread and consistent practice and/or provide evidence of *opinio juris* in support of an emerging or existing customary rule.[87] It is true that treaties may be more effective than soft law instruments because they indicate a stronger commitment to the principle in question and to that extent carry greater weight than a soft law instrument. Some soft law instruments are the first step in a process eventually leading to a conclusion of a multilateral treaty. It may also be used for authoritative interpretation or widening of the terms of a treaty.[88]

It may further provide for detailed rules and technical standard required for implementation of some treaties. The principles in a soft law may lay down parameters which affect the way courts decide cases or the way an international institution exercises its discretionary powers, thereby becoming a binding norm. Soft law is, therefore, a multifaceted concept, whose relationship to treaties is both subtle and diverse, as it presents alternatives to treaties in certain circumstances and at others it complements them.[89]

Although the General Assembly is not a legislature in the ordinary sense of the term, there are two special contexts in which it has generally recognised law making process. First, the Assembly has legislative authority with respect to most of the internal operations of the UN and second, in relation to the rules of international law which govern the conduct of Member States outside the UN;

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[86] A. E. Boyle, "Some Reflections on the Relationship of Treaties and Soft Law", 48 Intl. & Comp. L. Q. 901 (1999), 903

[87] The UN GA resolutions and intergovernmental declarations have had this effect in *Nicaragua Case*, 1986 ICJ Rep .14, *Nuclear Weapons Advisory Opinion*, 1996 ICJ Rep. 241, and the *Gabcikovo – Nagymaros Dam Case*, 1997 ICJ Rep. 7. Boyle, *supra* n. 86, 904.

[88] As the General Assembly Resolutions do of the Articles of the UN Charter.

[89] Boyle, *supra* n. 86, 913

decision of the General Assembly which settle legal disputes have a legal significance independent of any formal law making power given by the Charter. The settlement of any dispute, inside or outside the UN, constitutes a precedent, which enters into the stream of decisions, which may ultimately give rise to a rule of international law. Apart from this, a General Assembly Resolution can serve as a law creating mechanism by being linked to one or more of traditional sources of international law. A resolution can interpret the UN Charter or other treaty, accelerate the development and clarify the scope of a customary rule or identify and authenticate a 'general principle of law recognised by civilised nations'. A resolution tied in this way to a traditional source of international law may reasonably be relied upon as a definitive statement of international law.[90]

There are norms of various degrees of cogency, persuasiveness and consensus which are incorporated in agreements between States but do not create enforceable rights and duties. In the treaties there may be provisions that are *pacta de contrahendo*, which cannot be enforced if the parties do not reach agreement. Some treaties cannot be enforced and are particularly vulnerable to the operation of *rebus sic stantibus.*[91] Some provisions of the treaties are merely hortatory calling for co-operation by States to achieve certain purposes. None of these create legal obligations susceptible to enforcement.[92] States have on a number of occasions in recent years, undertaken the preparation of instruments which deliberately do not create legal obligations but which are intended to create pressures and to influence the conduct of states and to set the development of international law in new courses. Their legal impact is designedly left unclear. Provisions of treaties may create little or no obligation, although inserted in a form of instrument which presumptively creates rights and duties,

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[90] For a detailed analysis of role of General Assembly resolutions, see Samuel A. Bleicher, "The Legal Significance of Recitation of General Assembly Resolutions", 63 Am. J. Int'l. L. 444 (1969).

[91] The principle that all agreements are concluded with the implied condition that they are binding only as long as there are no major changes in the circumstances. Black's Law Dictionary, 7th edn., West Group, Minnesota, 1999.

[92] Baxter, *supra* n. 73, 551 – 54

while, on the other hand, instruments of lesser dignity may influence or control the conduct of States and individuals to a certain degree, even though their norms are not technically binding. One definite advantage of soft law is that once a matter has become subject of such a norm, it can no longer be asserted to be one within the reserved domain or domestic jurisdiction of a state.[93]

Customary practices of the States

Though norm creation by treaty is today 'the' major method adopted by the nation States, there is no denying the fact that the norm creation at international level was generally by the customary practices as followed by nation states. In ascertaining what the customary international law is or as to how and when it can be said to be created, the so called Baxter paradox comes into play –

> "[A]s the number of parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law *dehors* the treaty.... As the express acceptance of the treaty increases, the number of States not parties whose practice is relevant diminishes. There will be less scope for the development of international law *dehors* the treaty...."[94]

Customary International law is the law of international community that 'results from a general and consistent practice of states followed by them from a

[93] As observed by the Permanent Court in its *Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco* - "The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations." (1923) PCIJ Ser. B, No. 4, 24 referred to in Baxter, *supra* n. 73, 565.

[94] Baxter, *Treaties and Customs,* 129 *Hague Recueil des Cours* 27, 64 (1970) referred to in Theodor Meron, "The Geneva Convention as Customary Law", 81 Am. J. Int'l. L. 348 (1987), 365

sense of legal obligations.'[95] It was the customary international law that primarily governed relations among nations historically, such as treatment of diplomats and rules of war. This is not confined today to relationships between nations but also includes that between a nation and its own citizens, particularly in the area of human rights.[96] Despite its relatively amorphous nature, Customary International Law has essentially the same binding force under the international law as treaty law. In the *Nicaragua Case*[97], the ICJ held that the UN Charter does not subsume or supervene customary international law and that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical context.

Though at the initial stages, it was the customary international law which was sought to be codified by the international community through the instruments, the recognition of concepts like human rights as forming part of the concern of international community, treaties started being adopted in areas not trodden till then. The experience today is however different. Though not supported by history, certain concepts which have found place in treaties have been considered to be binding on the states which become party to the instruments. It could be said, in other words, that, today, treaties are able to create customary international law. Another example of what some people call as 'instant custom'.[98] Once the international community accepts an instrument it is considered as a part of the accepted and expected conduct of nations and is

[95] Curtis A. Bradley and Jack L. Goldsmith, "Customary International Law as Federal Common Law: A Critique of the Modern Position", 110 Harv. L. Rev. 815 (1997)

[96] This has become possible especially since the world community found it necessary to identify persons for proceeding against for international crimes during the Nuremberg trials.

[97] 1986 ICJ Rep.14. It has been at one place argued that the world Court has been better at applying than defining customary law since it has done only harm by interpreting the concept of *opinio juris* and handling of Art 2(4) of the Charter in this case. UN resolution and other majoritarian documents; *opinio juris* has nothing to do with "acceptance" of rules in such documents; *opinio juris* is a psychological element associated with the formation of a customary rule as a characterisation of State practice. Anthony D'Amato, "Trashing Customary International Law", 81 Am. J. Intl. L. 101 (1987), 102

[98] Verma, *supra* n. 23

considered to be persuasive if not binding on all nation states. This does not even require a subsequent continuous practice for being recognised as customary international law binding on nations. Subsequent to its adoption, its authority is accepted *a priori*. Any deviation from such norms or non-adherence to the same is considered as a violation of international norm. It is not recognised as loss in credibility of such a norm.

In numerous countries customary law is treated as the law of the land but an act of the legislature is required to transform treaties into internal law. Failure to enact the necessary legislation cannot affect the international obligation of these countries to implement the Conventions; but invoking a certain norm as customary rather than Conventional in such situations may be crucial for ensuring protection of the individuals concerned.[99] One definite advantage of treating them as customary law is that parties cannot terminate their customary law obligations by withdrawal. Similarly, reservations to the Conventions may not affect the obligations of the parties under provisions reflecting customary law to which they would be subject independently of the Convention and, as customary law, the norms expressed in the Convention may be subject to a process of broader interpretation different from that which applies to treaties. It might ultimately culminate in its elevation to *jus cogens* status. The ICJ has observed in the *Iranian Hostages Case*[100] that the obligations in question were not merely "contractual... but also obligations under the general international law."[101]

In the *Barcelona Traction Case*, the ICJ suggested that all States have legal interests in the protection of certain norms accepted into the corpus of general international law and of those incorporated into instruments of a

[99] See as an example of the application of Convention rights and obligations. Meron, *supra* n. 94

[100] *US Diplomatic and Consular Staff in Teheran US* v. *Iran*, 1980 ICJ Rep. 3

[101] The point was under consideration of the ICJ in *Nicaragua* v. *US* Merits, 1986 ICJ Rep.14. See for an analysis of the approach of ICJ and its future impact Meron, *supra* n. 94

universal or quasi-universal character.[102] These obligations are *erga omnes* implying that third State have not only the right to make appropriate representations urging respect for these norms to those allegedly involved in violating them, but also a duty not to encourage others to violate the norms and even to discourage others from violating them.

The ICJ seemed to support a hierarchy among the human rights norms when it held in *Barcelona Traction Case*[103] that "basic rights of the human person create obligations *erga omnes.*"[104] Claims of hierarchical status are also raised as to the relationship among rights belonging to the so-called first generation (Civil and Political rights), second generation (ECOSOC) and the third generation (solidarity rights e.g. right to peace, development and a protected environment). Hierarchical principles may be explicitly seen in the emerging rules of *jus cogens* and under Article 103 of the Charter of the UN.[105] Apart from this, it may be found in some international organisations and administrations.

Some human rights are obviously more important than other human rights. But except in a few cases (e.g. right to life and freedom from torture), to choose which rights are more important than other is exceedingly difficult. It is fraught with personal, cultural and political biases. Further, this has not been addressed by the international community as a whole, they have arrived at an agreement on a set of rights, but not on the order of priority to govern them.[106]

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[102] 1970 ICJ Rep. 32

[103] *Belgium* v. *Spain*, 1970 ICJ Rep. 4

[104] The obligations, by reason of the importance of their subject matter for the international community as a whole, in whose fulfilment all States have a legal interest. On the question of relevance of consensus with respect to customary norms while considering an argument that the challenged acts of the foreign government violate international law see *Banco National de Cuba* v. *Sabbatino* 376 US 398 (1964) where the court notes that without consensus decisions made in the name of international law will probably be perceived as an assertion of national policy rather than as an authoritative decision of law, 434 –35

[105] Which provides that in the event of a conflict between the obligations of member States under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail. See for a discussion of this Theodor Meron, "On a Hierarchy of International Human Rights", 80 Am. J. Int'l. L. 1 (1986)

[106] *Id.*, 4

There are only very few non-derogable fundamental human rights. Probably, reducible to the core of right to life and prohibition of slavery, torture and retroactive penal laws. It is being argued that because of this judgment, there has been a growing acceptance in contemporary international law of the principle that, apart from agreements conferring on each state party *locus standi* against the other State parties, all States have a legitimate interest in and the right to protect against significant human rights violations wherever they may occur, regardless of the nationality of the victims.

This crystallisation of *erga omnes* character of human rights rooted in Articles 55 and 56 of the Charter is taking place despite uncertainty as to whether a State not directly concerned, *ut singuli,* may take up claims against the violating state and demand reparation for a breach of law. However general principle establishing international accountability and the right to censure can be regarded as settled law. The *locus standi* of such a third state, in principle, is not questioned.

The use of hierarchical terms in discussing human rights reflects the quest for a normative order in which higher right could be involved as both a moral and a legal barrier to derogation from and violations of human rights.[107]

The recognition as customary of norms rooted in international human rights instruments will probably affect through a sort of osmosis the interpretation of the parallel norms in instrument of international nature and observance of provisions of Conventions. And eventually it may perhaps affect the status also. This would be so especially if accompanied by verbal affirmations supporting the binding, even *erga omnes*, character of principles stated in the Convention. It may constitute *opinio juris*[108] facilitating the gradual metamorphosis of those conventional norms into customary law, especially

[107] *Id.*, for the dangers of seeking a hierarchy among human rights norms without properly identifying and determining their content

[108] *Opinio juris et necessitates* – the element in the practice of States which denotes that the practice is required by contemporary international law

matters regarding human rights.[109] *Opinio juris* is critical for the transformation of treaties into general law.[110] These can take different forms. In the context of adoption of a treaty at an international conference *opinio juris* is spoken of in the sense that the provisions of a convention 'are generally acceptable' treating multilateral convention not only as treaty among the parties to it, but as a record of the consensus of experts as to what the law is or should be.[111]

A question of caution does arise at this stage. Does the international law forbid nations from violating it? Some would argue that the answers are not as clear as it appears, especially in the context of customary international law. It is simple to answer in the case of treaties since they constitute legal obligation that, under international law, simply cannot legally be violated. There may be exceptions to this rule (where a State responds to a violation by acting contrary to the treaty provision, raising a doubt as to whether its act amount to a violation). Considering the manner in which the customary international law has evolved and changed through centuries, without legislature, it appears that the system has accommodated changes in customary law as a result of departure from pre existing norms, which could be treated as violations.[112] Existing customary law then contains the seeds of its own violation; otherwise it could never change itself. But, States will rarely, if ever, admit that they have violated customary international law even in order to change it. Rather, they will agree

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[109] Meron, *supra* n. 94-368 the decision in *North Sea Continental Shelf Cases* 1969 ICJ Reports 43, may be seen with benefit

[110] For a distinction between an *opinio juris generalis* and *opinio obligationis conventionalis* see Prof. Cheng Cheng, "Custom: The Future of General State Practice in a Divided World", in *The Structure and Process of International Law,* R. MacDonald and D Johnston Eds., 1983, 513, 532-33

[111] See generally Louis B. Sohn, "Generally Accepted" International Rules", 61 Wash. L. Rev. 1073 (1986) and Louis B. Sohn, "Unratified Treaties as a source of Customary International Law", in *Realism in Law Making: Essays on International Law in Honor of Willem Riphagen*, A. Bos and H Siblesz, Eds., 1986, 231

[112] Anthony D' Amato, "The President and International Law: A Missing Dimension", 81 Am. J. Int'l. L. 375 (1987), 376. The process is explained in the schematic diagram of Hegelian dialectic – existing common law sets up a thesis; a State, acting in violation of it, manifests an antithesis; a new synthesis occurs – it can range from near congruity to the original thesis or to the antithesis or to a position at any point in between. The synthesis then becomes a new thesis, awaiting contradiction by a State acting antithetically to it

that their behaviour is consistent with the traditional law, or that the law has already changed.[113]

It may also be noted at this point that concepts like human rights cannot be treated in isolation. They are something of concern to all human beings anywhere in the world. This is one of the major reasons why the international community could identify a common thread in these concepts so as to enable them to come together, identify and recognise these concepts and seek to impose binding obligations on states to honour them. This also imposes a moral persuasion on all nation states to fall in line with the norms created. It is concepts like these that work on the humanitarian ideology alone and do not require any further proof for adherence to them. At the same time, it is also argued that general international law is facing what is termed as an 'identity crisis' of customary law, the absence of effective standards for 'customary law making' that would replace the 'mantras' of the obsolete positivist doctrine.[114]

We are witnessing a constant confrontation of the past, contemporary demands and projections of the future. The resolution of the contradictions that make this triangle depends at every moment depends on the concrete balance of political forces in international relations. This relationship determines the possibilities for improving the implementation of norms and principles belonging to international law, which would be an expression of the aspirations of mankind for justice and legal regulation of international life.[115]

It may also be mentioned at this juncture that some jurists do feel that the normative method has largely performed its mission and provided on the whole satisfactory answers and the attention must now be focused on the institutional and integrative levels by establishing different mechanisms for the implementation of international legal obligations in the most important sections

[113] Jonathan I. Charney, "The Power of the Executive Branch of the United States Government to Violate Customary International Law", 80 Am. J. Int'l. L. 913 (1986), 916

[114] Bruno Simma, Editorial, 3 EUR. J. INT'L. L. 215, 216 (1992)

[115] Milan Sahovic, "Nehru's Ideas and the Future of International Law", 29 Ind. J. Intl. L. 94 (1989), 95

of international life. This most effective instrument would lead to the satisfaction of the demands of the present time and the concretisation of the achievements recorded on the normative level with avoidance of declarative repetitions of normative solutions once defined.[116]

Modes of Implementation

The theorists of international law would like to make a sovereign subordinate to a higher authority. How much ever they try for that, it must be realised that the sovereigns are the most visible source and authority of law. This is the main reason why positivists prefer to recognise them as second to none. The higher norms, which the naturalists prefer the sovereigns to subject themselves to, are values and concepts which lack structure, though not the authority. No one can at least deny that they have moral authority and are omnipresent. In spite of the fact that the international norms are being generated at a high rate, there has been no consensus as regards the manner in which the norms are to be implemented in a sovereign independent state.[117] International law does not prescribe any specific procedure for implementation of treaty obligations or adherence to customary international law by virtue of passing necessary statutes in the municipal law for the benefit of citizens of a State. The procedure to be adopted has to be extracted from the documents of a State like the Constitution or, in its absence, from state practice or judicial interpretation.[118] The judicial process at the international sphere lacks the ability of the legislative process to establish the detailed, flexible, changing norms, carefully adjusted from time to time, to effect a workable compromise among

[116] *Id.*, 97

[117] See generally *The Future of UN Human Rights Treaty Monitoring*, Philip Alston and James Crawford Eds., Cambridge University Press, UK, 2000; *Enforcing International Human Rights in Domestic Courts*, B. Conforti and F. Francioni Eds., Martinus Nijhoff Publishers, The Hague, 1997

[118] The subject is dealt with in detail in Chapter II, *infra*

competing interests of States and groups of States and thereby to create a world order based on consensus.[119]

In this context, the role of Non Governmental Organisations in protecting human rights is also important. In many instances they have to do the necessary political preparatory work and only then can the international organisations like the United Nations be expected to do something in favour of implementing human rights. Their principal role consisted of the promotion of normative instruments. But, the establishment of international institutions like the United Nations Human Rights Committee and regional institutions also contributed to the emergence of non-governmental human rights organisations and laid the basis for their growing significance. It is argued that the creation of intergovernmental human rights institutions provided the non-governmental institutions with their *raison d' etre* for filing human rights complaints and mounting human rights campaigns on the national and international plane.[120] Since although many of the States within an organisation principally recognise human rights, they are not willing to have their own freedom of action restricted by precise obligations.[121] Human rights depend primarily upon the vigilance of the people and then upon recognition by the State.

The concept of universal jurisdiction for common law countries is said to have arrived by the litigation of the former Chilean President, Augusto Pinochet.[122] Universal jurisdiction was, of course, also claimed as the basis for the court's authority over an accused for crimes committed elsewhere by the Supreme Court of Israel in the *Eichmann* case.[123]

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[119] Kenneth S. Carlston, "Developments and Limits of International Adjudication", 1965 Proc. of 59th Am. Soc. Int'l. L. 182, 185

[120] Buergenthal, *supra* n. 39, 711

[121] Kunnemann, *supra* n. 20, 342

[122] *R* v. *Bow Street Metropolitan Stipendary Magistrate and others*; *Ex parte Pinochet Ugarte*, [2000] 2 AC 61; [2000] 1 AC 119; [No. 3] [2000] 1 AC 147. The Law Lords upheld the validity of extradition request from Spain in the matter of crimes committed in Chile. In the end, by a decision of the Home Secretary, he was not extradited to Spain but returned to Chile.

[123] *Attorney – General of Israel* v. *Eichmann*, (1962) 36 ILR 277

Complaint Procedure

The concept of international complaint procedure for violation of any right was unthinkable when state sovereignty reigned supreme. Between 1919 and 1970s, at least ten complaint procedures were developed within inter State frameworks, at the global, sectoral and regional levels. In the UN, however, this evolution was delayed probably on the basis that international organisation had 'no power.' This concept of 'no power' has witnessed a rapid erosion after mid 1960s.[124]

It is said that when the human right petition concept reaches a certain threshold of acceptance, it becomes the object of strong inter-State competition, where non-participation is viewed as presumption of guilt and co-operation as proof of innocence and self-confidence.[125]

Among all procedures of complaints, distinction must be made between 'complaint recourse' and 'complaint information'. Under the complaint recourse system, the competent international organ is legally bound to take a decision on each and every case brought before it, be it only admissibility. The goal is to redress specific grievances, on the judicial model of domestic law.

The complaint information schemes, on the other hand, seek not the redress of individual grievances, but identification of human rights problems affecting whole populations in order to define remedial strategies. Petitions are received only as elements of information. This is more like a parliamentary enquiry.[126]

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[124] M. E. Tardu, "International Complaint Procedure for Violation of Human Rights", 28 Ind. J. Int'l. L. 171, 171

[125] The third World new majority at the UN, from 1960 to 1970, chose the 'lesser evil' of participation in global UN monitoring – even at the cost of frequent condemnation – rather than the risks of marginalisation as second-rate peoples, the possible reduction of foreign aid and the gradual retreat of Western Countries from the UN, Tardu, *supra* n. 124, 172

[126] It is believed that thousands of victims in the World have lost faith in the UN because they mistakenly expected their complaints under 'information', systems to be treated as specific grievances. This was due not to their negligence but to insufficient clarification of ambiguous UN texts by human rights defenders group and by UNO itself, Tardu, *supra* n. 124, 175

The political thought in liberal societies, both positivist and natural law schools, seeks to maximise individual well being and full realisation of individual potentialities (the 'good life') compatible with the interests of other individuals generally (the public).[127] The alternate views reflects a variety of concerns, values and objectives of the developing countries confronting the liberal emphasis on individual rights with the notion of collective rights derived from broad traditionalist perspective. An overemphasis on individual rights at the expense of social values is seen having resulted in an abdication of social responsibility in many liberal societies.[128] The Vienna Declaration and Programme of Action[129] dealt with the difference that arose in the course of the World Conference on Human Rights and reaffirmed the universality of human rights in protecting 'the dignity and worth inherent in human person'. However, it observed that in invoking the spirit of our age and the realities of our time, the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind. It is accepted that North America and Europe, though with their liberal values, are not necessarily the models by which the rest of the World can be judged. It would be so even though they have a dominant position and are inherently attractive.[130]

All the values that the international community tries to protect can be summed up in the concept of 'human well being', which serves as a non partisan and more relevant goal which combines the liberal values of individual well being and the traditionalist value of community well being.[131]

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[127] All the variants of liberal perspective, minimalist approach, welfare approach and the class approach have individualism as their common characteristic. Rajiv Nair, "International Human Rights – Universality in Cultural Diversity", 34 Ind. J. Int'l L. 1 (1994), 2

[128] *Id.*, 5-6

[129] Adopted by the World Conference on Human Rights on 25 June 1993, Vienna Declaration and Programme of Action, UN GAOR, 48th Session, 22nd Plen. Mtg., UN Doc. A/CONF.157/24 (Part I) (1993)

[130] Nair, *supra* n. 127, 9-13. See also for the internal obstacles to the spread of liberal values across the world especially in heterogeneous societies

[131] *Id.*, 14

The high degree of interaction between national societies means that conditions and events in any country are of concern to individuals and societies in other parts of the world. On this note, it is argued that no country that enjoys the benefits of international interaction is entitled to ignore the concerns of international community for the well being of its population or reject the international mechanisms of human rights *per se*. What they can question, however, are the international norms and standards of human rights and the best means of achieving universal human well being.[132] If the international community shows an appreciation of the values of that society and criticises perceived breaches on the basis that the relevant acts are in breach of international standards of human rights established in accordance with global values and interpreted by the values and conditions of that society, such criticism would be more effective. The onus would then shift to the State concerned to show how the values of the state allow for an interpretation with which its acts are consistent.[133] Criticism from internal perspective is more difficult to ignore from the one based on external one. The World Conference's recommendation that a UN High Commissioner for Human Rights be appointed to oversee international human rights is an important step in seeking some coherence in international human rights structures.[134] The reporting procedure under the ICCPR aims at establishing a constructive dialogue between the States parties and the Human Rights Committee. In order to achieve this, the Committee invites representatives from States parties to answer questions posed by members of the Committee. Such a procedure leads to the realisation of the state

[132] *Id.*, 15

[133] *Id.*, 26. As early as in 1943, Hersch Lauterpacht proposed that the observance of the International Bill of Rights must consist of both supervision in its widest sense and enforcement. Egon Scwelb, "Civil and Political Rights : The International Measures of Implementation", 62 Am. J. Int'l. L. 827 (1968)

[134] Taken up by the UN General Assembly, Nair, *supra* n. 127, 27. The author argues for regional institutions (reporting in turn to an independent International Commission) which would be in a better position to appreciate the social values and conditions of any particular State in applying general principles of human rights and would be better able to oversee human rights performance in the region and to criticise breaches from the internal perspective. The Commission could have various sub committees to deal with specific aspects of human rights.

parties about the need for drafting of national legal texts and formulation of rules of practice at national level. It is believed that by means of a courteous, systematic, and constructive exchange of views, concrete results can be achieved.[135]

Traditionally, the international community has focused on holding governments rather than individuals responsible for violations of internationally guaranteed human rights, though some international human rights treaties established such individual responsibility for some of the most egregious violations of human rights, such as genocide, crimes against humanity and war crimes.[136] This situation is fast changing now.[137] United Nations was involved recently in the process of establishing a permanent International Criminal Court.[138] In addition, some investigatory bodies, such as the United Nations Truth Commission for El Salvador, while not international tribunals with criminal jurisdiction, are being created in large measure to pierce national insulations of impunity and to fix individual responsibility.[139]

[135] Boerefijn, *supra* n. 45, 772. See also Sarah Josaph, "New Procedures Concerning the Human Rights Committee's Examination of State Reports", 13 Neth. Q. Hum. Rts. 5 (1995)

[136] Buergenthal, *supra* n. 39, 717. See generally, Theodor Meron, "War Crimes in Yugoslavia and the Development of International Law", 88 Am. J. Int'l L. 78 (1994); Payam Akhavan, "The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond", 18 Hum. Rts. Q. 259 (1996); Payam Akhavan, "Punishing War Crimes in the former Yugoslavia: A Critical Juncture for the New World Order", 15 Hum. Rts. Q. 262 (1993); Juan E. Me'ndez, "Accountability for the Past Abuses", 19 Hum. Rts. Q. 255 (1997)

[137] Establishment by the United Nations of the International Tribunals for the Former and for Rwanda with the jurisdiction over crimes against humanity, genocide, and war crimes committed in those territories. See Theodor Meron, "International Criminalization of Internal Atrocities", 89 Am. J. Int'l. L 554 (1995)

[138] Statute of the International Criminal Court, Rome, 17 July 1998, came into force 02 July 2002, (1999) 37 ILM 999. For a background view of the Rome Statute, see James Crawford, "The Drafting of the Rome Statute", in *From Nuremburg to The Hague – The Future of International Criminal Justice*, Ed. Philippe Sands, Cambridge University Press, 2003, p. 109. James Crawford was the Chairman of the United Nations International Law Commission Working Group which produced the Draft Statute of 1994. In the present work he identifies three underlying issues – the institutional problem, the rule of law problem and the problem of acceptability of a universal international criminal court and suggests solutions to them.

[139] Buergenthal, *supra* n. 39, 719.

United Kingdom – the Common Law position

In countries like United Kingdom, where there is no written Constitution, common law principles or conventions are taken as the source for prescription of procedure for the implementation of international norms in the municipal or domestic field. United Kingdom's practice has become more intricate now that it has completely adhered to the requirements of European Union.

If the English practice of the acceptance of the customary norms of international law is to be taken as an example, it is said the approach has shifted from incorporation to transformation. It is generally said that English courts can take judicial notice of international law once a court has ascertained that there is no bar within the internal system of law to applying the rules of international law or provisions of a treaty.[140]

Once it is ascertained that the internal system of law does not bar its application, the international law is applied at par with the municipal law. By accepting the doctrine of incorporation, the English courts have held that the customary rules of international law are to be recognised and implemented as such so far as they are not inconsistent with Acts of Parliament or prior judicial decisions of final authority. Judicial notice of international law as an applicable rule has been a practice of English courts. They, however, have to consider the possible impact it would have within the domestic sphere now by virtue of the Human Rights Act, 1998.

In the later stage, a few authorities claim that the doctrine of incorporation has been displaced by transformation. According to them, the cases decided since 1876[141] have had the effect that customary law is a part of

[140] *Tendtex Trading Corp.* v. *Central Bank of Nigeria* [1977] 1 QB 529, CA; *R.*. v. *Secretary of State, ex p. Thakrar* [1974] 1 QB 694, CA; *International Tin Council Appeals* [1989] 3 WLR 969, HL. It is to be interpreted as not to conflict with international law. *R.* v. *Jameson* [1896] 2 QB 425; *Re AB and Co.* [1900] 1 QB 541 CA; *Cooke* v. *Charles A. Vogla Co.* [1901] AC 102, HL

[141] See Brownlie, *supra* n. 5, 43; Halburys Laws of England, 3rd edn., vii 4, 264

law of England only in so far as they have been clearly adopted and made part of the law of England by legislation, judicial decisions or established usage. Cockburn CJ in *Regina* v. *Keyn*[142] has stressed the need for evidence of assent by the British Government on the one hand and the Constitutional considerations that the courts cannot apply what would practically amount to legislation without usurping the province of the legislature. But, as a general condition, it does not require express assent of the Parliament.

As far as treaties are concerned, the Crown, which enters into the treaties, could also legislate on the subject without parliamentary consent. However, treaties that affect private rights or liabilities, result in creation of charge on public funds, or require modification of the common law or statute require legislation for their enforcement in the courts.

Treaties in Great Britain have not been thought to have the status of municipal law enforceable in common law courts. This is attributable to allocation – of – powers concerns: treaties in Great Britain are concluded by the Crown, but enacting municipal law is the province of Parliament. The basic rule of English law regarding treaties is that, whilst the Crown has power to enter into treaty obligations internationally, these can take effect in English law only if Parliament legislates appropriately.[143] The constitutional reason for this rule is that otherwise there would be the anathema of the Crown creating law without parliamentary approval and that this would undermine the sovereignty of Parliament. If a treaty contemplates that individuals will be treated in certain ways or their rights and liabilities governed by particular rule, the treaty must be 'implemented' by Parliament and the required norms incorporated into municipal law by statute. Thereafter, the statute, but not the treaty itself, will be given effect by domestic law-applying officials. In other words, under the fundamental law of Great Britain all treaties are non 'self executing'. All treaties, whatever their terms or the intent of the parties, require legislative

[142] (1876) 2 Ex. D. 63. See further *R.* v. *Kent Justices, ex p. Lye* [1967] 2 QB 153, DC.
[143] Halsbury, Laws of England, 4th edn. 1977, Butterworth, Vol. 18, para 1403, 718

implementation before they may be enforced by domestic law-applying officials.[144]

As far as interpretation of statutes is concerned, the courts are accepting the need to refer to the relevant treaty even in the absence of ambiguity in the statute. In determining common law, since 1979, the English courts have regularly taken into account standards of international law concerning human rights.[145]

Recently, while dealing with the Human Rights Act, it is very much on debate as to the extent to which the Act will, in addition to protecting individuals against the State – 'vertical effect', confer right on private individuals against one another – 'horizontal effect'.[146] Prior to the Human Rights Act, it was argued that there may be three main ways in which the Convention may form part of the Common law –a) as customary international law; b) as an element of public policy; and c) its uses in cases where no clear precedent exists.[147]

Countries with written Constitutions

A country with a written Constitution may have problems with regard to the implementation of international norms. The problems may be on the structure of the instruments or on the content of human rights. As far as countries with written Constitutions are concerned, the approach and response to

[144] Carlos Manuel Va'zquez, "The Four Doctrines of Self – Executing Treaties", 89 Am. J. Int'l. L. 695 (1995), 697

[145] *Malone* v. *Metropolitan Police Commissioners (No. 2)* [1979] 1 Ch. 344 on telephone tapping; *Gleaves* v. *Deakin* [1980] AC 477, HL (criminal libel); *A – G* v. *BBC* [1981] AC 303, HL (contempt of court). On Parliamentary sovereignty and relationship between statutes and treaty obligations see *Collco Dealings Ltd.* v. *IRC* [1962] AC 1; *Chenney* v. *Conn* [1968] 1 All E R 779

[146] Ian Leigh, "Horizontal Rights, The Human Rights Act and Privacy: Lessons from the Commonwealth", 48 Intl. & Comp. L. Q. 57 (1999). Some have argued that the Act will apply horizontally because of the inclusion of Courts in the definition of public authorities under section 6, some dispute if and still others prefer to leave it open.

[147] P. J. Duffy, "English Law and the European Convention on Human Rights", 29 Intl. & Comp. L. Q. 585 (1980), 599

the development in international law is dependent upon the provisions in the respective Constitutions. Many states follow the principle of incorporation of customary international law. The principle may be applied as part of judicial practice or on the basis of constitutional provisions as interpreted by the courts. The same may be the approach towards a treaty. But, a number of countries have accepted the principle that treaties made in accordance with the Constitution are binding on the courts without any specific act of incorporation.[148] It is also possible that the norms may be applied with modifications as required by the domestic circumstances. Depending upon the provisions in the instruments, it is also possible that a treaty may be self - executing. A self executing treaty may be defined as a treaty that may be enforced in courts without prior legislation by the legislature, and a non self executing treaty, conversely, as a treaty that may not be enforced in the courts without prior legislative 'implementation'.[149]

Although in common parlance none speaks of 'self-executing custom' it is apparent that certain rules of custom are, in effect, self-executing and others are not. The most obvious and most important of the potentially self-executing rules are many of those protecting basic human rights. They benefit individuals directly, and they are specific enough to be enforced judicially. At the non-self executing end of the spectrum would be most norms dealing with highly political types of intergovernmental conflict.[150] A self-executing norm could stand on its own entirely apart from whatever auxiliary role it might play as an aid in interpreting constitutional rights and liberties.

The implementation of a treaty is also dependent upon the nature of a State's legal and political system. There may not be much confusion if the State follows a unitary form of government. However, where a State follows federal

[148] Argentina, Austria, France, Luxembourg, Belgium, Greece, Spain, the Netherlands, Switzerland, US, Mexico etc.
[149] Va'zquez, *supra* n. 144, 695
[150] Frederic L. Kirgis Jr., "Federal States, Executive Orders and "Self – Executing Custom", 81 Am. J. Int'l. L. 371, 372

system, the implementation of international norms would also be dependent on the division of powers between the centre and the provinces. It would also be dependent on the demarcation of the powers between the legislature, executive and the judiciary. Where a complete separation of powers is envisaged under the Constitution, the legislature and the executive would share the power for implementation of international norms. However, in common law system, where judicial review is prevalent, the role of judiciary will also have to be taken into consideration.[151]

Socialist viewpoint

The Socialist's approach to the role of relation of treaties to domestic law was summarised thus –

> "International treaties directly impose obligation upon States which conclude them or which adhere to them. But ... every international treaty, which is generally published by a state, becomes a law binding upon its citizens."[152]

They consider neither the monist nor the dualist theories to be giving satisfactory answers. And it was their stand that the theory of primacy of international law was propounded by the capitalist powers for interference in the internal affairs of other States.

Vyshinsky, a leading theorist in socialist wing, described the Soviet position thus:

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[151] A comparison between the provisions of the various constitutions and their effect is the prime area covered in the next Chapter

[152] K I Kozhevnikov, in FI Kozhevnikov (ed.) *International Law* 276 (Translated from the Russian by Dennis Ogden, Moscow, 1957. See also by the same author – "Some Questions of the Theory and Practice of International Treaties", 2 *Sovetskoe Gosudarstvo i Pravo* 74 (1954) quoted in George Ginsburgs, "The Validity of Treaties in the Municipal Law of the "Socialist" States", 59 Am. J. Int'l. L. 523 (1965)

> "Recognizing the priority of national law, built in accordance with the interests of the people of a peace-loving, free and independent State, the Soviet conception of national law does not contradict and cannot contradict the conception of international law which fulfils the same requirement. What is more, in that event it creates a firm basis for international law and guarantees it the necessary authority without which a successful regulation of international relations between independent, sovereign state is impossible."[153]

This statement was slightly improved later as signified in the statement that:

> "The norms of international law and the norms of internal state law must not contradict each other and must be applied in harmony; there can be no talk of the primacy of international law or the primacy of internal state law."[154]

The socialist scheme rested on the formula of 'dialectic interaction' or 'close cross obligatoriness' of domestic and international law, on the concept of the 'organic interdependence' of the two legal systems, their inseparability because of values common to both and the endless interchange of principles and institutions that is a hallmark of their partnership. The two, domestic and international law, were, therefore, to be synchronised and the double set of rules which it has been instrumental in enunciating must function in unison, and genuine harmony must reign between their component elements in so far as they bear on identical issues.[155] The two are equal *inter se*. But they hold the view that the 'progressive' ingredients of national law traditionally have had a much

[153] A. Ya Vyshinsky, "International Law and International Organization", 1 *Sovetskoe Gosudarstvo i Pravo* 22 (1948) quoted in Ginsburgs, *supra* n. 152

[154] DB Levin, *Fundamental Problems of Contemporary International Law*, 114-115 Moscow, 1958. On the argument that the Communist follows dualist consensual approach with certain modifications see J F Triska and R M Shesser, *The Theory, Law and Policy of Soviet Treaties* 111 (Stanford, 1962) and an early version of this argument in E. Margolis, "Soviet Views on the Relationship between National and International Law", 4 Intl. & Comp. L.Q. 116-128 (1955)

[155] Ginsburgs, *supra* n. 152, 528-29

greater impact on international law than vice versa. As discussed earlier, while the ICCPR and the Protocols were being discussed there were marked difference of view between the then USSR and its allies and the West.

European Convention on Human Rights

It is immaterial whether or not under a legal system the Convention's provisions are deemed to be of a greater validity *vis-à-vis* or subsequent domestic legislation, since the system of implementation falls entirely outside the province of domestic law (with the exception of rule of exhaustion of local remedies). In fact, the Convention forms an integral part of the domestic law of many contracting parties. The enforcement machinery under the Convention, the Strasbourg organs, examines and determines whether domestic law as it stands complies with the provisions of the Convention. It does not place reliance upon the traditional international law concepts of 'nationality' or 'reciprocity'. The Convention has, therefore, been termed as *sui generis*.[156] Dr AH Robertson has explained that the law of the Convention (like European Community law) is neither domestic nor international law, although it comprises elements of both. It is not simply a law applied by the Commission and Court of Human Rights since, on the one hand, the Committee of Ministers of the Council of Europe also applies it, and, on the other hand, domestic tribunals also do so.[157] The Commission and the Court may be transforming a multinational arrangement into a novel form of common constitutional order.

[156] Andrew Drzemczewski, "The Sui Generis Nature of the European Convention on Human Rights", 29 Intl. & Comp. L. Q. 54 (1980)

CONCLUSION

In the prophetic words of an author –

> "The positive ideal of the world today is undoubtedly that the whole earth shall become a field of action open to every man, and that all the advantages which may be secured by the action of humanity throughout the world must be guaranteed to the citizens of each national Sovereignty. A new grouping of social, economic and political interests is being effected, in which, though indeed the national State will continue to hold a prominent place, public and associative action will be dominated to a large extent by forces and consideration which are broader than national life."[158]

The development of human right program especially under the auspices of the United Nations has transformed gradually the rudimentary demands for freedom from despotic executive tyranny into demands for, and provisions of, protection against not only the executive but all institutions or functions of government and even private oppression, and the early demands for the barest 'civil liberties', embodied in the most primitive conception of rule by law, have burgeoned into insistence upon comprehensive 'human rights'.[159]

In concluding non-codifying multilateral treaties, norms and values are commonly asserted that differ from the actual practice of States. When it comes to human rights or humanitarian convention, that is, convention whose object is to humanise the behaviour of States, groups and persons, the gap between the norms stated and actual practice tends to be especially wide. The law making process does not merely reflect or declare the current state of international practice. Rather, it is a process attempting to articulate and emphasise norms

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[157] Dr. A. H. Robertson, "The Relationship between the ECHR and Internal Law in General", *European Criminal Law, Colloques Europeens,* 1970 pp. 3-12, 12 referred to in Drzemczewski *supra* n. 156.

[158] Reinsch, *supra* n. 14, 18

[159] Myres S. McDougal and Gerhard Bebr, *supra* n. 46, 604

and values that, in the judgment of some States, deserve promotion and acceptance by all States, so as to establish a code for the better conduct of the nations.[160]

It is felt in some quarters that customary law or treaty law has been laggard in providing those legal norms that are necessary to preserve a viable international order in which value realisation is secured. In comparison, the growth and development of international law in the world society can be brought about much more rapidly as a result of international agreement than as a result of customary law since it tends to be slow to respond to social change. It is argued that the increase in the number of States' participants in the international sphere will tend to cause their patterns of inter-State practice to erode and restrict, rather than to expand, the present body of international law. The growth of law through the use of regional international organisations as a structure of social action would be desirable in the circumstances as the participating States may share a common value attachment. At the same time, the existence of such a common value attachment would diminish in direct proportion to the increase in the number of States involved and the diversity of their public orders and cultures.[161] It is argued that the future growth of international law in world society is to be found in the treaty law and national law regulating those complexes of international action brought into being through regional and functional international organisations.

The European Community is an old and time tested model for new modes of co-operation among States and for contributing new policies and for fashioning new values for international community, thereby developing international law and law of international organisations. The most important advance from the traditional international organisation is the ability of the Communities to enact law, which is directly binding on the Member States. Dr. Robertson has described this aspect as the 'essence of ... supranational

[160] Meron, *supra* n. 94, 363
[161] Carlston, *supra* n. 119, 183 – 84

powers'.[162] Apart from this elaborate institutional structure, the variety of weighted voting formulae, and the delicate balance between the institutions representing different and often opposing interests are all evidence of highly advanced international co-operation. They serve as a catalyst for the harmonisation of law and propose international conventions to these Members to achieve this.[163]

The contribution of the Communities to legal science is the breaking up of the rigid dichotomy of national and international law. Their experience demonstrates that an alternative to the creation of treaty based obligations for the solution of common problems is the constituting of a *lawmaker* with an authority to prescribe norms which bind their addressees. The Communities fashion intermediate forms of law which are neither national nor international law. It is municipal law in effect, federal in structure, but not national in origin. It may be a model for problem solution by other states with the requisite minimum homogeniety.[164]

Though it may be argued that it is early to expect a body like the United Nations, or any other organ like it, to take up the lawmaker role for the countries, the experience of the Community, as stated above is encouraging. It would be a while for the world's commuiy to accept such a possiblity. There should be continuous endeavour on the part the world citizens to bring about standards that are common to the whole mankind. We have already seen how the concept of sovereignty has undergone a sea change. Others would follow. For the moment but, a lot will have to depend on the domestic law that is prevalent in each country and for that, it would be worthwhile to look into the basic documents of a country, its Constitution, which we proceed to do in the next chapter.

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[162] "Legal Problems of European Integration", 91 *Hague Recueil des Cours* 105, 145 (1957, I) referred to in Peter Hay, "The Contribution of the European Communities to International Law", 1965 Proc. of 59th Am. Soc. Int'l. L. 195

[163] See for an elaborate discussion on the relation of the Communities to their Members Peter Hay, *supra* n. 162

[164] *Id.*, 199

CHAPTER II

ROLE OF THE CONSTITUTIONS AND LEGISLATURES IN THE IMPLEMENTATION OF THE INTERNATIONAL NORMS

An author identifies three issues concerning international law today.[1]

(1) How does international law become effective in internal law – is it by Constitution, legislation or practice? Some may permit a treaty to become directly applicable and to affect its individuals directly upon its coming into effect in international law[2] while others may require a legislative act (transformation);[3]

(2) what happens if a rule of international law comes into conflict with internal law? The general case is that the treaty must conform to the national Constitution. In some situations treaty would prevail over prior and subsequent legislation[4] and in others it will supersede only the prior legislative act according to the *lex posterior* rule;[5]

(3) what are the normative devices that enable a state to join an integrated organisation such as European Union, which requires a significant transfer of national sovereign powers.

Article 27 of the Vienna Convention on the Law of Treaties[6] requires the States to bring their domestic law into conformity with their validly contracted international commitments. Failure to do so, however, results only in an international delinquency but does not change the situation in the municipal legal system where the judges and the administrators may continue to apply national law rather than international law. The status of international law, especially treaties, is determined by different constitutional techniques like

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[1] Eric Stein, "International Law in Internal Law: Towards Internationalization of Central – Eastern European Constitutions", 88 Am. J. Int'l. L. 427 (1994)

[2] Self executing in the US and direct effect in European law

[3] Stein, *supra* n. 1, 431

[4] Netherlands - Article 94, France - Article 55, Greece - Article 28 (1) and Belgium, Luxembourg and Spain - with no Constitutional provisions but judgements, and the European Union.

[5] As in US, Germany and Italy, Stein, *supra* n. 1, 431. See for the position in Switzerland William J. Rice, "The Position of International Treaties in Swiss Law", 46 Am. J. Int'l. L. 641 (1952)

[6] 1969 UN Doc. A/Conf. 39/27

'legislative incorporation' and 'automatic incorporation'.[7] Even where there is no binding regional convention or courts to which persons who allege a breach of fundamental human right by a country can appeal, changes may be prompted by less obligatory mechanisms.[8]

India

In the words of a Supreme Court Judge –

> "The direct application of international law has not happened so far here. The wide ranging constitutional and legal protection already in place has possibly not made it necessary for us to consider if international covenants form part of our Constitution by implication. But the question may well arise in future if we do not legislate to enforce the international covenants that we may sign."[9]

Prior to the adoption of Constitution, India did not enjoy full external sovereignty. The 'implementation of treaties and agreements with other countries' was a federal subject under Item 3 of List I of Schedule VII under the Government of India Act 1935. This power was, however, restricted by section 106 of the Act which laid down that in exercise of the above power, the Federal legislature could not make any law for any province or Federal State without the consent of the Governor.[10]

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[7] V.T. Thamilmaran, "International Law and National Law Elements of Automatic Incorporation", 11 Sri Lanka J. Int'l. L. 233 (1999), 234. The legislative incorporation is not the same as act of ratification required in the UK or some countries of the Commonwealth. They require express legislative enactment of treaty provisions before they become domestic law. See further D.P. O'Connell, *International Law*, Stevens and Sons, 2nd edn., London, 1970, Vol. 1, 38 – 46

[8] Justice Michael Kirby, "Criminal Law – The Global Dimension", Keynote Address at The International Society for Reform of Criminal Law Conference, Canberra, 2001, http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_crimlaw.htm (03.02.2002)

[9] Sujata V. Manohar, "Judiciary and Human Rights", 36 Ind. J. Intl. L. 39 (1996), 46

[10] Basu D.D., *Commentary on the Constitution*, 4th Edn., Vol. IV, Prentice Hall of India, 182

Even after the adoption of the Constitution, India may not find itself in an unenviable situation. To begin with, as per Article 51 of the Constitution, the State has to 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 dealing of organised peoples with one another;

(d) encourage settlement of international disputes by arbitration.

The third leg of the Article only prescribes fostering respect for international law and treaty obligations. It does not mention anything about the procedure to be adopted for the implementation of international law or treaties. The structure of the Constitution makes it clear that the Union has got greater powers than that with the States. Moreover, the residuary powers rest with the Union and not with the States.[11]

In addition, under Article 253, the Parliament has very wide powers 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. The only possible restriction on the powers of the Union government would be that it cannot, by legislation under this Article, override fundamental rights included in Part III of the Constitution.[12]

While such wide powers have been granted to the Parliament, it is pertinent to note that any commitment at the international level does not automatically become the law of the land. This is unlike the United States Constitution where the treaties made under the authority of the United States are envisaged to automatically become the law of the land under the Supremacy

[11] By virtue of VII Schedule, List I, Item 97

[12] *Ajaib Singh* v. *State of Punjab*, AIR 1952 Punj. 309, 321 reversed on other points by *State of Punjab* v. *Ajaib Singh*, AIR 1953 SC 10

Clause. However, in India, unlike the United States, there is no restriction as regards the subject matter confined to the Union, in a way justifying the terming of over the Constitution as 'as a federal one with strong centralising tendency'. The First List of Seventh Schedule, at item 13, grants power to the Union for participation in international conferences, associations and other bodies and implementing of decisions made thereat. At item 14, it empowers the Union for entering into treaties and agreements with foreign countries and implementation of treaties, agreements and conventions with foreign countries.

This, in a way, takes care of the possible confusion with regard to the possibility of differences of opinion in a federal structure. The employment of the phrase 'any decision made at any international conference, association or other body' in the Article helps the judiciary to give it the widest possible connotation. Probably, the government need not be active for legislation in this field in as much as the judiciary can enlarge its ambit by resorting to interpretation in its decisions.

Since, entering into treaties does not *per se* bring the treaty provisions to the pedestal of the law of the land, further action by the organs of the State is necessary. The appropriate organ of the State for implementation of international treaties is, of course, the Parliament. Since the subjects that have occupied the attention of the international community largely falls within the I list or the III list of the Seventh Schedule, not many objections could be raised with regard to the exercise of the power under Article 253 by the Parliament, unlike what is encountered in the United States. Moreover, the Parliamentary form of government ensures that the representatives involved in international deliberations and negotiations remain accountable to the Parliament. The Constitution, however, does not envisage any prior consent of the Parliament for such representatives to appear for and on behalf of the nation and bind the nation by virtue of treaty commitments. But, there is always the necessity of subsequent ratification by the Parliament. Ratification in India, as in the US, has taken their own sweet time, although for different reasons.

Article 73 of the Constitution, which prescribes the extent of executive powers of the Union, is also quite relevant. As per the first limb, it extends to the matters with respect to which Parliament has power to make laws. It also implies that the executive would have power to pass any law for the timely implementation of any of the international norms for which the Parliament has the power. The executive in India has been as lethargic as the legislature.

Such situations have given rise to the phenomenon of the remaining organ of the State, namely the judiciary, to step into the shoes of the legislature. As regards the procedure of implementation of the international norms, courts have not been clear as to the course of action.[13]

It is important that we incorporate human rights within our legislative framework so that violations can be prevented and redressed. In the words of the same Supreme Court Judge –

> "As a nation which is a signatory to several UN Convention dealing with Human Rights, it is our obligation to have an administrative framework and an all pervading administrative policy that ensures proper respect for Human Rights.... It is when the administration fails in its duty petitions come and should come before the judiciary.... Secondly, the help which the judiciary can give will be moulded by the laws that we have, judicial activism notwithstanding. We have to guard against legislative inaction or failure as much as against administrative inaction or failure...."[14]

International Covenant on Civil and Political Rights (ICCPR) makes seven fundamental rights non derogable even during emergency – right to life (Article 6); freedom from torture or cruel, inhuman or degrading treatment or punishment (Article 7); freedom from slavery and servitude (Article 8); prohibition of imprisonment on the ground of inability to fulfill a contractual obligation (Article 11); prohibition of *ex post facto* criminal liability (Article

[13] An analysis of the same is done in Chapter III *infra*
[14] Manohar, *supra* n. 9, 40

15); right to recognition as a person before the law (Article 16); and freedom of thought, conscience and religion (Article 18).

Under the Indian Constitution, only two rights are made non-derogable by amending Article 359 by the Forty Fourth Amendment Act, 1978. They are protection in respect of conviction of offenders (Article 20) and protection of life and personal liberty (Article 21).

A country seeking a change in its criminal procedure system has to be aware that most systems have had to adapt gradually to international human rights standards. The European Convention on Human Rights is a good example for this, as the European Court of Human Rights made clear that each country, while free to adopt its own system of criminal justice, evidence, proceedings, etc., is nevertheless bound by the fair trial standard laid out in the Convention.[15]

Before moving further another school of thought may be mentioned. It has been argued that the concentration of fundamental rights in the Constitution as a method of governing society is a typical legal academic approach of taking international norms and the "effective" implementation in the west and of using the Indian Constitution as a touchstone to turn these international obligations into national norms through a process of metamorphosis.[16]

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[15] See, in this sense, *Salabiaku* v. *France*, E.Ct.H.R., Judgment of 7 October 1988, Series A No 141-A, paragraph 27

[16] Vikramjit Banerjee, "Human Rights and the Indian academia: A Need for Civilisational Understanding", (2002) 8 SCC (J) 1. It is stated that what results is a strictly legalistic rights regime and an attempt to make it work in a society which is organised around a different set of realities, which are largely duty-based. The author says that the academic approach is different from judicial approach in as much as the academic approach is divorced from Indian reality and inconsistent in evolving a philosophy. The problem, as rightly identified, is not with the rights but the difference in where these rights can be traced to. The author disagrees with the conception of universal human rights per se. See further the human Rights formulated according to the Hindu World View in the Hindu Declaration of Human Rights, Hindu Studies Review, Vol. 1 (1) http://www.csuchico.edu/rs/hsr/english.html. See also discussion on 'integral hinduism' of 'Bharat' by Deen Dayal Upadhyaya – Four Lectures Delivered on April 22 - 26, 1965 http://www.bjp.org/philo.htm and Heredia RC 'Interpreting Gandhi's Hind Swaraj', EPW Vol. 34 (24) June 12, 1999. Also discussing Raimundo Panikkar – 'Is the Notion of Human Rigths a Western Concept', 120 Diogenes 75 arguing that there are no trans cultural values as values are existent only in the cultural context. See also Agarwal H.O. *Implementation of Human Rights and the Law*, Kitab Mahal, Allahabad 1983; Also Mani VS, "Human Rights in India: A Survey", Saxena (Ed.) *Human Rights: Fifty Years of India's Independence*, Gyan Pub. House, 1999, 169-94

Argentina

By virtue of Article 31 of the Constitution[17] – the Constitution, the laws of the Nation enacted by the Congress in pursuance thereof, and treaties with foreign powers are the supreme law of the Nation; and the authorities in every Province are bound thereby, notwithstanding any provision to the contrary which the provisional laws or constitutions may contain.

The Constitution is not clear as to whether the treaties with parties other than sovereign powers like international bodies would also have the same sanctity.

Australia

In Australia Section 51 (xxxix) of the Constitution Act gives the Commonwealth the power over 'external affairs'. It has been held that external affairs include the agreements entered into by Australia and the Commonwealth.[18] By virtue of the same decision it was also held that legislation to give effect to such agreement is valid despite its effect on the States. There is no separate treaty making power.

Australia is a party to the ICCPR and has ratified the First Optional Protocol to that Covenant and so persons discontented with Australian decisions, on the grounds of breach of the Covenant, may communicate their grievances to the United Nations Human Rights Committee. Immediately as it was ratified, two homosexuals communicated their complaint against the sodomy provisions of the Tasmanian Criminal Code to the Committee. The Committee upheld the communication.[19] As a consequence, federal legislation was introduced to

[17] Constitution of Argentina adopted in 1975

[18] *King* v. *Burgess*, (1936) 55 CLR 608

[19] *Tooren* v. *Australia*, UN Human Rights Committee, Communication No. 488/1992, following similar rulings by the European Court of Human Rights in *Dudgeon* v. *The United*

remove the infraction of the nation's international obligations.[20] Tasmania also altered course and amended its criminal code repealing sodomy provisions.

Belgium

As per the Constitution, Belgium is a federal state.[21] But, the institutional structure is a complicated one comprising the federal level (House of Representatives, Senate and the King), the community level, the state region level and the language region level. The King manages international relations, without prejudice to the ability of Communities and Regions to engage in international co-operation, including the signature of treaties, for those matters within their responsibilities as established by the Constitution and in virtue thereof.[22] The Community or the Regional governments are empowered to conclude, in matters concerning them, treaties regarding matters that are in the scope of the responsibilities of their Councils.[23] They take effect on approval of the Council. Similarly, on other matters though the King is empowered to conclude treaties, these take effect only after the approval of the Houses.[24]

On the question of the possibility of divisibility or transfer of sovereignty, the Constitution is very clear when it states that the exercising of determined power can be attributed by a treaty or by a law to international public institutions.[25]

Kingdom, (1982) 4 EHRR 149; *Norris* v. *Ireland*, (1988) 13 EHRR 186; *Modinos* v. *Cyprus*, (1993) 16 EHRR 485.

http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_crimlaw.htm (03.02.2002) f.n. 34

[20] This was again considered, with Human Rights (Sexual Conduct) Act 1994 by the High Court of Australia in *Croome* v. *Tasmania*, (1998) 191 CLR 119 referred to in Kirby, *supra* n. 8.

[21] Constitution of Belgium adopted in 1970, revised in 1980, 1988 and 1993 - Article 1

[22] *Id.*, Article 167 (1.1)

[23] *Id.*, Article 167 (3)

[24] *Id.*, Article 167 (2)

[25] *Id.*, Article 34

Article 12 (1) guarantees individual freedom (personal liberty). No one can be prosecuted except in the cases provided for by law, and in the form prescribed by law.[26] The Article also specifies that except in the case of *flagrante delicto*, no one can be arrested except by a justifiable judge's order that must be served at the moment of arrest, or at least within 24 hours.[27] No punishment can be made or given except in pursuance of the law,[28] which cannot include punishment by confiscation of assets.[29] And further, capital punishment has been abolished and it cannot be brought back into force.[30]

Brazil

The international relations of the federative Republic of Brazil are governed, among others, by the principle of prevalence of human rights.[31] It has been categorically declared that the rights and guarantees established in the Constitution does not preclude others arising out of the regime and the principles adopted by it, or out of international treaties to which the Federative Republic is a party.[32]

Among the individual rights guaranteed under Chapter I are included the right not to be submitted to torture or to inhuman or degrading treatment[33] and declaration of the home as an inviolable asylum of the individual[34] which cannot be entered except with consent of the dweller or in case of *flagrante delicto* or by a court's order. Prior definition of law and prescription of punishment is required.[35] Similarly, penal law may be considered retroactive if it is for the

[26] *Id.*, Article 12 (2)
[27] *Id.*, Article 12 (3)
[28] *Id.*, Article 14
[29] *Id.*, Article 17
[30] *Id.*, Article 18
[31] Constitution of the Federative Republic of Brazil adopted in 1988. Article 4 (II)
[32] *Id.*, Article 5 (2)
[33] *Id.*, Article 5 (0) (III)
[34] *Id.*, Article 5 (0) (XI)
[35] *Id.*, Article 5 (0) (XXXIX)

benefit of the defendant.[36] Torture, unlawful traffic of narcotics and similar drugs, terrorism and heinous crimes does not entail bail or mercy or amnesty.[37] The document provides for the individualisation of punishment.[38] It is also particular that along with the abolition of death penalty (except in the event of declared war) it prohibits life imprisonment, hard labour, banishment and cruel sentences.[39] The constitution also provides for procedural safeguards in criminal law like due process of law, inadmissibility of evidence obtained through unlawful means and presumption of innocence.[40] No one is to be arrested except in *flagrante delicto* or by order of proper judicial authority, the details of arrest to be informed to the proper judge and to his family. He has the right to be informed of his rights and assistance for legal counsel.[41]

Bulgaria

The National Assembly is empowered to ratify or denounce by law all international instruments, *inter alia*, concerning Republic of Bulgaria's participation in international organisations and concerning fundamental human rights.[42] Treaties ratified may be amended or denounced only by their built in procedure or in accordance with the universally acknowledged norms of international law.[43] Before the conclusion of a treaty requiring an amendment to the Constitution, the amendment must be carried out.[44]

Bulgarian Constitution treats ratified and promulgated treaties as part of internal law and, in case of conflict between internal law and a treaty, the latter

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[36] *Id.*, Article 5 (0) (XL)
[37] *Id.*, Article 5 (0) (XLIII)
[38] *Id.*, Article 5 (0) (XLVI)
[39] *Id.*, Article 5 (0) (XLVII)
[40] *Id.*, Articles 5 (0), (LIV), (LVI) and (LVII), respectively
[41] *Id.*, Article 5 (0) (LXI) – (LXVII)
[42] Constitution of the Republic of Bulgaria adopted in 1991 - Article 85 dealing with the International Instruments
[43] *Id.*, Article 85 (2)
[44] *Id.*, Article 85 (3)

prevails.[45] Further the Constitutional Court can decide upon the consistency of internal law 'with accepted standards of general international law as well as treaties'.[46]

The Constitution provides that no one shall be subjected to torture or to cruel, inhuman, or degrading treatment, or to forcible assimilation.[47] Article 30 provides for the protection of personal freedom, integrity and defence. The judicial authorities are to rule on the legality of a detention within 24 hours and a person is entitled for legal assistance under the Article. Procedural safeguards like prompt trial, presumption of innocence and right against self-incrimination are recognised in the Constitution.[48]

Canada

Canada does not have a written Constitution in one single document but has a number of Constitution Acts. By virtue of section 132 of the British North America Act, the Parliament and the Government of Canada have all the powers necessary or proper for performing the obligation of Canada or of any province thereof as part of the British Empire towards foreign countries arising under treaties between the Empire and such foreign countries. The Dominion Parliament thus had the exclusive power to implement a treaty when it comes within section 132 or when the general residuary power under section 91 is applicable. However, by *In re Aeronautics*[49] it was held that the Dominion Parliament cannot legislate to implement the agreement without the consent of the Provinces, if the international convention was signed by Canada as an independent State, not as a member of the British Commonwealth of Nations, and the matter of the Convention relates to the classes of the Provincial subjects.

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[45] *Id.*, Article 5 (4) 1991
[46] *Id.*, Article 149 (1) (4)), Stein, *supra* n. 1
[47] *Id.*, Article 29 (1)
[48] *Id.*, Article 31
[49] (1932) AC 54

It would appear that the Dominion Parliament still lacked the whole of the treaty making powers.[50]

The Canadian Charter of Rights and Freedoms are included in the Constitution Act of 1982. It guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[51] Interestingly, no person is to be found guilty on account of any act or omission unless it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognised by the community of nations.[52]

Among the legal rights recognised are right to life and security of person, right to be secure against unreasonable search and seizure, right not to be arbitrarily detained or imprisoned and to be informed of the reasons if arrested.[53] Section 11 deals with the aspects of fair trial and confers rights to be informed of specific offence, to be tried within a reasonable time, against self-incrimination, to be presumed innocent, not to be denied reasonable bail, trial by jury (where punishment is five years or more), against double jeopardy and to get the benefit of lesser punishment in case of any variation in law. The Constitution also specifies that everyone has the right not to be subjected to any cruel or unusual treatment or punishment.[54] In Canada, the treaty power has been construed as not to give the national government legislative powers over matters reserved to the provinces.[55]

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[50] *Attorney General for Canada* v. *Attorney General for Ontario*, (1937) AC 326; See also *Theophile* v. *Solicitor General*, [1950] AC 186, HL; *Blackburn* v. *A-G*, [1971] 2 All E R 1380.
[51] Constitution Act 1982, Section 1
[52] *Id.*, Section 11 (g)
[53] *Id.*, Sections 7, 8, 9 and 10, respectively
[54] *Id.*, Section 12
[55] Curtis A. Bradley, "The Treaty Power and American Federalism", 97 Mich. L. Rev. 390 (1998 - 99), 456

China

The Chinese Constitution believes in the uniformity and dignity of the socialist legal system and the rule of law.[56] It recognises the personal freedoms of citizens as inviolable.[57] Arrests are to be made with the approval or by the decision of a people's procuratorate or by decision of a people's court and a public security organ must make it. It also specifies that unlawful deprivation or restriction of citizen's personal freedom by detention or other means is prohibited as also unlawful search of the person of the citizens.[58]

Croatia

In Croatia treaties properly ratified and published are considered to be part of the Republic's internal legal order and are, in respect of their legal effect, above the law.[59]

Cyprus

Cyprus recognises the predominance of international law and gives vital importance particularly to human rights norms. It has ratified almost all international legal instruments relevant to human rights and has accepted the compulsory jurisdiction of the European Court of Human Rights and the optional clause of Article 36 (2) of the Statute of the International Court of Justice. The legal instruments, from the date of their publication in the Official Gazette are treated to have been incorporated into the Republic's municipal law

[56] Constitution of the People's Republic of China adopted in 1982, Article 5
[57] *Id.*, Article 37
[58] *Ibid.* See also Stephen C. Angle, *Human Rights and Chinese Thought: A Cross Cultural Inquiry*, Cambridge University Press, UK, 2002.
[59] Constitution of Croatia adopted in 1990, Article 134

and have from the date mentioned superior force to any municipal law.[60] If the international convention is non-self executing, the legislature has a legal obligation to enact appropriate legislation to harmonise municipal law to make the convention fully enforceable. Part II of the Constitution sets out the Fundamental Rights and Liberties, which is almost a verbatim reproduction of those mentioned in European Convention of Human Rights and Fundamental Freedoms and some expansion on it. The legislative, executive and judicial authorities are enjoined to secure, within the limits of their respective competence, the efficient application of human rights.[61] Any restrictions or limitations of human rights guaranteed under the Constitution have to be provided by law and have to be absolutely necessary only in the interest of the security of the Republic, or the constitutional order, or the public safety, or the public order or the public health, or for rights guaranteed by the Constitution to any person. Such limitations or restrictions are to be interpreted strictly as held by the Supreme Constitutional Court in *Fina Cyprus Ltd.* v. *The Republic.*[62] It stated that legislation involving interference with the Fundamental Rights and Liberties safeguarded under the Constitution and their construction is governed by the settled principle that such provisions should be construed in case of doubt in favour of the said rights and liberties. Individuals, after having exhausted all local remedies, have been granted recourse to various international instruments by submitting communications to the appropriate authorities under the optional clauses.

Czech Republic

Czech Republic's Constitution of 1992 allows human rights treaties to have direct effect and unqualified supremacy over legislation. Article 10 of the same provides that – 'ratified and promulgated accords on human rights and

[60] Constitution of the Republic of Cyprus - Article 169
[61] *Id.*, Article 35
[62] RSCC, Vol. 4, 33

fundamental freedoms, to which the Czech Republic has committed itself, are immediately binding and carry power superior to that of law (legislation).'[63] But nothing is mentioned in the constitution about treaties other than human rights treaties or about accession to any integrated organisation like the European Union. As these instruments are directly applicable, they are invoked before and directly enforced by the courts and administrative authorities.[64]

Denmark

The King acts on behalf of the Realm in international affairs.[65] But he cannot undertake any obligation, which for fulfillment requires the concurrence of the Parliament or otherwise is of major importance. By virtue of specific provisions the powers vested in the authorities of the Realm under the Constitution, by a statute, can be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and co-operation.[66]

Personal liberty is treated as inviolable which can be deprived only if it is warranted by law.[67] A person taken into custody should be brought before the judge within 24 hours. Similarly the dwelling is also treated as inviolable. Any house search, seizure or examination can take place only under a judicial order unless particular exception is warranted by statute.[68]

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[63] By Articles 87 (1) (a) and (b) the Constitution gives the Constitutional Courts jurisdiction to annul legislation or administrative acts conflicting with human rights treaties

[64] Judgment of the Supreme Court of Cyprus in Civil Appeal No. 6616, *Malachtou* v. *Aloneftis*, 20 January 1986

[65] Constitution of Denmark adopted in 1953. Section 19 (1)

[66] *Id.*, Section 20 dealing with the Delegation of Powers.

[67] *Id.*, Section 71

[68] *Id.*, Section 72

France

The President of the Republic is empowered to negotiate and ratify treaties.[69] Treaties or agreements relating to international organisations may be ratified or approved only by act of Parliament.[70] They take effect only after having been ratified or approved. If the Constitutional Council has ruled that an international agreement contains a clause contrary to the Constitution, the ratification or approval of the agreement is not to be authorised until the revision of the Constitution.[71]

Constitutions of 1946 and 1958 have carried on the idea of treaties' superiority over legislation, subject, however, to the new requirement of reciprocity, a pattern followed by the Francophone countries of Africa.[72] The 1946 Constitution of France provided that treaties should have force superior to that of statute law. The later formulation of the same provided that duly ratified treaties shall be superior to laws on condition of reciprocity that is if the treaty in any particular case is likewise observed by the other State party. This is said to raise the question as to how reciprocity is to be defined and who is to decide whether it exists in the sense of the wording in the Constitution.[73]

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[69] Constitution of the Republic of France adopted in 1958 - Article 52

[70] *Id.*, Article 53

[71] *Id.*, Article 54. The President made a reference under this to the Constitutional Council concerning the Maastricht Treaty, which concluded, in *Re Treaty of European Union "Maastricht I"*, Constitutional Council (France), 9 April 1992, that three provisions of the Treaty were incompatible with the Constitution. A constitutional amendment was made to provide for the transfer of necessary powers. In *Re Treaty of European Union "Maastricht II"*, Constitutional Council (France), 2 September 1992, the Council held that the Treaty was now fully compatible with the Constitution as amended. Cases referred to in *The Relationship between European Community Law and National Law : The Cases*, Ed. Andrew Oppenheimer, Grotius Publications, Cambridge University Press, Great Britain, 1994

[72] *Id.*, Article 55

[73] Robert R. Wilson, "International Law in New National Constitutions", Editorial Comment, 55 Am. J. Int'l. L. 432, 435. See for the relation of the French Constitution to the European Union, P. Oliver, "The French Constitution and the Treaty of Maastricht", 1994 Intl. & Comp. L.Q. 1

France stands out in conforming to international standards set by the European Convention on Human Rights (ECHR)[74] with respect to suspects, defendants and victims of criminal processes. The French parliament, in June 2000, adopted the *Loi* touching upon different aspects of investigation, detention, trial and appeals, with the object of 'reinforcing the presumption of innocence and the rights of victims'.[75] Till these reforms, the police was not obliged to tell the suspect either of his right to silence or of the nature of enquiry in connection with which he was being held, he had access to his defence lawyer for a mere 30 minutes that too only after 20 hours of detention (*garde a' vue*) and there was no appeal against conviction for the most serious offences, the *crimes*, which was tried by the *cour d' assises*.

Article 55 of the French Constitution requires compliance with the ECHR. The reforms are an attempt to bring France in line with most European countries. Reform to Article 63-1 of the *Code de Proce'dure Pe'nale* (CPP) requires the police to inform the suspect of the reasons for his detention in police custody.[76] A new *juge des liberte's et de la de'tention* (JLD) is introduced to decide the issue of detention during investigation.[77] The European Court had also criticised the provision in Article 583 whereby the appellants to the *Cour de cassation* were to surrender to custody before the hearing of their appeal took place, as otherwise the appeal was automatically rejected. This requirement has now been dropped.

It is claimed that the rights based language of the reforms and the abrogation of important and contentious Articles in the CPP have been brought about not through a closed and internally generated desire for change and

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[74] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 came into force on 3 September 1953, ETS No. 5

[75] The reforms consist of some 144 articles, most of which modify parts of the CPP. Some came into effect immediately, some in January 2001 and the others in June 2001

[76] Article 5 (2) of the ECHR

[77] In 1993 a *juge de' legue'* was introduced with a similar object in mind but was not sustained. The JLD has a wider role than that of determining pre-trial detention during *instruction*. He has also to adjudicate on issues affecting the rights and liabilities of the suspect, complying with the ECHR requirements that an impartial judge should determine pre-trial detention

innovation, but rather, through a wider political necessity, in order to avoid continued criticism and condemnation under the ECHR.[78]

Under Article 55 of the Constitution, the French legal system appears to take a monist approach to the obligations under the international law. But, it is alleged, after empirical research, that though ECHR was part of the professional discourse of the *Magsitrats* and the defense lawyer, it was often understood in dilute and minimalist terms. The willingness to litigate Convention guarantees and rely upon them in domestic courts is not firmly established.[79] The *Cour de Cassation* has been following the policy of resistance to the supranational effect of the Convention law and preference for preservation of judicial autonomy and national sovereignty. It might require a re-look on its policies after these reforms.

A new preliminary Article inserted at the start of the CPP by way of the reforms sets out the principles governing criminal procedure, which may be adopted by the courts as a guide to interpretation. It states that criminal procedure must be fair, allow issues to be debated by all sides and maintain a balance between the rights of the parties. There must be a clear separation between investigation and prosecution and those responsible for trying the case. There should be equal treatment of accused persons and the judiciaries are also responsible for protecting the rights of the victims. Those suspected of, or prosecuted for, committing offences are presumed innocent, as their guilt has not been established. They are entitled to know the nature of the charges against them and to have a defense lawyer. Any restriction on a person's liberty must be determined by a judicial authority and be strictly necessary, in proportion to the gravity of the offence and not infringe the dignity of that person. The decision whether or not to pursue the charges should be made within a reasonable time.

[78] Jacqueline Hodgson, "Suspects, Defendants and Victims in the French Criminal Process: The Context of Recent Reform", 51 Intl. & Comp. L. Q. 781 (2002), 784

[79] *Id.*, 785 – 86

All convicted persons have the right to have their conviction reviewed by another court.[80]

Breaking from the traditional inquisitorial roots, it is now prescribed that the witnesses may be no longer held in *garde a' vue* during any investigation. Though this reform was slightly reversed by specifying strictly the grounds for suspecting a person, by the '*petite loi*' of February 2002, the grounds have been diluted from 'evidence giving rise to suspicion' to 'one or more reasons to suspect'.[81]

Another major change is that a person in custody of police must be told of the nature of the offence of which he is suspected and of his right to silence.[82]

Another reform is that now a person will not be automatically *mis en examen* on referral by the *procureur.* The *juge d' instruction* is required to hear the suspect, in the presence of his lawyer, before deciding whether or not to make him *mis en examen* (which now requires precise and corroborating evidence of guilt, not simply suggestive of involvement) or simply a *te'moin assiste'* (which requires only some evidence suggesting guilt). By virtue of Article 181, at the close of *instruction*, the *juge d' instruction* sends the case directly to the *Cour d' Assises* without sending it to the *Procureur* first. If no charges are brought against the *mis en examen*, he can request for compensation for costs incurred including that of the lawyer.

Juveniles now have access to defense lawyer at the start of detention and their interrogation is to be videotaped.

There is a conscious attempt to reduce delay at every stage of criminal process. This is done by imposing timetables, obligating reporting on the progress of investigations and by imposing a limit on the amount of time a

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[80] *Id.*, 792

[81] *Id.*, 803

[82] The *petite loi* of 2002 has intervened to modify the way in which the suspect is informed of his right to silence – the suspect will no longer be advised that he 'has the right not to respond to questions put', but that 'he has the choice to be silent, to respond to questions put him or to make a statement'. The initial plans to introduce a warning that silence may harm the defence were dropped. *Id.*, 804

person may be remanded in pre-trial custody.[83] The trial procedure now permits lawyers to question witnesses directly rather than through the trial judge, both in the *tribunal correctionel* as well as in the *cour d' assises*.[84]

It is also possible to prefer an appeal from the decision of the *cour d' assises* to a differently constituted *cour d' assises* with 12 jurors who are to decide by a 10:2 majority.[85]

The criminal justice system is in transition in France. It is moving towards greater openness influenced by the ECHR. It has been obligated to make changes to its criminal procedure in response to particular European Court decisions as well as to give effect to basic Convention guarantees. It is observed that those responsible for reforms are walking a tight rope between, on the one hand, ensuring that France remains faithful to the European Convention and maintains its self-image as the homeland of human rights, and the other, proffering reassurances that the change which this entails in no way represents a move towards more adversarial process.[86]

The reforms were prompted by the Report of the Delmas – Marty Commission which proposed sweeping changes to make criminal process more coherent, transparent and in conformity with the ECHR.[87]

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[83] In the *tribunal correctionel*, a person may only be remanded for a two-month period, renewable twice. If he is not put to trial after six months, he is to be released (Art. 179). In the *cour d' assises*, the period is one year, renewable twice in exceptional circumstances for six months, and if not put on trial for two years and is in custody, the accused is to be released (Article 215-2). *Id.*, 809

[84] Articles 312 and 442

[85] The *cour d' assises* tries the most serious offences, *crimes*, and comprises a jury of 9 and 3 judges who together determine guilt or innocence and the sentence from which until the reforms there was no appeal. The February 2002 '*petite loi*' also allows the *procureur* to appeal against an acquittal.

[86] Hodgson *supra* n. 78, 813

[87] Referred to in Hodgson *supra* n. 78, 813

Germany

The Constitution considers human dignity as inviolable and the German People acknowledge inviolable and inalienable human rights as the basis of every human community, of peace and of justice of the world.[88] The Federation can, for the purpose of Germany's participation in the development of the European Union to realise a unified Europe, with the consent of the *Bundesrat* (Senate) delegate sovereign powers.[89] The Federation may, by legislation, transfer sovereign powers to intergovernmental institutions. For the maintenance of peace, the Federation can join a system of mutual collective security and in doing so it will consent to such limitations upon its rights of sovereignty to bring about and secure a peaceful and lasting order in Europe and among the nations of the world.[90]

The Basic Law of Federal Republic of Germany has made general rules of public international law superior to legislation and directly invocable by individuals.[91]

Intrusion on life and personal integrity may be made only pursuant to a statute.[92] Similarly, home is also inviolable and searches may be ordered only by a judge or, in emergency, by other organs legally specified.[93] Capital punishment is abolished by the Constitution.[94] Article 103 mandates due process requirements including hearing in accordance with law, prior declaration of an act as a crime and protection from double jeopardy. Further, it also provides for the legal guarantees in the event of deprivation of liberty, which can be done only by virtue of a formal statute. The person detained must not be subjected to mental or to physical ill treatment. The judge has to decide upon detention

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[88] Constitution of Germany (*GRUNDGESETZ*) adopted in 1949. Article 1
[89] *Id.*, Article 23
[90] *Id.*, Article 24
[91] *Id.*, Article 25
[92] *Id.*, Article 2
[93] *Id.*, Article 13
[94] *Id.*, Article 102

within a day and a relative of the detained person has to be notified of the decision to detain.[95]

Greece

The generally recognised rules of international law and the international conventions after their ratification by law and their having been put into effect constitute integral part of the Greek law. They have an overriding effect over any municipal law provision to the contrary.[96] The application of such rules to aliens is based on condition of reciprocity. By virtue of the same provision, it is also possible to recognise the competence of bodies of international organisations by virtue of treaties and agreements. Similarly, Greece can accept restrictions on the exercise of national sovereignty by laws passed if this is dictated by important national interests, if human rights and foundations of the democratic regime be not violated and if it is effected on the basis of the principle of equality and on condition of reciprocity.

The Constitution recognises respect for and protection of human dignity as the primary obligation of the State.[97] All persons within the State enjoy full protection of their life, honour and freedom with exceptions as are permitted in such cases as provided for by international law.[98]

A judicial warrant stating the reasons is required in all cases of arrest except in crimes committed *in flagrante delicto*, the arrested person should be brought before the Magistrate within 24 hours, requiring him to decide on the issue within at the most three days.[99] Retroactive crime and punishment are prohibited. So are torture and any kind of bodily ill-treatment, injury to health, or the use of psychological pressure or any other offence against human dignity.

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[95] *Id.*, Article 104
[96] Constitution of Greece adopted in 1975 - Article 28.
[97] *Id.*, Article 2
[98] *Id.*, Article 5
[99] *Id.*, Article 6

Israel

Israel does not have a written Constitution in one single document but has a number of Basic Laws. Interestingly, there is absolutely no mention of any international law or norms in the relevant Basic laws.

Basic human rights in Israel are based on the recognition of the value of the human being, and the sanctity of his life and his freedom respected in the spirit of the principles of the Declaration of Independence of the State of Israel.[105] It prescribes that there shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or by any other manner.[106] It further states that there shall be no violation of rights under this Basic Law except by a Law fitting the values of the State of Israel.[107]

Italy

The Italian Constitution is silent on the effect of treaties in internal law.[108] This may be due to extreme positivism of the dualists which provided the doctrinal underpinnings for defeating the forward looking proposals regarding treaties.[109]

Japan

Article 73 of the Constitution provides that the cabinet shall conclude treaties but it shall obtain prior or, depending upon circumstances, the subsequent approval of the *Diet*. What kinds of international agreements would

[105] Basic Law: Human Dignity and Liberty adopted in March 1992. Section 1
[106] *Id.*, Section 5
[107] *Id.*, Section 8
[108] Article 10
[109] Stein, *supra* n. 1, 428

require approval is not clear, as the Constitution does not define a treaty. This question has, therefore, been taken to the courts on a case to case basis.[110]

Luxembourg

By the Constitution, the State guarantees the natural rights of the individual and of the family.[111] The Grand Duke concludes the treaties. These do not come into effect until they have been sanctioned by law and published in the manner laid down for the publication of laws.[112] The exercise of powers reserved to the legislature, executive and judiciary may be temporarily vested by treaty in institutions governed by international law.[113]

Individual freedom is guaranteed and no one may be prosecuted except for cases and according to procedure laid down by law. No one is to be arrested without a reasoned order of the judge (to be given at the time of arrest or within 24 hours) except in *flagrante delicto*. The death penalty on political grounds and civil death and branding are abolished.[114] The home is also treated as inviolable.

Mexico

The Constitution prescribes that – the Constitution, the laws of the Congress of the Union that emanate therefrom, and all treaties that have been made and shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the supreme law of the whole Union. The judges of each state shall give effect to the said Constitution, the

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[110] *Japan* v. *Shigeru and others*, 32 ILR 43 (1952); *Japan Industrial Exhibition 1969 at Peking and Shanghai* v. *The State*, (1971) referred to in K. I. Igweike, "The Definition and Scope of 'Treaty' Under International Law", 28 Ind. J. Int'l. L. 249 (1988)

[111] Constitution of Luxembourg adopted in 1868

[112] *Id.*, Article 37

[113] *Id.*, Article 49 *bis* dealing with international institutions.

[114] *Id.*, Article 18

laws, and treaties, in spite of any contradictory provisions that may appear in the constitutions or the laws of the State.[115]

Nepal

In Nepal, the ratification of, accession to, acceptance of treaties or agreements to which the Kingdom or the Government is to become a party is to be determined by law.[116] Unless a treaty or agreement is ratified, acceded to, accepted or approved in accordance with this Article, it is not binding on the Government or the Kingdom. No treaty is permissible that is detrimental to the territorial integrity of Nepal.

The Constitution specifically provides that no person shall be deprived of his personal liberty, save in accordance with law and that no law shall be made which provides for capital punishment.[117] Article 14 provides for the rights regarding criminal justice including prohibition of retroactivity of criminal law, double jeopardy and right against self-incrimination. No person detained shall be subjected to physical or mental torture, nor be given any cruel, inhuman or degrading treatment. A person so treated is entitled for compensation. An arrested person is entitled to know the grounds for arrest and can consult a legal practitioner. The person arrested is to be brought before the judicial authority within 24 hours. The Constitution, like the Indian one, deals with Preventive Detention also which is prohibited except in case where sufficient grounds for the existence of an immediate threat to the sovereignty, integrity or law and order situation of the country.[118]

[115] Constitution of the Republic of Mexico adopted in 1917 as amended in 1934. Article 133
[116] Constitution of the Kingdom of Nepal adopted in 1990. Article 126 (1)
[117] *Id.*, Article 12 (1)
[118] *Id.*, Article 15

Netherlands

The Constitution obligates the Government to promote the development of the international rule of law.[119] Prior approval of the Parliament is required for the Kingdom to be bound by a treaty. The Parliament can provide for the cases where approval may not be necessary and where necessary, the manner in which it is granted.[120] Netherlands Constitution appears to have carried the priority of treaties principle to its logical end by making treaties superior even to the Constitution.[121] Article 92 enables conferment of legislative, executive and judicial powers on international institutions by or pursuant to a treaty. Once they are published the provisions of treaties and of resolutions by international institutions binds all persons by virtue of their contents.[122] Therefore, statutory regulations in force shall not be applicable if it is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.[123]

The Constitution abolishes capital punishment.[124] Article 15 provides that no one shall be deprived of his liberty other than in cases laid down by Parliament. It also mandates that the trial of such a person should take place within a reasonable period. It also provides for prior publication of an act as a crime, right to be heard and right to legal representative in legal and administrative proceedings.[125]

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[119] Constitution of Netherlands adopted in 1983- Article 90
[120] *Id.*, Article 91
[121] Art 91(3), 94 as amended in 1983
[122] *Id.*, Article 93
[123] *Id.*, Article 94
[124] *Id.*, Article 114
[125] *Id.*, Articles 16, 17 and 18, respectively.

New Zealand

New Zealand, like Canada and Israel, does not have a written Constitution. It has passed an Act to affirm, protect, and promote human rights and fundamental freedoms and to affirm the country's commitment to the international Covenant on Civil and Political Rights.[126] The Act has predominance over all other enactment whether passed before or after the passing of this Act. No provision can be impliedly repealed or revoked or held to be invalid or ineffective or refuse to apply any provision of this Bill of rights Act on the grounds of its inconsistency with any other provision.[127] The meaning of a provision consistent with the rights and freedoms enumerated in this Act should be preferred.[128]

By virtue of Section 8, no one shall be deprived of life on such grounds as are established by law and are consistent with the principles of fundamental justice. Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.[129] It guarantees a right to be secure against unreasonable search or seizure of person or property and not to be arbitrarily arrested or detained.[130] Section 23 deals with the rights of an arrested or detained person including the rights to be informed the reason at the time of arrest, to consult and instruct a lawyer, to get validity of arrest determined without delay by way of habeas corpus, to be charged promptly, to refrain from making any statement (also to be informed of that right) and to be treated with humanity and with respect for the inherent dignity of the person. The Act also deals with the aspects of criminal justice and fair trial like benefit of a trial by jury (where more than 3 months imprisonment

[126] New Zealand Bill of Rights Act 1990 – Preamble. This has also been improved upon by amendments through the Human Rights Act 1993.
[127] *Id.*, Section 4
[128] *Id.*, Section 6
[129] *Id.*, Section 9
[130] *Id.*, Sections 21 and 22

...an be given), public hearing by an independent and impartial court, to be ...resumed innocent, not to be compelled as a witness or to confess, benefit of ...sser penalty if varied by legislation and to make an appeal to a higher court.[131] ...rinciples of non-retroactivity of penal laws and double jeopardy are also ...prescribed under section 26.

Norway

Under the Constitution, the King has the right to conclude and denounce ...onventions.[132] In the same Article, it is envisaged that treaties on matter of ...pecial importance and, in all cases, treaties whose implementation, according to ...he Constitution, necessitates a new law or a decision by the *Storting* ...Parliament), are not binding until the *Storting* has given its consent thereto. In ...order to, inter alia, promote international rule of law and co-operation between ...nations, the *Storting* has been empowered, with a 3/4th majority, to consent that ...an international organisation shall have the right, within objectively defined ...fields, to exercise powers that are normally vested in the country's authorities, ...excluding the power to alter the Constitution.[133] This provision is not applicable ...in cases of membership in an international organisation whose decisions apply to ...the country purely under the international law.

Article 110c declares that it is the responsibility of the authorities of the ...State to respect and ensure human rights with specific provisions for the ...implementation of treaties to be determined by law. It lays down that no one ...may be convicted except according to law or be punished except after a court ...judgment. In a bare statement it says that interrogation by torture must not take ...place.[134] By Article 97 it also prohibits retroactive law.

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[131] *Id.*, Sections 24 and 25
[132] The Constitution of the Kingdom of Norway adopted in 1814. Article 26
[133] *Id.*, Article 93
[134] *Id.*, Article 96

Pakistan

1962 Constitution of Pakistan authorised the Central legislature of the country to make law concerning "Offences against the law of nations".[135] Being in such turmoil, it is not clear which constitution or law is to be looked upon to see its position in these matters.

Portugal

In international relations, Portugal is governed by the principles, among others, of national independence and respect for human rights.[136] Article 8 deals with the effect of international law on the domestic field. It provides that the rules and principles of general or customary international law are an integral part of the Portuguese law. Rules provided for in international conventions that have been duly ratified or approved shall apply in national law, after their official publication, so long as they remain internationally binding on the State. Similarly, rules made by the competent organs of international organisations to which Portugal belongs apply directly in national law to the extent that the constitutive treaty provides. The Government is empowered to negotiate and agree to international conventions. It approves international agreements by decree.[137] The President of the Republic, exercising his powers in international relations, ratifies international treaties once they have been duly approved.[138]

The Constitution is elaborate in dealing with the rights under the criminal justice administration. While declaring human life as inviolable it provides that

[135] Article 132 and Third Schedule - paragraph (f)
[136] Constitution of the Portuguese Republic adopted in 1974, Fourth Revision in 1997 - Article 7(1)
[137] *Id.*, Article 197
[138] *Id.*, Article 135

...no case shall the death penalty be applied.[139] Similarly, it declares the moral and physical integrity of the person also to be inviolable while specifying that no one shall be subjected to torture or to cruel, degrading or inhuman treatment or punishment.[140] Article 27 guarantees that no one shall be deprived of his liberty unless as a consequence of a sentence or of a security measure judicially enforced. This guarantee does not extend to detention *in flagrante delicto*, serious offence punishable with more than 3 years imprisonment etc. Persons detained should be informed the reasons for arrest or detention and of his rights. Detentions should be scrutinised by a judicial authority within 48 hours, remand in custody is of exceptional nature and should be subject to time limitations laid down by law.[141] By virtue of Article 29, criminal act or omission should have been punishable prior to their commission except where, within the limits of municipal law of punishment, it was a crime under general principles of international law that are customarily recognised. It also provides for any benefit of variation of law to go to the offender and prohibits double jeopardy. Interestingly, the Constitution mandates that no one shall be subjected to a sentence or security measure that involves deprivation or restriction of liberty for life or for an unlimited or indefinite term.[142] The right of habeas corpus is available on which the court should rule within 8 days, in Article 31. Guarantees in criminal proceedings include safeguards for the defence, including appeal, presumption of innocence, trial within shortest period of time compatible with the defence guarantees, right to counsel at all stages and that the proceedings are to be accusatory in structure, in which victim is also entitled to take part.[143] The Article specifically prohibits reliance on evidence obtained by torture, force, infringement of the physical or moral integrity of the individual, or wrongful interference with private life, the home, correspondence or telecommunication.

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[139] *Id.*, Article 24
[140] *Id.*, Article 25
[141] *Id.*, Article 28
[142] *Id.*, Article 30 (1)
[143] *Id.*, Article 32

Romania

Under the Romanian Constitution ratified treaties are part of domestic law.[144] Moreover Constitutional provision on basic human rights must be interpreted in accordance with UDHR and ratified treaties.

Russian Federation

The Constitution declares that the rights and freedoms of humans are of supreme value and it is the duty of the state to recognise, respect and protect the rights and liberties of humans and citizens.[145] It treats the commonly recognised principles and norms of international law and the international treaties as part of internal legal system. The treaties are superior, in case of conflict, to internal law.[146] But then the Constitutional Court is empowered to review the constitutionality of any treaty.[147] Russia being a strong Presidential Republic, the 'executive agreements' have been accorded the same standing as treaties approved by the legislature.[148]

As far as generally recognised principles and norms of international law are concerned they are also treated as part of internal law but not superior to them. But human rights and freedoms are guaranteed in accordance with such principles and norms.[149] These are considered as inalienable. As per the Constitution, the Russian Federation may participate in interstate unions and may transfer parts of its powers to them in accordance with international treaties if this transfer does not lead to a restriction on human rights and does not

[144] Constitution of Romania - Articles 11 (2) and 20.
[145] Constitution of the Russian Federation approved by a popular referendum on December 12, 1993 entered into force on December 25, 1993. Article 2
[146] *Id.*, Article 15 (4)
[147] *Id.*, Article 125 (2) (g)
[148] Stein, *supra* n. 1, 443
[149] *Supra n.* 145, Articles 15(1), 17(1) and 69

contravene the constitutional order.[150] The relation with foreign states and the conclusion of international treaties of the Russian Federation is within the jurisdiction of the federal government.[151] The constituent republics and provinces have right to establish their own 'international and foreign economic relation' with foreign states, a limited treaty making power.[152]

If the constitutionality of the proposed treaty is challenged, the Court may be drawn into the national procedure of ratification.[153] Treaties that conflict with the Constitution "are not [to be] given effect and are not applicable". It is observed that – this means that if a treaty submitted for ratification is considered to be unconstitutional by the Court, it may be ratified only after the Constitution has been amended.[154] The chapter on human rights of the Russian Constitution provides a clause that all persons enjoy a constitutionally protected right to submit petitions to international organs for the protection of human rights and freedoms, if all the available domestic legal remedies have been exhausted.[155]

The Constitution of the erstwhile USSR[156] proclaimed that the relation of the USSR with other States should be based on the principle of 'fulfillment in good faith of obligations arising from the generally recognised principles and rules of international law, and from international treaties signed by the USSR.' This broad clause was never interpreted as a general incorporation of international norms into Soviet domestic law and that it was applicable on transformation, a dualist approach.[157]

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[150] *Id.*, Article 79, Stein, *supra* n. 1, 446
[151] *Id.*, Article 71(k)
[152] *Id.*, Article 72 (1) (n)
[153] The President of the Russian Federation, the Federal Council, the State *Duma*, one-fifth of the deputies of either chamber of the legislature, the Government, the Supreme Court, the Supreme Arbitration Tribunal, and the legislative and executive organs of the subjects of the Federation may all bring such challenges before the Constitutional Court. Gennady M. Danilenko, "The New Russian Constitution and International Law", 88 Am. J. Int'l. L. 451 (1994), 456
[154] *Ibid.*
[155] Article 46(3)
[156] Constitution of the USSR; Article 29
[157] Danilenko, *supra* n. 153, 458

Capital punishment may, until its abolition, be instituted by federal law as an exceptional punishment for especially grave crimes against life.[158] No one is to be subjected to torture, violence or any other harsh or humiliating treatment or punishment.[159] The aspects of the rights of a person under the criminal justice administration are also dealt with in detail. Article 22 provides that no person shall be arrested or kept in detention for more than 48 hours without an order of a court of law. On trial, a person is presumed to be innocent, not obliged to prove his innocence, entitled to the benefit of doubt, has a right not to be repeatedly convicted of the same offence, has a right to go on appeal and right to remain silent. Evidence obtained in violation of federal law is not allowed. Retroactive law is not applicable except in case of benefit to the person.[160]

Singapore

The Constitution empowers the State to enter into treaty, agreement, contract, pact or other arrangement with any other sovereign state or with any federation, confederation, country or countries or any association, body or organisation therein, where such a document provides for mutual or collective security or any other object or purpose whatsoever which is, or appears to be, beneficial or advantageous to Singapore in any way, without derogating from Article 6, which prohibits surrender of sovereignty.[161]

Article 9 states that no person shall be deprived of his life or personal liberty save in accordance with law. An arrested person ought to be informed of the grounds of his arrest, should be allowed to consult a legal practitioner of his choice and should be produced before a magistrate within 48 hours to decide on

[158] *Supra* n. 145, Article 20
[159] *Id.*, Article 21 (2)
[160] *Id.*, Articles 22, 49, 50, 51 and 54
[161] Constitution of Singapore adopted in 1963 - Article 7

further detention. The constitution also protects against retrospectivity and prohibits repeated trials.[162]

Slovak Republic

Slovak Republic's Constitution,[163] at Article 11, provides that – "International treaties on human rights and basic freedoms ratified by the Slovak Republic and promulgated in the manner prescribed by law shall have priority over laws (legislation) to the extent that the treaty ensures a greater scope of Constitutional rights or freedoms." Nothing, however, is mentioned about the general international law. Articles 125 and 132 (1) gives jurisdiction to the Constitutional Court to pass upon the conformity of 'generally binding legal provisions' with duly promulgated international treaties and to declare any conflicting provisions ineffective. Interestingly, if the respective organs fail to comply within six months time the contested provision lose their validity. Article 144 (2) provides that as far as ordinary courts are concerned, the judges are bound also by an international treaty if so provided by the Constitution or a Law (legislation)

Slovenia

Under the Slovenian Constitution,[164] treaties are applied directly and laws and regulations must be in compliance with generally accepted principles of international law and valid treaties.[165]

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[162] *Id.*, Article 11
[163] Adopted in 1992
[164] Adopted in 1991
[165] *Id.*, Articles 8 and 153 (2)

South Africa

In South Africa, prior to the adoption of the interim Constitution in 1993, the relevance and applicability of customary international law was settled almost entirely by case law. Before 1978, the courts had indirectly held customary international law as part of municipal law. South Africa had followed the British model of taking notice of customary international law.[166] In 1978, it was clearly held that it was obvious that international law is to be regarded as part of South African law on the basis of incorporation.[167] But there it is also observed that only such rules of customary international law are to be regarded as part of South African law as are either universally recognised or have received the accent of the country.

As far as status of treaties in South African law was concerned, it was held in *Pan American case*[168] that, as a general rule, the provisions of an international instrument are not embodied into the municipal law, except by legislative process. In contrast to the incorporation theory, which (with exceptions) applied to international customary law, the court has affirmed that the translation theory applied to treaties.[169]

Under the interim Constitution of 1993, it was provided that the Parliament shall, subject to the Constitution, be competent to agree to the ratification of or accession to an international agreement negotiated and signed in terms of section 82 (1) (I) and where Parliament agrees to the same under subsection (2), such international agreements shall be binding on the Republic and shall form part of the law of the Republic, provided Parliament expressly so provides and such agreement is not inconsistent with the Constitution. And as

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[166] Rosalie P. Schaffer, "The Inter-relationship between Public International Law and Law of South Africa: An Overview", 32 Intl. & Comp. L. Q. 277, 296 (1983)

[167] *Nduli and Another* v. *Minister of Justice and Ors.*, 1978 (I) SA 893 (AD) referred to in Dermott J. Devine, "The Relationship Between International Law and Municipal Law in the Light of Interim South African Constitution", 44 Intl. & Comp. L. Q. 1 (1995), 2

[168] 1965 (3) SA 150 (AD), 161

[169] Devine, *supra* n. 167, 5

far as rules of customary international law was concerned, such of those rules binding on the Republic shall, unless inconsistent with the Constitution or an Act of Parliament, form part of the law of the Republic. The translation principles followed in the interim constitution appears strict as the Constitution requires not merely legislative implementation of a treaty (express provision that if forms part of the law of the Republic) but that this must be preceded by the agreement of the Parliament.[170]

The new Constitution[171] expressly provides for statutory interpretation of the Bill of Rights provisions.[172] It states that while interpreting the same a court, tribunal or forum, among other things, must consider international law. It also states that when interpreting any legislation, and when developing the common law or customary law, the spirit, purport and objects of the Bill of Rights must be promoted. It further states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.[173] As far as international law is concerned, it follows most of the provisions in the interim constitution. An international agreement binds the Republic only after both the National Assembly and the National Council of the Provinces has approved it. It becomes law when it is enacted into law by national legislation. But a self-executing provision that has been approved by Parliament is law, unless it is inconsistent with the Constitution or an Act of Parliament.[174] Similarly, customary international law is the law of the Republic

[170] *Id.*, 6
[171] Constitution of South Africa adopted in 1996
[172] The Bill of Rights will not only apply between the state and the citizen (vertical application) but also, to the extent that the rights permit, between private persons (horizontal application). See Jeremy Sarkin, "The Development of a Human Rights Culture in South Africa", 20 Hum. Rts. Q. 628 (1998), 632
[173] Section 39 - Interpretation of Bill of Rights. Bill of Rights provided under Chapter 2 of the Constitution. See for the position under the interim constitution section 35 (1), Anton J. Steenkamp, "The South African Constitution of 1993 and the Bill of Rights: An Evaluation in Light of International Human Rights Norms", 17 Hum. Rts. Q. 101 (1995), 105
[174] *Id.*, Section 231

unless it is inconsistent with the Constitution or an Act of Parliament.[175] And reasonable interpretation of legislation consistent with international law must be preferred.[176]

The Constitution also provides for the establishment of a Human Rights Commission to promote, *inter alia*, the protection, development and attainment of human rights.[177] The interim Constitution had provided that if the Commission is of the opinion that if any proposed legislation might be contrary to Chapter 3 (Bill of Rights therein) or to the norms of international human rights law which form part of South African law or to other relevant norms of international law, it shall immediately report the fact to the relevant legislature.[178] Such a broad position is missing in the new Constitution.

It has also been criticised that neither the administrative arm of government nor Parliament has a strategy for reviewing international human rights instruments and determining whether to sign them. Similarly that, South Africa's present obligations are not really understood by government and little process has preceded signing and ratifying instruments to determine whether South African law complies with them.[179] Nor has any review been undertaken to identify such laws that are to be amended so as to conform to ratified international treaties.

Section 12, dealing with freedom and security of the person, among other rights, includes right not to be deprived of freedom arbitrarily or without just cause, not to be detained without trial, not to be tortured in any way and not to be treated or punished in a cruel, inhuman or degrading way. The rights of an arrested, detained and accused person are covered extensively in the Constitution including the right to remain silent, against self incrimination, to be brought before a court within 48 hours, to be charged on the first appearance in court

[175] *Id.*, Section 232
[176] *Id.*, Section 233
[177] *Id.*, Section 184
[178] Section 116 (2) of the interim constitution
[179] Sarkin, *supra* n. 172, 636

after being arrested or to be informed of reasons for detention to continue, consult a legal practitioner, to communicate with relatives and right to a fair trial.[180] Even in cases of emergency, rights of human dignity and life and entirely non-derogable while some others are derogable to the extent provided under section 37.

On the question of bail, it is argued that the new provision at Section 35 (1) (f) which states that – 'everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions', is a dilution of the corresponding provision in the Interim Constitution of 1993.[181] This has been done with the intention to ensure that bail legislation enacted in 1995,[182] which reverses the burden of proof by placing it on the accused in serious offences, survives constitutional scrutiny. This provision not only violates human rights but also discriminates inequitably against unrepresented accused persons and its potential for abuse is enormous.[183]

In order to increase transparency and to build a human rights culture in the police force, a civilian structure, the Independent Complaints Directorate has been established. It is an administrative mechanism, independent of Police Department, designed to deal with complaints and allegations of abuses by police. It is said to have been ineffective due to its lack of resources and its limited authority with the only power to make recommendations.[184]

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[180] *Supra n.* 171, Section 35
[181] Section 25 (2) (d) in the Interim Constitution
[182] Criminal Procedure Second Amendment Act of 1995
[183] Sarkin, *supra* n. 172, 633
[184] Sarkin, *supra* n. 172, 646

South Korea

In South Korea, the generally recognised rules of international law as also ratified and promulgated treaties are to have the same effect as that of the laws of Korea.[185]

Spain

In 1931, the Constitution of Democratic Socialist Spanish Republic established for the first time in history precedence of treaties over ordinary legislation enforceable by a Constitutional Court.[186] The position is reiterated in the new Spanish Constitution of 1978.[187] Validly concluded treaties constitute part of internal legal order once they are published. Their provisions can be varied only in the manner provided for in the treaties themselves or in accordance with general norms of international law. Prior consent of the Parliament is necessary before giving consent in certain cases of treaties.[188] Similarly, before the conclusion of an international treaty that contains stipulations contrary to the Constitution a constitutional revision must take place.[189] Treaties can be concluded, with proper authorisation, which attribute to an international organisation or institution the exercise of powers derived from the Constitution.[190] The Article further obligates the Parliament or the Government, depending on cases, to guarantee compliance with these treaties and the resolutions emanating from the international or supranational organisations.

[185] Constitution 1960 - Article 7.
[186] Stein, *supra* n. 1, 428, Articles 7 and 65
[187] Constitution of Spain adopted in 1978 - Article 96 (1)
[188] *Id.*, - Article 94. In other cases the House of Representatives and the Senate should be immediately informed of the conclusion of the treaties or agreements.
[189] *Id.*, Article 95
[190] *Id.*, Article 93

Under the Constitution, the norms relating to basic rights and liberties, which are recognised by the Constitution, should be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain.[191] Article 15 declares that everyone has the right to life and physical and moral integrity and in no case may be subjected to torture or inhuman or degrading punishment or treatment. The Article further declares that the death penalty is abolished except in cases established by military penal law in times of war. Personal liberty is dealt with in Article 17 which states that deprivation cannot be without the observance of the form prescribed and for the cases laid down by law. Preventive detention cannot go beyond 72 hours without a judicial authority. The person must be informed of the rights and reason on his arrest, not be forced to make a statement and granted the assistance of an attorney during police and judicial proceedings.[192] The Constitution further guarantees a public trial without delays, to refrain from self-incrimination, refrain from pleading guilty and to presumption of innocence.[193] It requires prior declaration of an act or omission as a crime.[194] Interestingly, the Constitution also stipulates that prison sentences and security measures should be oriented towards re-education and social rehabilitation and may not consist of forced labour,[195] a provision peculiar to the Constitution.

Sweden

The Swedish Constitution requires the Parliament to give its consent before an instrument of ratification is deposited where treaty in question requires implementing legislation or involves substantial expenditure or is otherwise

[191] *Id.*, Article 10 (2)
[192] *Id.*, Article 17
[193] *Id.*, Article 24
[194] *Id.*, Article 25 (1)
[195] *Id.*, Article 25 (2)

important".[196] Even where such consent has been given, legislation may still be required where a treaty grants individual rights or imposes duties.[197] It is possible to delegate to a limited extent the right of decision making to an international organisation excluding some core areas concerning enactment, amendment, or repeal of a fundamental law, of Parliament Act etc.[198]

In relation to European Convention on Human Rights, the incorporation law provides that the Convention is to have the status of an ordinary statute. No law or regulation is to be issued which is to be in conflict with Sweden's obligations under the Convention.[199] All courts and administrative agencies are in principle obliged to refuse to apply a norm that conflicts with the Convention, an extremely diffuse situation.

In Sweden, the Convention, like EC law, permeates large areas of national law. But unlike the EC law, it does not explicitly take precedence in the event of a conflict with national law. Instead, it applies in parallel with other national law. To put it another way, the Convention, as interpreted by its case law, is largely a set of principles. As is well known principles differ from rules in that a rule is either applicable or not, whereas several principles can apply simultaneously, all pulling in different directions. The process of applying these principles is described as one of 'concretisation' rather than 'interpretation'.[200] The general application of the Convention means that for a national court it is not a question of deciding whether a rule contained in the Convention or in another statute is more appropriate and then applying it. Instead, the latter has to be applied in the light of the former. This position is similar to what happens in

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[196] Constitution of Sweden adopted in 1975, Chapter 10 – Article 2

[197] Iain Cameron, "The Swedish Experience on the European Convention on Human Rights Since Incorporation", 48 Intl. & Comp. L. Q. 20 (1999), 41

[198] *Supra* n. 196, Chapter 10 – Article 5

[199] *Id.*, Chapter 2 – Article 23; rather than encroaching the Parliament's freedom to manoeuvre, the courts are, however, encouraged to solve the problem of possible conflicts by application of principles of interpretation like *lex specialis, lex posterior*, 'treaty conform' construction and the principle that 'the human rights treaties should be given special significance in the event of conflict with other norms. Cameron , *supra* n. 197, 24

[200] Cameron , *supra* n. 197, 35

...State which has a written Constitution, where the statutes have to be applied in ...e light of the general rules set out in the Constitution.

The Constitution expressly prohibits capital punishment.[201] Similarly, all ...eople are protected against corporal punishment and against torture or any ...edical influence or intervention for the purpose of extorting or suppressing ...atements.[202] In case of deprivation of liberty, a person can have his case tested ...efore a court of law or a duly constituted tribunal without undue delay.[203] The ...onstitution also prohibits retroactivity of penal law and punishments.[204] By ...rtue of Article 20, all these rights are extended to foreigners also as they are ...quated with a Swedish citizen for this purpose.

The United States

The United States stands out as the best specimen for study where there ...as been a written constitution governing the field for well over two centuries. Historically, violation of treaties by the state was a prime concern of the Framers ...nd so they introduced the Supremacy Clause which declared the Constitution, ...ederal laws and treaties to have automatic domestic legal force and instructed ...he courts to give them effect directly without awaiting actions by the legislature ...f either the States or the federal government. It effectuated, in the words of an ...uthor, a wholesome incorporation of US treaties into domestic law, dispensing ...ith the need for retail transformation of treaties into domestic law by the Congress.[205]

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[201] *Supra* n. 196, Chapter 2 – Article 4
[202] *Id.*, Article 5
[203] *Id.*, Article 9
[204] *Id.*, Article 10
[205] Carlos Manuel Va'zquez, "The Four Doctrines of Self – Executing Treaties", 89 Am. J. Int'l. L. 695 (1995), 698. But what constitutes a treaty would depend upon the subject matter ...d the juridical character of a particular agreement – See Igweike, *supra* n. 110. See also ...man & Co. v. *US*, 224 US 583 (1912); *US* v. *Belmont*, 224 US 330 (1912); *Louis Wolf & Co.* ... *US*, 107 F.2d. 819 (1939); *George Warren Corpn.* v. *US*, 71 F.2nd. 434 (1934) referred to ...ere. Similarly, it was suggested that some treaties, by their character, could not be self

The US Supreme Court in *The Paquete Habana* said –

> "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."[206]

It is accepted that both customary law and treaties are law of the US – treaties by express reference in Article VI of the Constitution, customary law without any express "incorporation". The place of international law in the hierarchy of US law, however, has been largely established for treaties but hardly for customary law. By construction of the Supremacy Clause of the Constitution, the Supreme Court has established that treaties are subordinate to the Constitution. Therefore, a provision of a treaty cannot be given effect to as law in the US if it is inconsistent with the Constitution.[207] Also a treaty and an Act of Congress have the same status in the US law, and in case of conflict between a treaty and a statute, the later in time prevails.[208] By implication the courts have placed the US somewhere in the "dualist" camp.[209] Later though, it

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executing *Per* John Marshall J. in *Foster* v. *Neilson*, 27 US (2 Pet.) 253 (1829) quoted in Louis Henkin, "U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker", 89 Am. J. Int'l. L. 341 (1995). See also Louis Henkin, "The Treaty Makers and the Law Makers: The Niagara Power Reservation", 56 Colum. L. Rev. 1151 (1956)

[207] 175 US 677 (1900)

[208] *Reid* v. *Covert*, 354 US 1 (1957). Restatement (Third) of the Foreign Relations Law of the United States (1987). See further "Contemporary Practice of the United States", 88 Am. J. Int'l. L. 719 (1994)

[209] *Whitney* v. *Robertson*, 124 US 190,194 (1888) referred to in Louis Henkin, "The President and International Law", 80 Am. J. Int'l. L. 930 (1986), 932 and *The Chinese Exclusion Case*, 130 US 581 (1889)

[210] Henkin, *supra* n. 208, 932. For a discussion on the question of whether custom could ever supersede a federal executive act as a matter of US law in the light of *Garcia-Mir* v. *Meese*, 25 CM 664 (1986), see Frederic L. Kirgis Jr., "Federal States, Executive Orders and "Self – Executing Custom", 81 Am. J. Int'l. L. 371. See also Jordan J. Paiest, "The President *IS* bound by International Law", 81 Am. J. Int'l. L 377 (1987) – where it is argued that historical

has been argued that because of the last in time rule, under which a statute is to be enforced by the courts even if it conflicts with an earlier treaty, the legislature ultimately has the power to control the judiciary's role in enforcing even self executing treaties.[210] This is so notwithstanding the Supremacy Clause.[211]

Customary international law has not been mentioned in any of the cases. But it is probable that the courts would conclude that customary law, being equal to treaties in international law, has the same status as treaties in the domestic legal hierarchy as well. It has the status of federal law, in the form of federal common law and no congressional authorisation is necessary for the courts to apply them.[212] It has been criticised that the modern positions places the *unelected federal judges* in a position to apply customary law made by *the world community* at the expense of state prerogatives, where the interests of the states are neither formally nor effectively represented in the lawmaking process.[213]

In the United States, the position, which was once considered as settled, is becoming the centre of heated debate. For a Constitution which has withstood changes for well over two centuries, the developments in the latter half of the

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developments and the Supreme Court decision do not suggest the 'flexibility' to violate international law or usage by any authority.

[210] Va'zquez, *supra* n. 205, 696. See also Lawrence Preuss, "On Amending the Treaty Making Power: A Comparative Study of the Problem of Self Executing Treaties", 51 Mich. L. Rev. 1117 (1953).

[211] Va'zquez, *supra* n. 205, identified four grounds on which a Court in the US might legitimately conclude that legislative action is necessary to authorise it to enforce a treaty – the Intent Based Doctrine, the Justiciability Doctrine (classifying as precatory and obligatory treaties, precatory as an effective *international* enforcement mechanism are lacking), the Constitutionality Doctrine and the Private Right of Action Doctrine.

[212] Curtis A. Bradley and Jack L. Goldsmith, "Customary International Law as Federal Common Law: A Critique of the Modern Position", 110 Harv. L. Rev. 815 (1996 – 97), 820. See further *Filartiga* v. *Pena – Irala*, 630 F.2d. 896 (2 d Cir. 1980) where it was held that international law has an existence in the federal courts independent of acts of Congress. Also *Ishtaq* v. *Nelson*, 627 F. Supp. 13; *Fernandez* v. *Wilkinson*, 505 F. Supp. 787 (referred to the above article) and the Restatement (Third) of the Foreign Relations Law of the United States (1987) – 'Any rule of customary international law ... is federal law'. Speaking of the general common law, Holmes J., in minority, had described it as a transcendental body of law outside of any particular State but obligatory within it unless changed by statute – *Black & White Taxicab & Transfer Co.* v. *Brown & Yellow Taxicab & Transfer Co.*, 276 US 518, 533 (1928). See also for the direct application of the UN Charter *Oyama* v. *California*, 332 US 633 (1948) where the anti-Japanese alien land laws were held to be inconsistent with the Charter.

[213] Bradley and Goldsmith, *supra* n. 212, 868 (emphasis original)

last century has raised very many a questions going to the very root of the accepted principles, with regard to the implementation of international norms, especially the uncodified rules of customary international law. As regards treaties, by virtue of Article II of the US Constitution, the President, the Chief Executive, is granted the power to make treaties with the Advice and Consent of 2/3rd of the Senate. The Supremacy Clause, at Article VI, declares that the Constitution, the laws of the US made pursuant thereto and all treaties made, or which shall be made, under the authority of the US, shall be supreme law of the land and the Judges in every State are bound thereby, anything in the Constitution or the laws of the State to the contrary notwithstanding. The States have been specifically forbidden from entering into treaties, alliance or confederation by Article I section 10 clause (1). They are required to get the prior consent of the Congress before entering into any Agreement or Compact with another State, or with a foreign power. Treaties and executive agreements pre-empts State law.[214]

Notwithstanding such provisions, doubts have been raised against exercise of federal powers on subjects exclusively within the domain of the State. This gains further relevance from the fact that, by virtue of Tenth Amendment to the US Constitution, the power not delegated to the US by the Constitution nor prohibited by it to the States, is reserved to the States respectively or to the people. In other words, the residuary power remains with the States with respect to those subjects that are not expressly conferred to the United States. Due to these provisions, there is an incongruity in the present scenario where more and more subjects are coming within the treaty provisions.[215] It is not confined to those areas exclusively within the domain of the United States *i.e.* in the federal government. Treaties at international level

[214] Bradley, *supra* n. 55, 391

[215] Though the central principle underlying American federalism is that the national government is one of limited, enumerated powers (restrained either by inherent limits in the scope of its delegated powers or Tenth Amendment reservation of powers to states, or both), they are not as strong as they once were

have even addressed to subjects expressly delegated to the States. While it was once widely accepted that treaties could be made with respect to matters of "international concern" most commentators today either disagree with such a limitation in the US or assume that it is insignificant, given that most matters upon which treaties are likely to be concluded can plausibly be characterised as of international concerns.[216] This is more so in the light of decisions of the Supreme Court of the United States that Tenth Amendment does not limit the power to make treaties or other agreements.[217]

This may be because of the fact that the Constitution expressly forbids the States from entering into treaties. The holders of the view that the federal power is all inclusive in treaty making, termed as 'nationalists'[218] by an author, claim that historical justifications of the necessity to speak in one voice has promoted the Founders to make such constitutional provisions.[219] Those who support strong States argue that, since residuary power is invested with the States, the federal government could act only on such of those powers that are expressly delegated to them, *i.e.* to the Congress.[220] They, however, fail to clarify as to who would have the power to enter into treaties on subjects within the jurisdiction of States since the States have been expressly forbidden from the same. The nationalist conceive the treaty power as an independent grant of power delegated to the national government and argue that it cannot be restricted to such of those powers conferred on the Congress. The States' rights view is

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[216] Bradley, *supra* n. 55, 393

[217] *Missouri* v. *Holland*, 252 U.S. 416 (1920); *Ware* v. *Hylton*, (1796) 3 Dall. 199. It is argued that when *Holland* was decided customary international law rather than treaties was the dominant form of international law. Since then there has been a rise in treaty law, especially human rights law, which regulates the relation between nations and their citizens meaning that there is today a significantly greater overlap and potential for conflict between treaty law as US domestic law. Bradley, *supra* n. 55, 459-60. As regards the unenumerated powers of the Congress on matters touching foreign affairs see *United States* v. *Curtiss-Wright Export Corp.*, 299 US 304 (1936) and *Perez* v. *Brownell*, 356 US 44 (1958)

[218] also called federalists

[219] For the historical foundation see David M. Golove, "Treaty Making and The Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power", 98 Mich. L. Rev. 1075 (2000)

[220] Bradley, *supra* n. 55

...at such blanket conferment of power would work against the interest of States. ...hey envisage a situation where the national government, with the ulterior ...otive of legislating on areas within the exclusive domain of States enter into ...reaties with certain foreign sovereign who are willing to dance to their tune. ...nce the President on behalf of the nation enters into a treaty, it becomes the ...upreme law of the land and the Congress is empowered to initiate legislation in ...e area.[221]

This reasoning receives credence because courts have been very strict in ...onstruing constitutional validity of enactment of Congress, which even slightly ...ffect the State rights whereas they are unduly lenient in the cases of enactment ...s a consequence of or as part of treaty implementation.[222] The nationalists ...rgue that the States do not have to worry that much since the President can act ...nly with the 'Advice and Consent' of the Senate, where the States have equal ...epresentation. Attempts have been afoot for canalising the treaty powers of the ...ederal government for long time.[223]

It is even argued that if the executive branch is restrained by the rule that ...ustomary international law is domestic law of the US and that it may not be ...iolated, US participation in international system will be handicapped. Seeking ...ongressional approval prior to any violation would be impractical, calling for ...reater executive flexibility. On the other hand, it is argued that customary ...nternational law is part of federal common law and as such is binding on every ...xecutive branch official, including the President. In the face of congressional ...ilence, he is required to respect a clearly defined and widely accepted norm of

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[221] Article VI and section 8 of Article I

[222] The example of Migratory Birds Statute of 1916 and Treaty of 1913 as a precursor to ...acting the relevant law

[223] e.g. attempted Bricker Amendment of the fifties. To help defeat the Bricker Amendment, the ...isenhower administration made a commitment that it would not seek to become a party to any ...ore human rights treaties. In 1955, the State Department of the US published a circular ...ating in obvious reference to the Amendment debate that "[t]reaties are not to be used as a ...vice for the purpose of affecting internal social changes or to try to circumvent the ...onstitutional procedures established in relation to what are essentially matters of domestic ...oncern." See Curtis A. Bradley and Jack L. Goldsmith, "Treaties, Human Rights, and ...onditional Consent", 149 U. Pa. L. R. 399 (2000), 413

customary international law.[224] The President, as the executive head may indicate his dissent while a customary rule is being developed, since it would not yet be part of customary international law, and *a fortiori* not yet part of federal common law.[225]

But, the issue has gained importance because of the proliferation of treaties dealing with human rights. The subjects covered under human rights are generally those coming under the States concern. It is little wonder that the United States finds it extremely difficult to adopt and ratify the international instruments though entered into after much deliberations and negotiations. And, even if they do ratify them at some later point of time, they do it with sufficient reservations, understandings and declarations, leaving open the argument that it is as good as not ratifying the same.

The Senate ratification of almost all treaties on human rights is now done with these reservations, understandings and declarations (RUDs). It is a pertinent question whether the credibility of the US government would suffer a dent if the practice of not ratifying the treaties in consonance with treaty obligations were successively resorted to. The nationalists consider this to affect the bargaining power of the US *vis-à-vis* other members of international community. In other words, it would affect their image of being the World Police.

The example of death penalty is a case in point. Article 6 (5) of the ICCPR mandates that sentence of death should not be imposed on persons under 18 years of age and it must not be carried out on pregnant women. In consenting to the treaty, the Senate stated that "subject to its constitutional constraints", the US reserves the rights "to impose capital punishment on any person (other than a pregnant woman)... including such punishment for crime committed by persons below 18 years of age." The United States has, while ratifying the Torture

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[224] Article 1, section 8, clause 10 explicitly confers upon Congress the power to define and punish offences against the law of nations

[225] Michael J. Glennon, "Can the President do no Wrong?", 80 Am. J. Int'l. L. 923 (1986), 929

Convention, in effect, reserved the right to inflict inhuman or degrading treatment when it is not for a crime and criminal punishment when it is inhuman and degrading but not cruel and unusual.[226]

The approach of the federal government to human rights treaties is more restrictive. As stated above, the Senate, which earlier refused to consent to any major human rights treaties, has recently began to ratify some of these treaties but only subject to a now standard set of RUDs that limit the treaties effect on domestic law.[227] The RUDs reflect a desire not to effectuate changes to domestic law by means of the treaty making process. It is said to be designed to assure that changes in US law will be effected only by "domestic processes".[228] The ambiguous position in the US is clear from the Restatements. The Restatement (Second) of the foreign relations law of the US (1965) stated that treaty power is limited to matters of "international concern" and that international agreements "must relate to the external concerns of the nation as distinguished from a matter of a purely internal nature. Whereas the Restatement (Third) of the same law of 1987 declared that, contrary to what was once suggested, the Constitution does not require that an international agreement deal with only "matters of international concern".[229] The US Supreme Court, on

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[226] Henkin, *supra* n. 205 (1995), 342 asking for a comparison between *Ingraham* v. *Wright*, 430 US 651 (1977). Also *Rhodes* v. *Chapman*, 452 US 337 (1981). See also the "Contemporary Practice of the United States", 85 Am. J. Int'l. L. 334 (1991) and as to how even the decisions of the European Court of Human Rights have influenced the reservations Richard B. Lillich, "The *Soering Case*", 85 Am. J. Int'l. L. 128

[227] Among other things, these RUDs typically include a declaration that the treaty is non-self-executing, as well as a statement that the US understands that the treaty shall be implemented by the federal government only to the extent that it possess legislative and judicial power over the matters in question, and otherwise by the state and local governments. Bradley, *supra* n. 55, 428. See for the purported principles guiding the US in attaching the RUDs to human rights conventions and their scope Henkin, *supra* n. 205 (1995). See also the "General Comment" adopted by the Human Rights Committee on the reservations to the ICCPR by the US - UN Doc. CCPR/C/21/Rev.1/Add.6 (1994)

[228] Henkin, *supra* n. 205 (1995), 346

[229] Bradley, *supra* n. 55, 432. It is argued that the approach of S. 403 of Restatement (Third) has been rejected in *Hartford Fire Insurance Co.* v. *California*, 113 S.Ct.2891 (1993) and the formulation of *Alcoa case*, 148 F 2d. 416 (2d cir.1945) is still followed, in Phillip R. Trimble, "The Supreme Court and International Law: The Demise of Restatement SECTION 403", 89 Am. J. Int'l. L. 53 (1995)

part, has made it clear that the incorporation and enforcement of international law is subject to domestic law standards, such as habeas corpus limitations, the last in time rule concerning conflicts between treaties and federal statutes, and the Eleventh Amendment.[230] In a way it confirmed the dualist approach to international law in the US.

It is argued that since human rights treaties touch on almost every aspect of domestic civil, political and cultural life and the language of these treaties is often vague and open ended, if such treaties had the status of self executing federal law, they would generate significant litigation and uncertainty regarding the application and validity of numerous domestic laws.[231]

On the other hand, it is argued that, RUDs reflect a sensible accommodation of competing domestic and international considerations as they help bridge the political divide between isolationists who want to preserve the US's sovereign prerogatives and internationalists who want the US to increase its involvement in international institutions, a divide that has had a debilitating effect on US participation in international human rights regimes since late 1940s.[232]

The RUDs of the US, themselves, take various forms –

(1) Substantive reservations, e.g. capital punishment of juvenile offender;

(2) Interpretative conditions;

(3) Non self-declaration;

(4) Federalism understanding;

(5) ICJ reservation.[233]

On the terminology used by the US in its RUDs, Prof. Baxi has observed that even the authors of the *Yes, Minister* (a highly popular satire on the legalese

[230] *Breard* v. *Greene*, 118 S. Ct. 1352 (1998)
[231] Bradley and Goldsmith, *supra* n. 223, 400
[232] *Id.*, 402
[233] *Id.*, 416

...f the British Civil Service) could not match the imagination of this ...rmulation.[234]

In this context, Article 27 of the Vienna Convention, which states that a ...ation cannot "invoke the provision of its internal law as justification for its ...ilure to perform a treaty," is relevant.

But, it is to be observed that, nations have made reservations to treaties ...nce the end of 18th century. In a bilateral treaty, a reservation was like a ...ounter offer where both parties to the treaty had to agree to every reservation ...fore the treaty became valid. For multilateral treaties, the traditional rule was ...at a reserving state was not a party to a treaty unless every other party to the ...eaty accepted the reservation. This traditional unanimity rule was –

> "... based on the concept of integrity of the terms of a treaty which had been freely negotiated by the prospective parties, and it provided an unambiguous answer to the question whether a state which had submitted an instrument of ratification or accession, accompanied by reservation, had become a party to the treaty generally."[235]

The Vienna Convention has embraced a flexible approach to reservation ...hereby an objection to a reservation does not preclude entry into force of the ...eaty between the reserving and objecting nation unless the objecting state says ...o definitely. Rather the provision to which the reservation relates is simply ...applicable between the two nations to the extent of the reservation. This ...exible approach is designed to encourage widespread participation in treaty ...egimes.[236] It is alleged now that once the widespread ratification of human ...ghts treaties have been achieved, the human rights advocates have now ...anged their position and attack the RUDs on the ground that the flexible

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...pendra Baxi, "A Work in Progress?" The US Report to the United Nations Human Rights ...mmittee", 36 Ind. J. Intl. L. 34 (1996), 37

...N Conference on Law of Treaties: First Session, Vienna, 1968 at 113 UN Doc. A/CONF. ...

...Bradley and Goldsmith, *supra* n. 223, 432

approach to reservations adopted in the Vienna Convention is inappropriate for human rights treaties.[237]

The US submitted its first ever Human Rights report to the Human Rights Committee of the ICCPR at the end of March 1995. It was among the last of the nations of the world to ratify a treaty, which it was among the first to shape.[238] This and subsequent reports were supposed to encompass issues of international accountability of the US observance of the treaty provisions. The delayed ratification of the ICCPR with the RUDs may be compared with the fast track ratification by the US towards the end of 1994 of the GATT/WTO treaty with the much stronger requirement to subject states to dispute resolution.[239]

On the question of the obligation of the US to protect human rights on a foreign soil, it has been observed that some human rights treaties have extraterritorial effect and that a narrow territorial interpretation of human rights treaties is anathema to the basic idea of human rights, which is to ensure that a state should respect human rights of persons over whom it exercises jurisdiction.[240] But in *Sale* v. *Haitian Centers Council Inc.*,[241] the US Supreme Court had held that –

> "... a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent".

Thus, it is not just in domestic but even in international sphere that the US refuses to recognise the full potential and validity of international treaties.

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[237] *Id.*, 439

[238] Baxi, *supra* n. 234, 35 and see also for an analysis of the Report.

[239] *Id.*, 51.

[240] Theodor Meron, "Extraterritoriality of Human Rights Treaties", 89 Am. J. Int'l. L. 78 (1995), 82

[241] 113 S. Ct. 2549 (1993)

Yugoslavia

In Yugoslavia, the international treaties which have been confirmed and published in accordance with the Constitution and the generally accepted principles of international law constitute an integral part of the domestic legal system. The Constitutional Court can decide on the conformity of the laws and regulation with treaties.[242]

Conclusion

The Constitutions that have been adopted lately confirm the tendency towards heightened recognition of the problem of internal effect of international law. But the procedure and formulas adopted vary as they are influenced by policy perceptions, history, politics and foreign advice as also by the background, biases and priorities of the decision-makers of the day.[243] The recent Constitutions adopted do not *explicitly* challenge the body of rules that comprise international law on the grounds that these rules are the product of imperialism or colonialism. But, much would depend upon those who interpret the provision, which make reference to international law or some parts of it. As stated in an Editorial Comment – "A realistic view would seem to be that the 'international law habit' will not necessarily be effectively promoted through mere wording in national constitution. What is accomplished under types of clauses that have been noted seems more likely to depend upon the constructive approach, vision and good faith of rulers and judges rather than upon the skill of drafts men."[244]

[242] Articles 16 (2), 126 (2)
[243] Stein, *supra* n. 1, 447
[244] Wilson, *supra* n. 73, 436

General international law did not fare as well as treaties in most of the modern Constitutions. The communists and the newly independent Third World States distrusted the 'imperialist made' rules, while the developed West was concerned about the 'soft law'[245] emerging from the UN.

It is being argued that norms grounding international law and institutions in national basic documents are of more than symbolic value, although symbols are important on their own account. These constitutional norms help delegitimise non-confirming conduct of states and enhance the visibility of, and respect for, international standards. They reinforce the state of legal certainty in the internal and international legal orders and advance the protection of individuals. They are the manifestation of the will to join the community of peaceful, democratic 'liberal states'.[246]

The constitutions have taken different approaches to the issue of implementation of international norms. But, as discussed above, it is not the wordings in the constitution, a basic document, that matters but the actual practices of the States. Many a times, these practices can be gathered fro the decisions rendered by the Court, to which we look into next.

[245] Stein, *supra* n. 1, 429
[246] *Id.*, 449

CHAPTER – III

ROLE OF COURTS IN THE IMPLEMENTATION OF INTERNATIONAL NORMS

Courts of justice are more likely to respect international law than either the legislature or the executive.[1] Consequently, States which authorise their courts to apply customary international law and treaty provisions directly are more likely to meet their international responsibilities promptly than are states whose courts are confined to national codes.[2] This may not be always true since even if the States authorise, the courts may also be reluctant to deviate from the conventions that they have been following.[3]

It is argued that the device of relating international law in general (or some part of it) to municipal law through express wordings in Constitution or other basic documents, by whatever name called, does not relieve tribunals or legislature from the continuing task of determining what the rules of international law are.[4]

At the supranational level, in the European community system, the European Court has been attempting to establish a distinctive identity. The national courts in the European Community are to apply the Treaty under the general supervision of the European Court. Thus, the monistic identity of the Community system is asserted at the expense of international law, which is implicitly characterised by some as dualistic.[5]

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

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

Id. 236. The decisions of the municipal courts can also be a source of international law – H. Lauterpacht, "Decisions of Municipal Courts as a Source of International Law", 10 Br. Yrbk. Int'l L. 65 (1929)

As discussed about the attitude of the French Courts in Chapter II, *supra*.

Robert R. Wilson, "International Law in New National Constitutions", Editorial Comment, 58 Am. J. Int'l. L. 432, 436

Stuart A. Scheingold, "The Court of Justice of the European Communities and the Development of International Law", 1965 Proc. of 59th Am. Soc. Int'l. L. 190

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

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

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

...r example *Velasquez Rodriguez* v. *Honduras (Merits)*, Case 7920, Inter American C.H.R. ...OEA/Ser.L./V./III. 19. Doc. 13 (1988) referred to in Thomas Buergenthal, "The Normative ...Institutional Evolution of International Human Rights", 19 HUM. RTS. Q. 703 (1997), f.n. ... See also Reed Brody and Felipe Gonzalez, "'Nunca Ma's: An Analysis of International ...ruments on "Disappearances"", 19 HUM. RTS. Q. 365 (1997); Jo M. Pasqualucci, *The ...ice and Procedure of Inter American Court of Human Rights*, Cambridge University ...ss, UK, 2003. On the African perspective see Evelyn A. Ankumah, *The African ...mission on Human and Peoples' Rights : Practice and Procedure*, Martinus Nijhoff ...lishers, The Hague, 1996.

... Y. Jennings, "The Judiciary, International and National, and the Development of ...rnational Law", 45 Intl. & Comp. L. Q. 1 (1996), 3

...rlos Manuel Va'zquez, "The Four Doctrines of Self – Executing Treaties", 89 Am. J. Int'l. ...95 (1995), 715

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

The concept of universal jurisdiction is still far from the imagination of most of the judges. Normally, judges of our legal tradition demand a legislative or established common law foundation for the exercise of jurisdiction over a person whose criminal acts are alleged to have been committed in another country. At the most the notion of universal jurisdiction has constituted a minority opinion[10] or commented upon sympathetically.[11]

It is argued that the *Pinochet* case[12] is a landmark one on the point that it emphasises the role of national courts even for the prosecution of the most serious international crimes.[13] The Statute of the International Criminal Court

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[9] Iain Cameron, "The Swedish Experience on the European Convention on Human Rights Since Incorporation", 48 Intl. & Comp. L. Q. 20 (1999), 38-39

[10] *R* v. *Bow Street Stipendary Magistrate and others; Ex parte Pinochet Ugarte [No. 3]*, (1999) 2 WLR 827 per Lord Millett

[11] *Nulyarimma* v. *Thomson*, (1999) 165 ALR 621 per Merkel J. referred to in Justice Michael Kirby, "Criminal Law – The Global Dimension", Keynote Address at The International Society for Reform of Criminal Law Conference, Canberra, 2001

[12] *Supra* n. 10

[13] Philippe Sands, "After Pinochet : The Role of National Courts", in *From Nuremburg to The Hague - The Future of International Criminal Justice*, Ed. Philippe Sands, Cambridge University Press, 2003, p. 68. See also *Democratic Republic of Congo* v. *Belgium*, Case Concerning the Arrest Warrant of 11 April 2000, ICJ General List No. 121, Judgment date 14 February 2002 at www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe-ijudgment_20020214.pdf for the approach of the World Court to a similar issue

ICC) also gives primacy to the national courts.[14] The jurisdiction of the ICC is not contemplated to be hierarchically superior to the national courts. This is said to reflect a desire to maintain a degree of respect for traditional sovereignty with the ICC playing a residual role serving as a long stop in the event that justice is inadequately dispensed at the national level.[15]

Ironically, the time has come for the development of an International Code of Judicial Conduct that could be adopted as an international standard to promote judicial propriety, to provide transparent rules, to stimulate effective accountability and to uphold a common standard of conduct of judges in all parts of the world.[16]

India

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

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

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[14] The Preamble emphasises that the ICC established under the Statute shall be complimentary to national criminal jurisdiction

[15] *Id.*, 75

[16] Bangalore Principles 2001. The principles include propriety, independence, integrity, impartiality, equality, competence, diligence and accountability

in India – to fill a gap in the law; as a means of interpretation; to justify and fortify a stance taken; to implement international conventions when they are not in conflict with the existing laws; to fulfil the spirit of the Conventions and Treaties; and to interpret the law so as to reflect international changes.[17]

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

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

[17] Justice S. B. Sinha, "A Contextualised Look at the Application of International Law – The Indian Approach", AIR 2004 (J) 33, 37

[18] AIR 1951 Raj. 127, DB

[19] AIR 1969 SC 783

with the Constitution. The executive is *qua* the State competent to represent the State in all matters international and may by agreement, convention or treaties incur obligation which in international law are binding upon the State. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with Parliament under Entries 10 and 14 of List I of the VII Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the laws of the State. If the rights of the citizens or others, which are justiciable, are not affected, no legislative measure is needed to give effect to the agreement or treaty.

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

Probably the position was clarified a little better in *M/s. V/o. Tractoroexport, Moscow* v. *M/s Tarapore and Co. Madras*[20] where it was held

[20] AIR 1971 SC 1

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

"If the terms of the legislation are clear and unambiguous they must be given effect to whether or not they carry out Her Majesty's treaty obligations for the sovereign power of the Queen in Parliament extends to breaking treaties and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty's own courts. If the terms of the legislation are not clear, however, but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is *prima facie* presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred. Thus, in case of lack of clarity in the words used in the legislation, the terms of the treaty are relevant to enable the court to make its choice between the possible meanings of these words by applying this presumption."[21]

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

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

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[21] *Salomon* v. *Commissioners of Customs and Excise*, [1966] 3 All E. R. 871, 875

[22] AIR 1973 SC 1461: (1973) 4 SCC 225

Human Rights. The Declaration may not be a legally binding instrument but it shows how India understood the nature of human rights. To the question whether rights remain inalienable if they can be amended out of existence, the Chief Justice observed that the Preamble, Articles 1, 55, 56, 62, 68, and 76 of the United Nations Charter had provided the basis for the elaboration in the Universal Declaration of Human Rights. He held that although there is a sharp conflict of opinion whether respect for human dignity and fundamental human rights is obligatory under the Charter, in view of Article 51 of the Directive Principles, the Apex Court must interpret the language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India. He quotes the observation by Lord Denning in *Corocraft* v. *Pan American Airways*[23] -

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

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

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[23] (1969) All ER 82

Khanna J., in *ADM Jabalpur* v. *S. Shukla*,[24] again speaking as minority, observed that, well established is the rule of construction that if there be a conflict between the municipal law on the one side and the international law or the provisions of any treaty obligations on the other, the courts would give effect to municipal law. If, however, two constructions of the municipal law are possible, the courts should lean in favour of adopting such construction as would make the provisions of municipal law to be in harmony with international law or treaty obligations. Every statute, according to this rule, is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations or the established rules of international law and the courts will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language. He held that while dealing with the Presidential Order under Article 359 (1) such a construction should be adopted as would, if possible, not bring it in conflict with Articles 8 and 9 of the Universal Declaration of Human Rights. Beg J., however, in a separate but concurring with majority opinion, indicated that neither rights supposed to be recognised by some natural law nor those assumed to exist in some part of Common Law could serve as substitutes for those conferred by Part III of the Constitution. He observed that no lawyer can seriously question the correctness, in Public International Law, of the proposition that the operation and effects of such provisions are matters which are entirely the domestic concern of legally sovereign States and can brook no outside interference. Similarly, Chandrachud J. held that the Rule of Law during an emergency is as one finds it in the provisions contained in Chapter XVIII of the Constitution. There cannot be a brooding and omnipotent rule of law drowning in its effervescence the emergency provisions of the Constitution. Again Bhagwati J. observed that contention of the detenus that *Kesavananda Bharathi*'s[25] case did not negative the existence and enforceability of natural rights is belied by the observation of

[24] AIR 1976 SC 1207: (1976) 2 SCC 521
[25] *Supra* n. 22

...least 7 judges. He further pointed out that Subba Rao J. also, in *Golak Nath*,[26] ...ected the theory of natural rights as being independent and apart from ...damental rights in Part III.

The Supreme Court, in *Jolly George Varghese and another* v. *The Bank ... Cochin*,[27] had an opportunity to examine the position in the light of ...nstitution and case laws. Analysing the implication the court held that, even ...India is signatory to international instruments, until the municipal law is ...nged to accommodate the international law, what binds the court is the ...mer, not the latter. Quoting from AH Robertson – 'Human Rights – in ...tional and International law', it is pointed out that international conventional ... must pass through the process of transformation into the municipal law ...fore the international treaty can become internal law.... From the national ...nt of view the national rules alone count ...With regard to interpretation, ...ever, it is principle generally recognised in national legal system that in the ...ent of doubt, the national rule is to be interpreted in accordance with the ...te's international obligations. Rejecting the argument that international law ... the vanishing point of jurisprudence, the court observes that such an argument ...elf is vanishing in a world where humanity is moving steadily, though slowly, ...ards a world order, led by that intensely active, although yet ineffectual ...dy, the UNO. Its resolutions and covenants mirror the conscience of mankind ...d inseminate, within the member states, progressive legislation, but till last ...p of actual enactment of law takes place, the citizen in a world of sovereign ...te, has only inchoate rights in the domestic courts under the international ...venants. It further holds that the positive commitment of the State parties ...ates legislative action at home but does not automatically make the covenants ...enforceable part of the *corpus juris* of India.

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[26] AIR 1967 SC 1643
[27] AIR 1980 SC 470

It was pointed out in *Bachan Singh* v. *State of Punjab*[28] that India, as a ...ber of the International community, was a participating delegate at the ...national conference that made the Stockholm Declaration on December 11 ..., that India has also accepted the ICCPR adopted by the General Assembly ...e United Nations and so it stands committed to the abolition of death ...alty as the impugned limb of section 302 IPC must be considered in the light ...e aforesaid Stockholm Declaration and the International Covenants which ...resent the evolving attitudes and standards of decency in a maturing world. ...mining these contentions, it was held that the clauses of international ...ruments are substantially the same as the guarantees or prohibitions ...tained in Articles 20 and 21 of our Constitution. It was held that India's ...mitment, therefore, does not go beyond what is provided in the Constitution, ...e Indian Penal Code and the Code of Criminal Procedure.[29] India's penal ..., including the impugned provision and their application, are the entirely in ...ord with its international commitments. In the minority, however, Bhagwati ... held that the standards or norms set by international organisations and bodies ...e relevance in determining the constitutional validity of death penalty. He ... discusses the important developments in the United Nations and observes ...t the objective of the United Nations has been, and that is the standard set by ...e world body, that capital punishment should ultimately the abolished in all ...untries. This norm set by the world body must be taken into account in ...ermining whether death penalty can be regarded as arbitrary, excessive and ...reasonable so as to be constitutionally invalid.

It has been held in *Prem Shankar Shukla* v. *Delhi Administration*[31] that ...e deeper issues of detainee's rights against custodial cruelty and infliction of ...dignity must be investigated within the human rights parameters of Part III of

...IR 1980 SC 898
...lso followed in *P.N. Krishna Lal* v. *Government of Kerala*, 1995 Supp (2) SCC 187
...IR 1982 SC 1325
...IR 1980 SC 1535

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

In *Civil Rights Vigilance Committee, SLSRC College of Law, Bangalore v. Union of India*,[32] the failure of the Government of India to prevent the entry of sportsmen blacklisted by UN for having participated in sports event in South Africa were challenged since Government of India is a party to Gleneagles Accord of 1977, which reaffirmed full support for international campaign against apartheid. The High Court held that Article 51 is not enforceable by any court and if Parliament does not enact any law for implementing the obligations under a treaty, courts cannot compel Parliament to make such law. In the absence of such law, court cannot also enforce obedience of the Government of India to its treaty obligations with foreign countries. Further, in England, while it is possible to regard customary international law as part of English law, a similar principle does not apply to treaties or obligations created thereunder. Hence the contention that a treaty like the Accord could have been a part of municipal law in England and English courts would have enforced such treaties as binding on the UK internally, cannot be accepted as correct.

Chinnappa Reddy J. in *Gramophone Company of India Ltd.* v. *Birendra Bahadur Pandey*[33] formulated two questions – whether international law is, of its own force, drawn into the law of the land without the aid of a municipal statute and second, whether, so drawn, it overrides municipal law in case of conflict. After discussing the schools of thought, he observes that there can be no question that nations must march with the international community and the municipal law must respect rules of international law even as nations respect international opinion. The Comity of Nations requires that Rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But, when they do run into such conflict, the sovereignty and

[32] AIR 1983 Kant. 85
[33] AIR 1984 SC 667: (1984) 2 SCC 534

integrity of the Republic and the supremacy of constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of nations or no, municipal law must prevail in case of conflict. National courts cannot say 'yes' if Parliament has said 'no' to a principle of international law. National courts endorse international law but not if it conflicts with national law. National courts being organs of the National State and not organs of international law, perforce apply national law if international law conflicts with it. But the courts are under an obligation within the legitimate results, to so interpret the Municipal Statute as to avoid confrontation with the Comity of Nations or the well-established principles of international law. But if conflict is inevitable, the latter must yield. The Court observed that it may be possible to say, by implication, that the Court, in *Tractoroexport*,[34] preferred the doctrine of incorporation, as otherwise the question of interpretation would not truly arise.

In *Kubic Dariusz* v. *Union of India and others*,[35] while dealing with preventive detention of a foreign national, it was held that preventive detention for a foreign national who is not resident of the country involves an element of international law and human rights and the appropriate authorities ought not to be seen to have been oblivious of its international obligations in this regard. When an act of preventive detention involves a foreign national, though from the national point of view the municipal law alone counts in its application and interpretation, it is generally a recognised principle in national legal system that in the event of doubt the national rule is to be interpreted in accordance with the state's international obligations. There is need for harmonisation whenever possible bearing in mind the spirit of Covenants. It observed that, in the

[34] *Supra* n. 20
[35] AIR 1990 SC 605

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

In *Charan Lal Sahu* v. *Union of India*,[36] it was observed that in the context of human rights, right to life, liberty, pollution free air and water is guaranteed by the Constitution under Articles 21, 48A and 51(g), it is the duty of the State to take effective steps to protect the guaranteed Constitutional rights. These rights must be integrated and illumined by the evolving international dimensions and standards, having regard to our sovereignty, as highlighted by clauses 9 and 13 of United Nations Code of Conduct of Transnational Corporations. The Court observed that the evolving standards of international obligations need to be respected, maintaining dignity and sovereignty of our people, the State must take effective steps to safeguard the Constitutional rights of citizens by enacting laws.

In *M.V. Elisabeth* v. *Harwan Investment and Trading Pvt. Ltd., Goa*,[37] it was observed that India seems to be lagging behind many other countries in ratifying and adopting the beneficial provision of various conventions intended to facilitate international trade. Although these conventions have not been adopted by legislature, the principles incorporated in the convention are themselves derived from the common law of nation as embodying the felt necessities of international trade and are as such part of the common law of India and applicable for the enforcement of maritime claims against foreign ships. While the provisions of various international conventions concerning arrest of

[36] AIR 1990 SC 1480: (1990) 1 SCC 613
[37] AIR 1993 SC 1014

...s, civil and penal jurisdiction in the matters of collision, maritime liens and ...rtgages etc. have been incorporated into the municipal laws of many maritime ...es. India lags behind them in adopting the unified rules. By reason of this ...l doubts about jurisdiction often arise, as in the present case, when ...stantive rights such as those recognised by the Carriage of Goods by Sea Act ... sought to be enforced. The remedy lies apart from enlightened judicial ...nstruction, in prompt legislative action to codify and clarify the admiralty laws ...this country. This required thorough research and investigation by a team of ...perts in admiralty law, comparative law and public and private international ...w. Any attempt to codify without such investigation is bound to be futile. It ...as further held that although India has not adopted the various Brussels ...nvention, the provisions of these Conventions are the result of international ...nification and development of the maritime laws of the world, and can, ...erefore, be regarded as the international common law or transnational law ...oted in and evolved out of the general principles of national law, which, in the ...sence of specific statutory provisions, can be adopted and adapted by the ...urts to supplement and complement national statutes on the subject. It was ...rther observed that these Conventions embody principles of law recognised by ...e generality of maritime states, and can therefore be regarded as part of our ...ommon law. The want of ratification of these conventions is apparently not ...ecause of any policy disagreement, as is clear from active and fruitful Indian ...articipation in the formulation of rules adopted by the conventions, but perhaps ...ecause of other circumstances, such as lack of adequate and specialised ...achinery for implementation of the various international conventions by co-...rdinating, for the purpose, the concerned departments of the government.

Nilabati Behera v. *State of Orissa*[38] referred to Article 9(5) of ICCPR ...966 which indicates that an enforceable right to compensation is not alien to the ...oncept of enforcement of a guaranteed right. The court went on to award

[38] (1993) 2 SCC 746: AIR 1993 SC 1960. The other relevant parts of the case have been discussed in detail in Chapter VI *infra*

compensation as a remedy available under public law, based on strict liability, for contravention of fundamental rights to which the principle of sovereign immunity does not apply.

As regards the termination of a treaty, it has been held in *Rosiline George v. Union of India*[39] that whether a treaty has been terminated by the State is essentially a political question. The Governmental action in respect of it must be regarded as of controlling importance.

With regard to environmental protection, the Apex Court, in *Vellore Citizens Welfare Forum* v. *Union of India and others*,[40] held that sustainable development is a balancing concept between ecology and development and has been accepted as a part of customary international law though its salient features have yet to be finalised by the international law jurists. It was held that, once these principles are accepted as part of the customary international law, there would be no difficulty in accepting them as part of domestic law. It was observed that it is almost an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by courts of law. Since our legal system has been founded on the British common law, the right of a person to pollution free environment is a part of basic jurisprudence of the land.

In *C. Masilamani Mudaliar and others* v. *Idol of Sri S S Thirukoil and others*,[41] after a discussion of the international instruments granting rights against discrimination of women, the Apex Court held that, though the directive principle and fundamental rights provided the matrix for development of human personality and elimination of discrimination, these conventions add urgency and teeth for immediate implementation. It also observed that Article 2(e) of

[39] (1994) 2 SCC 80
[40] AIR 1996 SC 2715
[41] AIR 1996 SC 1697

...EDAW[42] enjoins the court to breathe life into the dry bones of the Constitution, ...ternational Conventions and the Protection of Human Rights Act and to ...ffectuate right to life.[43]

In *Peoples Union for Civil Liberties* v. *Union of India*[44] it was pointed out ...at it is almost accepted proposition of law that the rules of customary ...ternational law which are not contrary to the municipal law shall be deemed to ...e incorporated in the domestic law. It was held that Article 17 of ICCPR does ...ot go contrary to any part of our municipal law and therefore Article 21 of the ...onstitution has to be interpreted in conformity with the international law.

D.K. Basu v. *State of West Bengal*,[45] the Supreme Court held that ...stodial violence and abuse of police power is not only peculiar to this country ...ut it is widespread. It has been the concern of international community because ...e problem is universal and the challenge is almost global. Observing that the ...niversal Declaration of Human Rights, which marked the emergence of a ...orld-wide trend of protection and guarantee of certain basic human rights, ...akes a stipulation against it. The Court, in the light of these instruments, found ... necessary to issue requirements to be followed in all cases of arrest or ...etention till legal provisions are made in that behalf. Dealing with the punitive ...easures, it refers to Article 9(5) of the ICCPR, which provides that anyone who ...as been the victim of unlawful arrest or detention shall have enforceable right ...o compensation. Though the Court noticed that the Government of India, at the ...me of its ratification in 1979, made a specific reservation to the effect that the ...dian legal system does not recognise a right to compensation for victims of ...nlawful arrest or detention and thus does not become a party to the Covenants it ...eld that the reservation has now lost its relevance in view of the law laid down ...y the Supreme Court in a number cases awarding compensation for the

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... Convention on the Elimination of All Forms of Discrimination against Women, 249 U.N.T.S. ...

... See also for a similar line, *Madhu Kishwar and others* v. *State of Bihar*, AIR 1996 SC 1864

... AIR 1997 SC 568: (1997) 1 SCC 301

... (1997) 1 SCC 416

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

In *Peoples Union for Civil Liberties* v. *Union of India*,[46] it was observed the main criticism against reading such conventions and covenants into municipal laws is that the ratification of these Conventions and Covenants is done, in most countries, by the executive acting alone and that the prerogative of making the law is that of the Parliament alone. Unless the Parliament legislates, law can come into existence. The Court observed that it is not clear whether Parliament has approved the action of the Government of India ratifying the 1966 Covenant. Assuming that it has, it says that the question yet may arise whether such approval can be equated to legislation and invests the covenants with the sanctity of a law made by Parliament. It says that, as pointed out by the Court in *S R Bommai* v. *Union of India*,[47] every action of Parliament cannot be equated to legislation. Legislation is no doubt the main function of the Parliament but it also performs many other functions all of which do not amount to legislation. In their opinion, this aspect requires deeper scrutiny than has been possible in the case. But for the case, they state that it would suffice to state that the provisions of the covenants, 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. But at the same time, it observes that so far as multilateral treaties are concerned, the law is different, though it does not go into the aspect as to how it is different.

[46] AIR 1997 SC 1203
[47] AIR 1994 SC 1918: (1994) 3 SCC 1

In *Vishaka* v. *State of Rajasthan*,[48] the Court held that, in the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at workplaces, the contents of the international conventions and norms are significant for the purpose of the interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against harassment implicit therein. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into the provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. After discussing the provisions dealing with the implementation of the international norms, the Court states that the power of the Court under Article 32 for the enforcement of the fundamental rights and the executive power of the Union have to meet the challenge of protecting the working women from sexual harassment and make their fundamental rights meaningful. Governance of the society by the rule of law mandates this requirement as a logical concomitant of the constitutional scheme. The judgment further states that the international conventions and norms are to be read into the Constitution in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It observes that, it is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.

In *Apparel Export Promotion Council* v. *A.K. Chopra*,[49] dealing with sexual harassment of female employees at work places, after discussing international instruments such as CEDAW 1979, the Beijing Declaration and International Covenants of Economic, Social and Cultural Rights, the Apex

(1997) 6 SCC 241; See also *Prem Shankar Shukla* v. *Delhi Admn.*, (1980) 3 SCC 526; *Mackinnon Mackenzie and Co. Ltd.* v. *Audrey D' Costa*, (1987) 2 SCC 469; *Sheela Barse* v. *Secretary Children's Aid Society*, (1987) 3 SCC 50; *D.K. Basu* v. *State of W.B.*, (1997) 1 SCC
Apparel Export Promotion Council v. *A. K. Chopra*, (1999) 1 SCC 759
(1999) 1 SCC 759

urt held that these international instruments cast an obligation to see that the ssage of international instruments is not allowed to be drowned. The Court serves that it has in numerous cases emphasised that while discussing stitutional requirements court and counsel must never forget the core nciple embodied in the international convention and instruments and, as far as sible, give effect to the principles contained in those international struments. The courts are under an obligation to give due regard to ternational conventions and norms for construing domestic law, more so, when ere is no inconsistency between them and there is void in domestic law. In ses involving violation of human rights, the courts must forever remain alive the international instruments and conventions and apply the same to a given se when there is no inconsistency between the international norms and the mestic law occupying the fields.

In *Githa Hariharan* v. *RBI*,[50] it was again held that the domestic courts e under an obligation to give due regard to international convention and norms r construing domestic laws when there is no inconsistency between them. This bservation was made while eliciting the message of CEDAW and Beijing Declaration, which direct all state parties to take appropriate measures to prevent scrimination of all forms against women, in the light of India being a signatory CEDAW and having accepted and ratified it in June, 1993.

In *Chairman, Railway Board* v. *Chandrima Das*,[51] after quoting the Universal Declaration of Human Rights 1948 and various other international struments, the Supreme Court says that the International Covenants and Declarations as adopted by the UN have to be respected by all signatory States nd the meaning to various words in those Declarations and Covenants have to e such as would help in effective implementation of those rights. The pplicability of the UDHR and the Principles thereof may have to be read, if eed be, into the domestic jurisprudence. The court relied on the statement of

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

Lord Diplock in *Salomon* v. *Commissioner of Customs and Excise*[52] that there is a prima facie presumption that Parliament does not intend to act in breach of international law, including specific treaty obligations. It also falls back on the observation of Lord Bridge in *Brind* v. *Secretary of State for the Home Department*[53] that it was well settled that, in construing any provision in domestic legislation which was ambiguous in the sense that it was capable of a meaning which either conforms to or conflicts with the International Convention, the courts would presume that Parliament intended to legislate in conformity with the Convention and not in conflict with it. After quoting so, the Court holds that, for the purpose of the case, interpreting the Constitution is enough. However, it repeatedly fell back on the international norms to make its conclusions.

While dealing with the extradition law, the Supreme Court, in *Daya Singh Lahoria* v. *Union of India*,[54] described it as a 'dual law', ostensibly municipal yet international in as much as it governs relations between two sovereign states. This question is decided by national courts but on the basis of international commitments as well as the rules of international law relating to the subject.

In *Union of India* v. *Association of Democratic Reforms*[55] while declaring right to get information in a democracy as a natural right flowing from the concept of democracy reference were made to Article 19, clauses (1) and (2) of the ICCPR.

T.N. Godavarman Thirumalpad v. *Union of India*[56] dealt in detail the effect of international obligations. It observed that the Convention on Biological Diversity has been acceded to by the country and, therefore, it has to implement

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[52] *Supra* n. 21
[53] (1991) 1 All ER 720 (HL)
[54] (2001) 4 SCC 516
[55] (2002) 5 SCC 294
[56] (2002) 10 SCC 606

e same. It reiterated what was stated by the Court in *Vishaka*[57] that in the sence of any inconsistency between the domestic law and international nventions, the rule of judicial construction is that regard must be had to ternational conventions and norms even in construing the domestic law. It was pulated that it is necessary for the Government to keep in view the ternational obligations while exercising discretionary powers under the onservation Act unless there are compelling reasons to depart therefrom.[58]

Thus, we see that the Supreme Court is taking a definite direction, via dgments, towards the recognition and implementation of the norms developed the international level. Initially he courts were reluctant to be the torchbearer such matters as evident from the initial cases. However, lately, probably on cognition that the legislature is not going to anything to implement the ternational norms, it has taken the task upon itself to implement it, though directly is what it can do. In the process, it has been making mends to the arlier approaches taken. Even if the courts have not been vigilant enough to rotect the rights of the citizens of this country, it is still not late that such means re resorted to for, if at all any evident injustice is caused by any Court, it must ake it a point to act so as to correct the injustice. Our Supreme Court, acting x *dibito justitial* and ensuring that *actus curiae neminem gravabit*, has resorted o correction in many cases. In *AR Antulay* [59] it observed that there was a duty o correct on a petition or *suo motu.*[60] What we see here is a correction as and hen the opportunity arises for the Court to do so in a subsequent case. Rather

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(1997) 6 SCC 241

Supra n. 56, paragraph 43, 630 –31. The Court referred to the Stockholm Declarations of the N on Human Environment 1972, subsequent Conference on the Tenth Anniversary of the ame in Nairobi (May 10 – 18, 1982), UN General Assembly World Charter for Nature, the Directives of the Council of European Economic Committee and the Convention on Biological Diversity (5-6-1992)

A.R. Antulay v. *R. S. Nayak*, (1988) 2 SCC 602 reconsidering and correcting *R. S. Nayak* v. *A. R. Antulay*, (1984) 2 SCC 183

Similarly *Union Carbide Corp.* v. *Union of India*, (1991) 4 SCC 584 correcting *Union Carbide Corp.* v. *Union of India*, (1989) 1 SCC 674; *Supreme Court Bar Association* v. *Union of India*, (1998) 4 SCC 409 correcting *VC Mishra Re*, (1995) 2 SCC 584 etc.

than seeing it as correcting its mistakes, it may be worthwhile to consider this as a case of a gradual evolution by the courts.

Australia

In Australia, there have been a series of cases in which the High Court has read into the Constitution certain international norms by implication. In *Nationwide News*[61] it was held that the spirit of the Australian Constitution as reflected in its leading doctrines becomes a source of Constitutional practice and international covenants on Human Rights have been held to provide basis for such practices.

Sweden

The judgments of the European Court of Human Rights have had its impact on Swedish law. Some have prompted changes in the domestic law even though Sweden was not found to have violated the Convention and some have prompted reforms of the rules.[62]

It is argued that membership of the EU, has enabled, and obliged, the Swedish courts to recognise the 'Convention dimension' and interpret European Court of Justice judgments and the preliminary ruling concerning other States (possibly even the Commission Reports) and apply them to the Swedish context.[63]

[61] (1992) 108 Australia L. R.681 cited in A-13-46.
[62] See on Pre-trial detention cases referred to in Iain Cameron, "The Swedish Experience on the European Convention on Human Rights Since Incorporation", 48 Intl. & Comp. L. Q. 20 (1999), 33.
[63] *Id.*, 40

United Kingdom

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

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

[64] Ian Leigh, "Horizontal Rights, The Human Rights Act and Privacy: Lessons from the Commonwealth", 48 Intl. & Comp. L. Q. 57 (1999), 74-75. The Act's main devices for strengthening respect for the Convention are threefold: pre-legislative reviews by ministers and Parliament, the strong interpretative duty laid on courts and tribunals; and the new duty on public authorities.

[65] *Attorney General* v. *Guardian Newspapers (No.2)*, [1990] 1 AC 108, 283. Cf. Butter Sloss LJ and Lord Keith in *Derbyshire Cc* v. *Times Newspapers*, [1993] 3 All ER 65, 93 and [1993] 1 All ER 1011, 1021 respectively.

with, rather than directly influenced by, the Convention under the unconvincing justification that the two are identical.[66]

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

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

United States

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

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[66] Leigh, *supra* n. 64, 82

[67] *Malone* v. *Metropolitan Police Commr.*, [1979] 2 All ER 620: [1979] Ch.344

[68] *Salomon* v. *Commissioner of Customs and Excise*, [1967] 2 QB 116: [1966] 3 All ER 871 which was used in *R* v. *Hull Prison Board of Visitors, ex p. St. Germain*, [1979] QB 425 (A); *Allgemeine Gold-und-Silberscheidanstalt* v. *Customs and Excise Commissioners*, [1980] 2 WLR 564 and other cases.

[69] *R* v. *Deery*, (1977) 20 ECHR Yrbk 857 noted in (1977) Crim. L.R. 550

[70] 175 US 677 (1900)

...w, which must reflect the developments in international society through ...ppropriate changes in the norms, it is argued that in the light of the special role ...f the President in the US Government, including the conduct of the nation's ...reign relations, and the fact he sits at the intersection of the domestic and ...ternational responsibilities of the US, he, acting alone, may have the authority ...der domestic law to place the US in violation of customary international law.[71]

Prof. Henkin has pointed out that developments subsequent to *The ...quete Habana* have made the classification of the US as monist or dualist not ...mple matter. Even if customary international law is law of the US, its ...nforcement through court action is not guaranteed as it must have a subject ...atter jurisdiction and there must be a cause of action.[72]

In the US, the courts will not treat an act of government that puts the US ...n violation of international law as, *ipso facto,* an act in violation of US Constitution as held in the *Chinese Exclusion Case*[73] -

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

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

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[71] Jonathan I. Charney, "The Power of the Executive Branch of the United States Government to Violate Customary International Law", 80 Am. J. Int'l. L. 913 (1986), 919

[72] See *Tel Oren* v. *Libyan Arab Republic*, 726 F. 2d 744 (DC Cir. 1984) and *Filartiga* v. *Pena-Irala*, 630 F. 2d. 876 (2d Cir. 1980) referred to in Charney, *supra* n. 71, 914

[73] 130 US 581, 602-03 (1889)

"It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact."[74]

The US Supreme Court, in requiring reciprocity in international relations has held that non performance by a foreign State with which the US had concluded a treaty (of extradition) would not itself permit the judiciary in the US to declare the treaty void, although it might, for the reason indicated, have become voidable so that the Executive could take steps to terminate it.[75]

South Africa

It is an accepted proposition that international law is part of South African law, and that principles of international law must be applied by South African courts in appropriates cases. In *Nduli and another* v. *Minister of Justice and others*,[76] the Court held that "only such rules of customary international law are to be regarded as part of our law as are either universally recognised or have the assent of this country."[77] This position has been reiterated in *S.* v. *Ebrahim.*[78]

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

[75] *Charlton* v. *Kelly*, 229 US 447 (1913)

[76] 1978 (1) SA 893 (AD) cited in Dermott J. Devine, "The Relationship Between International Law and Municipal Law in the Light of Interim South African Constitution", 44 Intl. & Comp. L. Q. 1 (1995), 2

[77] *Id.*, 906

[78] 1991 (2) SA 553 (AD): 31 I.L.M. 888 (1992). Discussion of this case can be seen in Rosemary Rayfuse, "International Abduction and the US Supreme Court: The Law of the Jungle Reigns", 42 Intl. & Comp. L. Q. 882, 895 (1993)

Before the adoption of the justiciable Interim Constitution in 1994, due to parliamentary supremacy, judges had a limited role and could only mitigate the effects of unjust laws on procedural and technical grounds.[79] Now the courts can evaluate legislation enacted by the Parliament or other bodies under the Bill of Rights when the law's constitutionality is under challenge.

The Constitutional Court in South Africa has played a crucial role while the drafting of the Final Constitution was being done. It sent a number of provisions back to the Constitution Assembly for reworking in September 1996.[80] Later, it re-examined the revised text and certified it in November 1996.[81]

The Constitutional Court is given enough freedom to interpret treaties. While drafting the interim constitution itself the experts of the parties shied away from pronouncing on the question of abolition of death penalty. It is supposed to be taken care of in the open-ended provision that 'every person shall have the right to life'.[82] It is argued that this has been a deliberate omission to leave the interpretation of these contentious issues to the Constitutional Court.[83] In other words, the Courts were to decide such a vital question. And, the Constitutional Court has ruled that the imposition of death penalty was unconstitutional.[84] Judgments have also covered juvenile judicial corporal punishment,[85] outlawing

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[79] Jeremy Sarkin, "Problems and Challenges Facing South Africa's Constitutional Court: An Evaluation of its Decisions on Capital and Corporal Punishment", 113 S. Afr. L. J. 71 (1996)

[80] See *Ex Parte Chairperson of the Constitution Assembly; In re Certification of the Constitution of the Republic of South Africa 1996,* 1996 (10) BCLR 1253 (CC) referred to in Jeremy Sarkin, "The Development of a Human Rights Culture in South Africa", 20 HUM. RTS. Q. 628 (1998), 634

[81] *Certification of the Amended Text of the Constitution of Republic of South Africa 1996*, 1997 (1) BCLR 1 (CC) referred to in Sarkin, *supra* n. 80, 634

[82] Section 9. This was in spite of the demand for the abolition of capital punishment in the draft Bill of Rights recommended by the ANC Constitutional Committee – A Bill of Rights for the New South Africa (1990).

[83] Anton J. Steenkamp, "The South African Constitution of 1993 and the Bill of Rights: An Evaluation in Light of International Human Rights Norms", 17 HUM. RTS. Q. 101 (1995), 108

[84] *S. v. Makwanyane*, 1995 (6) BCLR 665 (CC): 1995 (3) SA 391 (CC) cited in Sarkin, *supra* n. 79, 640.

[85] *S. Williams and another*, 1995 (3) SA 632

...vil imprisonment for debt and recognising the right to access police dockets ...d to consult state witnesses.[86]

European Community

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

Historically speaking, there were three organisations[88] that were created. ...hese were later unified as a single organisation by the Merger Treaty of 1965. ...nder this, four institutions were set up – a Council, a Commission, a European ...arliament and the Court of Justice.[89] By virtue of the Single European Act of ...986, the European Economic Community Treaty was amended to provide for

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...Coetzee v. *Government of the Republic of South Africa*, 1995 (10) BCLR 1382 (CC) and ...abalala and others v. *Attorney General of Transvaal and another*, 1995 (12) BCLR 1593 ...(C). The application of the Bill of Rights in other fair trial rights issue have also been ...gated - *Du Plessis and another* v. *De Klerk*, 1996 (5) BCLR 658 (CC) and *Parbhoo and ...ers* v. *Getz NO and another*, 1997 (10) BCLR 1337 (CC). All cases cited in Sarkin, *supra* n. ...643

...See generally Andrew Z. Drzemczewski, *European Human Rights Convention in Domestic ...w : A Comparative* Study, Clarendon Press, Oxford, 1983; *The Criminal Process and ...man Rights : Towards a European* Consciousness, Ed. Mireille Delmas-Marty, Martinus ...hoff Publishers, London, 1995. See also Malcolm N. Shaw, *International Law*, 4th edn., ...mbridge University Press, UK, 1997, 280 – 81. The cases referred to under this section have ...en gathered from the compilation in *The Relationship between European Community Law ...d National Law: The Cases*, Ed. Andrew Oppenheimer, Grotius Publications, Cambridge ...versity Press, Great Britain, 1994, unless otherwise specifically mentioned

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

...The Council composed of representatives of the governments of member states. The ...ommission was an independent supranational organ whose members were appointed by ...mmon accord of the governments of member states. The Parliament was elected by the ...oples of the member states and divided into political groupings largely without distinction as ...nationality

creased Community powers and establish a framework for inter-governmental olitical co-operation.[90]

The European Community came into existence by the entry into force in ovember 1993 of the Maastricht Treaty on European Union concluded in 1992. he community has increased powers and responsibilities, especially in relation economic and monetary policy. The European Union also has the specific action to provide a framework for increased inter-governmental co-operation various non-economic spheres and to promote legislative activity in European ommunity institutions.[91]

The Court of Justice, which was a common organ for all the Communities om the beginning, is the supranational judicial institution whose task is to uarantee respect for Community law. The EEC Treaty first created an nvironment for a permanent dialogue at the judicial level, which by its rocedure, laid down that the national courts of last resort in a state could make eferences for preliminary rulings to the Court of Justice of the European ommunities where any question was raised concerning the interpretation of ommunity law.[92] The Court of Justice has final authority to interpret ommunity law whereas the national courts have the task of applying it. It is he national courts that ensure full effectiveness to the Community law in their espective legal systems.

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

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was concluded in accordance with the procedure laid down in Article 236 of the Treaty and adopted instead of a draft European Union Treaty approved by the European Parliament in which was intended to create a single institutional framework to replace the existing munities

See *EC Law and National Law, supra* n. 87, 2

rticle 177. This procedure is generally characterised as co-operation

Supremacy

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

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

Case 6/64, European Court of Justice, 1964

Internationale Handelsgesellschaft mbH v. *Einfuhr - und Vorratsstelle fur Getreide und Futtermittel*, Case 11/70, ECJ, 1970

Amministrazione delle Finanze dello Stato v. *Simmenthal Spa,* Case 106/77, ECJ, 1978

Case C - 213/89, 1990; [1990] 3 WLR 852 ECJ

Ibid.

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

This position is true not just of the Community legal order but of all supranational legal orders

The domestic courts of the member states, expectedly, took their time for ...e doctrines to be accepted. Among the original members of the Community, ...e Court of Cassation in Belgium in the *Le Ski* case,[100] the German Federal ...onstitutional Court in *Lutticke*,[101] the Italian Constitutional Court in *Frontini*[102] ...d the French Court of Cassation in *Cafes Vabre*[103] have accepted the doctrine ...supremacy. The *Counseil d' Etat* in France recognised the supremacy of EEC ...eaty provisions only in 1989 in the *Nicolo Case.*[104] Similarly the *Counseil d' ...at* in Luxembourg accepted this position in *Bellion.*[105]

The acceptance of supremacy in the United Kingdom was fully ...ablished only in *Factortame.*[106] The Irish Supreme Court accepted the ...premacy of Community law in *Crotty.*[107] Greece joined the Community in

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...Minister of Economic Affairs v. *SA Fromagerie Franco-Suisse "Le Ski"*, Court of Cassation ...gium), 1971

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

...Frontini v. *Ministero delle Finanze*, Case No. 183/73 Constitutional Court, (Italy), 1973. ...e Constitutional Court accepted the position described by the Court of Justice in *Simmenthal* ...pa Granital v. *Amministrazione delle Finanze dello Stato*, Case No. 170/84, Constitutional ...t (Italy), 1984

...dministration des Douanes v. *Socie`te` Cafés Jacques Vabre and Weigel et Compagnie*, ...t of Cassation (France), 1975

...Nicolo and another, *Conseil d' Etat* (France), 1989

...Bellion and Others v. *Minister for the Civil Service, Conseil d' Etat* (Luxembourg), 1984

...R. v. *Secretary of State for Transport, ex p. Factortame Ltd (No. 2)*, [1990] 3 WLR 818: ...0] 2 AC 85, HL. United Kingdom joined the Community only in 1973. Prior to this case ...re were a number of statements concerning the position of community law on the basis of ...tion 2 (1) of the European Communities Act 1972 – by the House of Lords in *Duke* v. *GEC ...ance Ltd.*, [1988] AC 618, HL and by the Court of Appeal in *Bullmer Ltd. and Another* v. ...linger SA and Others*, [1974] 2 All E. R. 1226, CA and *Macarthys Ltd.* v. *Smith*, [1979] 3 ... E. R. 325, CA. See also Hood Phillipe, "A Garland for the Lords: Parliament and ...mmunity Law Again", 98 LQR 524 (1982); H.W.R. Wade, "What has Happened to the ...vereignty of Parliament?", 107 LQR 1 (1991). See also *The Siskina*, [1977] 3 All. E. R. 803; ...Macarthys Ltd.* v. *Smith*, [1981] 1 All E. R. 1111; *Garland* v. *British Rail Engg. Ltd.*, [1982] 2 ...751

...Crotty v. *An Taoiseach and Others*, 93 ILR 480, Supreme Court (Ireland), 1987. Ireland ...d Denmark, like UK, joined only in 1973

...l and its Council of State held in *Banana Market case*[108] that EEC Treaty ...visions took precedence over national law on the basis of Article 28 in the ...nstitution. The Spanish Supreme Court granted precedence to Community ... on the basis of Article 93 of their Constitution in the *Canary Islands ...toms Regulation Case.*[109]

...rect Effect

...e Court of Justice in *Van Gend en Loos*[110] observed thus –

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

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

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...Case No. 815/1984, Council of State (Greece), 1984. The Council followed the *Simmenthal* ...e in *Mineral Rights Discrimination case*, Case No 2152/1986, Council of State (Greece), ...

...Case No 4524, Supreme Court (Spain), 1989. Spain joined the Community in 1986 along ...h Portugal, which indicated its willingness to give direct effect, and thereby supremacy, to ...mmunity law in *Ca`dima* Case No 12 381-36 053, Court of Appeal of Coimbra, 1986. The ...anish Constitutional Court accepted *Simmenthal* position in the *Electoral Law ...nstitutionality case*, Case No 4524, Constitutional Court (Spain), 1991.

...*Algemene Transport en Expeditie Onderneming van Gend en Loos* v. *Nederlandse ...ministratie der Belastingen*, Case 26/62, ECJ, 1963.

...At this point it may be pertinent to point out that not all provisions of the Community law ...e direct effect and produce rights for the individuals.

...*Van Gend en Loos supra* n. 110 and also in *Costa* v. *ENEL supra* n. 93, it dealt with ...gative rights where as in *Lutticke supra* n. 101 it went further to positive obligations

implementation.[113] In *Defrenne*,[114] the Court of Justice confirmed that some Treaty provisions could have effect not just between individuals and Member States (vertical effect) but also in relations between individuals themselves (horizontal effect).

This position enunciated by the Court of Justice has been largely followed by the national courts e.g. Belgium in *Le Ski*,[115] Luxembourg in *Bellion*[116] and Greece in the *Real Property Acquisition case.*[117] This has been facilitated by the references made under Article 177 of the EEC Treaty which enables and, in the case of courts of last resort, requires national courts to make references for preliminary rulings to the Court of Justice of the European Communities where a question is raised concerning the interpretation of Community law.

Article 189 of the Treaty provides that regulations are directly applicable.[118] The Court of Justice has consistently held that, by reason of their nature and function, regulations have direct effect and are capable of creating individual rights although they do not always do so.[119] In *Grad*[120] the Court of Justice held that the fact that the Article referred to only regulations did not exclude the possibility that other categories of Community acts, including decisions, could have direct effect. This could apply to directives also. But then, by later decisions, it has further clarified that the individuals could rely upon the directives only when a Member State failed to adopt adequate implementing measures within the prescribed period and only if the provision in

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[113] *Van Duyn* v. *Home Office*, Case 41/74, ECJ, 1974

[114] *Defrenne* v. *Sabena*, Case 43/75, ECJ, 1976

[115] *Supra* n. 100, 1971

[116] *Supra* n. 105, 1984

[117] Case No. 43/1990, Court of Appeals of the Dodecanese (Greece), 1990

[118] The directives are binding upon the Member States as to the result to be achieved but the choice of form and method for their implementation is left to the national authorities.

[119] *Politi*, [1971] ECR 1039. National courts have also accepted this position e.g. Italy in *Frontini*, *Supra* n. 102, 1973; Germany in *Wunsche Handelsgesellschaft (Solange II)*, Case No. 2 BvR 197/83, Constitutional Court (FRG), 1986; Portugal in *European Regional Development Fund Case*, Case No. 184/89, Constitutional Court (Portugal), 1989; and Spain in *Canary Islands case*, *supra* n. 109 1989

[120] *Grad* v. *Finanzamy Traunstein*, Case No. 9/70, ECJ, 1970

...uestion was sufficiently precise and unconditional.[121] It has also held that, ...nlike Treaty provisions, directives do not have 'horizontal direct effect' and ...ould only be relied upon against the State and not against the other ...dividual.[122]

In the context of the national courts, most of them have accepted this ...osition. The German Constitutional Court in *Kloppenburg*[123] has held that the ...isprudence of the Court of Justice on direct effect was binding upon the ...erman courts and, despite amounting to judicial legislation, did not exceed the ...mits of the constitutionally acceptable development of Community law.

Though the *Counseil d' Etat* in France has accepted the supremacy of ...ommunity law in general,[124] and directives in particular,[125] and has held that ...e national authorities have a duty to abrogate national legislation incompatible ...th the provisions of a directive once the time limit for its implementation has ...pired, it has not expressly accepted that non – implemented directives can ...eate rights directly enforceable by individuals before national courts.[126]

The Constitutional Court in Italy in *Giampaoli*,[127] the Council of State in ...reece in *Karella*,[128] the Court of Appeal in Portugal in *Cadima*,[129] and the ...panish Supreme Court in *Rodolfo DR* v. *FOGASA*[130] have applied the ...isprudence of the Court of Justice on directives.

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[121] *Becker* v. *Finanzamt Munster – Innenstadt*, Case No. 8/81, ECJ, 1982; *Francovich, Bonifaci & Ors.* v. *Italian Republic (Joined Cases)*, C – 6/90 & C – 9/90, ECJ, 1991

[122] *Marshall* v. *Southampton and South – West Hampshire Area Health Authority*, Case 152/84, ECJ, 1986

[123] Case No. 2 BvR 687/85, Constitutional Court (FRG), 1987

[124] *Nicolo, supra* n. 104, 1989

[125] *SA Rothmans International France & SA Philip Morris France, Conseil d' Etat* (France), 1992

[126] It had earlier held in *Minister of the Interior* v. *Cohn – Bendit, Conseil d' Etat* (France), 1978 that a directive could not be invoked by an individual against an administrative act addressed to him even though the Court of Justice had expressly held otherwise in *Rutili*, [1975] ECR 1219

[127] *Spa Giampaoli* v. *Ufficio del Registro di Ancona*, Case No. 168/91, Constitutional Court (Italy), 1991

[128] *Karella* v. *Minister of Industry*, Case No. 3312/1989, Council of State (Greece), 1989

[129] Case No. 12 381 – 36 053, Court of Appeal of Coimbra (Portugal), 1986

[130] Case No. 5985, Supreme Court (Spain), 1991

Any national legislation adopted for the implementation of a directive should be interpreted by the national court in conformity with the requirements of Community law, in so far as it was given discretion to do so under national law. The Court of Justice, in *Von Colson and Kamann*,[131] held that, in applying national law and in particular the provisions of national legislation specifically introduced to implement a directive, national courts were required by Article 189 of the EEC Treaty to interpret their national law in the light of the wording and purpose of the directive. Later, in *Marleasing*,[132] it held that while interpreting in the light of the wording and purpose of the directive, it made no difference whether the provision in question had been adopted before or after that directive.

National courts – role in enforcing Community law

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

[131] *Von Colson and Kamann* v. *Land Nordrhein – Westfalen*, Case 14/83, ECJ, 1984
[132] *Marleasing SA* v. *La ComercialInternacional de Alimentacio'n SA*, Case C – 106/89, ECJ, 1990
[133] *Simmenthal supra* n. 95, 1978
[134] *Factortame supra* n. 96, 1990
[135] *Francovich supra* n. 121, 1991

...its for individuals to bring actions to protect rights conferred upon them by a ...ective, so long as that directive has not been properly transposed into the legal ...stem of the Member State concerned.[136]

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

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

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

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[136] *Emmott* v. *Minister for Social Welfare and the Attorney General*, Case C – 208/90, ECJ, ...91

[137] Some of these proceedings can be seen in G. Dannemann, "Constitutional Complaints: The ...ropean Perspective", 1994 Intl. & Comp. L. Q. 142

[138] *Re Treaty on European Union "Maastricht I"*, Constitutional Council (France), 1992.

[139] *Re Treaty on European Union "Maastricht II"*, Constitutional Council (France), 1992.

[140] In *Re Treaty on European Union*, Case No. 1236/92, Constitutional Court (Spain), 1992, the ...onstitutional Court made a broad examination of the constitutional position regarding the ...articipation of non-nationals in municipal elections and concluded that the Treaty provision ...as incompatible with Article 13 (2) of the Constitution. An amendment was brought to the ...id Article and the Treaty was ratified

The Federal Constitutional Court in Germany, in the *Maastricht Treaty Constitutionality Case*,[141] examined the position and elaborated a series of principles concerning the relationship between the Member States and the European Union including conditions for and restrictions upon its future development.

Issue of Sovereignty

Some decisions have dealt with the issue of sovereignty also. As regards the consequence of the formation of the Community, the Court of Justice, in *Costa* v. *ENEL*,[142] had expressly held that the creation of the Community had brought about a transfer of powers from the Member States involving a permanent limitation to their sovereign rights. It held thus –

> "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply....
>
> The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of Community cannot prevail."

Though the national courts have accepted the position regarding limitation, not all have accepted the aspect of permanency.[143] The French

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[141] Case No. 2 BvR 2134/92, Constitutional Court (FRG), 1993

[142] *Supra* n. 93, 1964

[143] Many national courts have accepted this view e.g. Belgium in *Le Ski supra* n. 100, 1971; Germany in *EEC Regulations Constitutionality Case*, Case No. 1 BvR 248/163, Constitutional Court (FRG), 1967; Italy in *Frontini supra* n. 102, 1973; Luxembourg in *Bellion supra* n. 105, 1984; and Spain in *Re Treaty on European Union*, *supra* n. 140, 1992

Constitutional Council, in *Maastricht I*,[144] held that, according to paragraph 15 of the Preamble to the Constitution, France agreed to those limitations of sovereignty necessary for the organisation of peace. It was perfectly consistent with respect for national sovereignty under Article 3 of the Constitution of France to conclude international agreements with a view to participating in permanent international organisations involving the transfer of competences from the Member States. And where such agreements contained a clause contrary to the Constitution or infringed the essential conditions for the exercise of national sovereignty, constitutional revision was required.

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

[144] *Supra* n. 138, 1992
[145] *Supra* n. 94, 1974; reiterated in *Wunsche supra* n. 119, 1986
[146] *Supra* n. 123, 1987
[147] *Supra* n. 141, 1993

Member States continues to be supplied by the national parliaments. It observed that although the European Community competencies involved the pooling of sovereignty, they essentially covered only the economic sphere. Other co-operation under the Treaty remained inter governmental in nature.

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

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

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[148] *Supra* n. 102, 1973
[149] The European Community (Amendment) Act 1993 (UK)
[150] *R. v. Secretary of State, Ex parte Lord Rees – Mogg*, [1994] 2 WLR 115, Divisional Court
[151] *Blackburn* v. *Attorney General*, [1971] 2 All E. R. 1380

the courts would be bound to follow any statute repudiating the EEC Treaty or some of its provisions.[152] This position was reiterated in *Lord Rees – Mogg*.

In *Crotty*,[153] the Irish Supreme Court felt that the legislative powers of the Community institutions involved a limitation of sovereignty which had necessitated constitutional amendment since the provisions of the Single European Act 1986, concerning the co-ordination of foreign policy between the Member States, involved a diminution of sovereignty.[154]

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

The question here is whether the national courts can examine the allegations that a Community measure is in conflict with the fundamental constitutional rights or principles. The Court of Justice, on its part, in *Internationale Handelsgesellschaft*,[155] has held that the national courts would have no such jurisdiction because otherwise the uniformity and effectiveness of Community law would be undermined. It was more so since the fundamental rights were to be protected within the framework of the Community by the Court of Justice itself, inspired by the constitutional traditions common to the Member States. Later, in *Nold*,[156] it held clearly that it would not uphold Community measures incompatible with fundamental constitutional rights recognized by national constitutions.

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[152] *Macarthys, supra* n. 106, 1979

[153] *Supra* n. 107, 1987

[154] Article 29 (4) (3) was amended enabling Ireland to ratify the Act. A similar procedure was adopted for the ratification of the Maastricht Treaty 1992 by amending the same Article. In Denmark, the ratification of the European Treaty was achieved on the basis of the existing constitutional provision, Article 20 which provides for the transfer of sovereign powers to international organizations, of course, after the holding of a referendum under Article 42.

[155] *Supra* n. 94, 1970

[156] *Nold and Ors.* v. *Commission of the European Communities*, Case 4/73, ECJ, 1974.

Though the German Federal Constitutional court, in *Wunsche*,[157] held that, in view of recognition of the significance of the European Convention on Human Rights by all the Community institutions, including the Court of Justice in *Johnston*,[158] Community law and in particular the case law of the Court of Justice has ensured the effective protection of fundamental rights. Later, in *Philip Morris*[159] and *Maastricht Treaty Constitutionality*[160] case, it has observed that although it is primarily for the Court of Justice to ensure protection of fundamental rights, the Constitutional Court retains a jurisdiction of last resort. In the latter decision, it further held that the two courts have complementary roles in protecting the fundamental rights.

Conclusion

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

However, it becomes clear that if the international community wishes and works towards such an environment, it may be possible for the world bodies to lay down norms and the same can be referred to be international and municipal courts making the rights available for the individuals in different countries. Our

[157] *Supra* n. 119, 1986
[158] *Johnston* v. *Chief Constable of the Royal Ulster Constabulary*, Case No. 222/84, ECJ, 1986.
[159] *Philp Morris and Ors.*, Case No. 2 BvQ 3/89, Constitutional Court (FRG), 1989.
[160] *Supra* n. 147, 1993

...periences in the Courts range from a passive onlookers waiting for the ...gislature to act first, to a complete usurpation of this role through judicial ...terpretation.

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

CHAPTER – IV

PRE TRIAL STAGES

A person would rather not come within the purview of criminal law. It is ...e most serious of the infractions that are categorised as crimes. As is the ...nciple, a crime is considered to be against the immediate victim, the society at ...ge and the State. The last of the above, because when a person commits an ...ffence, he challenges the protection granted by the State to persons within its ...ealm. When the State takes upon itself to prosecute a person who has ...ommitted an offence, it is a case of unequals fighting. The person stands alone ...gainst the might of the State. The State comes into the picture the moment the ...nformation regarding the commission of an offence becomes known. Apart ...rom the miniscule category of private crimes, the majority affects the State ...irectly. The machineries under the State start their role as soon as the ...roceedings under the criminal law are initiated. The State has set up a ...pecialised force, the police force, for the prevention and detection of crimes.[1] Right from the stage of filing of the First Information Report, the suspect comes ...ithin the purview of the investigation by the police. The police have been ...iven wide powers under the Code of Criminal Procedure, especially in ...ognizable offences. In non cognizable offences there is the supervision by the ...udicial officer from the beginning itself. Throughout the investigation, the police have been given adequate powers to conduct a proper investigation, ...hough under the supervision of the court. However, the courts are not the ones ...ho are directly involved in any of these functions. This leaves a considerable ...ap for the police to have freedom of choice. Till the filing of the police report, ...he police play the active role in the criminal justice proceedings. That is why ...he study of the proceedings at the pre trial stage holds importance. There have

[1] Preamble to the Police Act, 1861. Police forces are also created for the Union Territories and ...he Delhi Special Police Establishment Act 1946 creates a special force in Delhi for ...nvestigating specified offences in the Union Territories. The powers of this force can be ...xtended to the other States also with the concurrence of the respective State Governments. The inherent restrictions in the Act have been bypassed by the courts. See *State of Bihar* v. *Ranchi Zila Samta Party*, (1996) 3 SCC 682; *K. Chandrasekhar* v. *State of Kerala*, (1998) 5

been many international documents prescribing the dos and don'ts. The attempt in this chapter is to understand the proceedings at the pre trial stage and to study how far we are in tune with the international standards. In the process, the provisions under the criminal statutes as well as the Constitution are relevant.

The Statement of Objects and Reasons of the Code of Criminal Procedure, 1973 states:

i) an accused person should get a fair trial in accordance with the accepted principles of natural justice;

ii) every effort should be made to avoid delay in investigation and trial which is harmful not only to the individuals involved but also to society: and

iii) the procedure should, to the utmost extent possible, ensure fair deal to the poorer sections of the community.[2]

The Committee on Reform of the Criminal Justice System[3] has pointed out the need for reforms to a system devised more than a century back. According to it, the system has become ineffective; a large number of guilty go unpunished in a large number of cases; the system takes years to bring the guilty to justice; and has ceased to deter criminals because of which crime is increasing rapidly everyday and types of crimes are proliferating and the citizens live in constant fear. The Committee has recommended a comprehensive review of the Indian Penal Code, the Evidence Act and the Criminal Procedure Code by a

SCC 223; The functional independence of the CBI has been combined with the Central Vigilance Commission in *Vineet Narain* v. *Union of India*, (1998) 1 SCC 226

Paragraph 3

The Committee headed by Justice V. S Malimath was constituted on 24 November 2000 by the Union Government. The Report was submitted to the Union Home Ministry in April 2003 proposing important changes to various aspects of administration of justice with particular focus on the principles of evidence and conduct of criminal trials (hereafter referred to as Malimath Committee). The other members were S. Varadachary, IAS (Retd.) Amitabh Gupta IPS (Retd.) Prof.(Dr.)N.R. Madhava Menon, D.V. Subba Rao, Members and Durgadas Gupta as Member-Secretary

broad based Committee representing the functionaries of the Criminal Justice System, eminent men and women representing different schools of thoughts, social scientists and vulnerable sections of the society and make recommendations to the Parliament for stronger and progressive laws for the country.[4] It further recommended taking of a holistic view in respect to punishment, arrestability and bailability.[5]

In the context of the recommendations, some of which are discussed in this work, it may be pointed out at the outset that the principle of *nullum crimen sine lege, nulla poena sine lege*,[6] is a fundamental and inderrogable[7] right under international law. It not only prohibits retroactivity of laws, but also prescribes that criminal offences must be clearly defined, free from ambiguities, and not extensively construed to an accused's detriment. The individual must be able to know from the wording of the relevant provision, what act and omission will make him or her criminally liable.[8] This is mentioned at the outset because as we go further we observe that the Committee has recommended some sweeping changes to this basic law.

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[4] Recommendation 114. The Committee felt that when reviewing the Indian Penal Code it may be examined whether it would be helpful to make a new classification into i) The Social Welfare Code, ii) The Correctional code, iii) the Criminal Code and iv) Economic and other Offences Code.

[5] Recommendation 45

[6] Article 15 (1) ICCPR; Human Rights Committee, *General Comment 29 on derogations during a state of emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para 7; see also Article 22 (2) of the Rome Statute for the International Criminal Court, which reads "The definition of a crime shall be strictly construed and shall not be extended by analogy". See with benefit Criminal Justice Reform in India: ICJ Position Paper - Review of the Recommendations made by the Justice Malimath Committee from an international human rights perspective submitted on the occasion of the National Conference on 9th & 10th August 2003, New Delhi (hereinafter referred to as ICJ Position Paper)

[7] See Article 4(2) ICCPR

[8] See, *inter alia*, Concluding Observations of the Human Rights Committee: Algeria, UN Doc CCPR/C/79/Add.95, 18 August 1998, para 11; Concluding Observations of the Human Rights Committee: Portugal (Macao), CCPR/C/79/Add.115, 4 November 1999, para 12; *Veeber* v. *Estonia (No. 2)*, ECtHR, Judgment of 21 January 2003, para 30.

Rights available to all 'persons'

To begin with, it may be mentioned that the protection of rights available under the Constitution has been subject to some wide interpretation. In *Chairman, Railway Board* v. *Chandrima Das*, the Supreme Court observed thus:

> "The word "LIFE" has also been used prominently in the Universal Declaration of Human Rights, 1948. The fundamental rights under the Constitution are almost in consonance with the rights contained in the Universal Declaration of Human Rights as also the Declaration and the Covenants of Civil and Political Rights and the Covenants of Economic, Social and Cultural Rights, to which India is a party having ratified them, as set out by this Court in *Kubic Daruisz* v. *Union of India*.[9] That being so, since "LIFE" is also recognised as a basic human right in the Universal Declaration of Human Rights, 1948, it has to have the same meaning and interpretation as has been placed on that word by this Court in its various decisions relating to Article 21 of the Constitution. The meaning of the word "life" cannot be narrowed down. According to the tenor of the language used in Article 21, it will be available not only to every citizen of this country, but also to a "person" who may not be a citizen of the country."[10]

It has been held in *Anwar* v. *State of J & K*[11] that the rights under Articles 20, 21 and 22 are available not only to 'citizens' but also to 'persons' who would include 'non-citizens'. Article 20, which guarantees right to protection in

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AIR 1990 SC 605

(2000) 2 SCC 465, 482, para 32. See for the shift in position from *AK Gopalan* v. *State of Madras*, AIR 1950 SC 27 (as also *Union of India* v. *Bhanu Das*, AIR 1977 SC 1027) – where it was held that in a different context that procedure need not be fair and reasonable as long as procedure contemplated to *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597: (1978) 1 SCC 248 - where it was held that the procedure has to be fair and reasonable and the resultant expansion of the concept in the later decisions in the light of *Maneka*

(1971) 3 SCC 104: AIR 1971SC 337. See generally Manjula Batra, *Protection of Human Rights in Criminal Justice Administration: A Study of the Rights of the Accused in Indian and Soviet Legal Systems*, Deep and Deep Publications, New Delhi, 1989

...spect of conviction for offences, Article 21, which guarantees right to life and ...ersonal liberty and Article 22, which guarantees right to protection against ...bitrary arrest and detention have been held to be wholly in consonance with ...rticle 3, Article 7 and Article 9 of the Universal Declaration of Human Rights, ...948.[12]

Let us now see the specific procedures contemplated under the criminal ...stice administration for the purpose of finding out how we fare in the system ...nd implementation of the norms at the international level.

Arrest

Arrest means apprehension of a person by legal authority resulting in ...eprivation of his liberty. Arrests, under the Code of Criminal Procedure may ...e made with or without warrant, without warrant where the legal provisions ...ermit it. It is basically resorted to for the purpose of securing the attendance of ...he accused at his trial. It may also be required where he is likely to abscond or ...isobey summons or where social interests would demand that he be arrested ...nd kept in detention.

The word 'arrest' is derived from the French word '*Arreter*' meaning 'to ...top or stay' and signifies a restraint of the person. The meaning of the word ...arrest' is given in various dictionaries depending upon the circumstances in ...which the said expression is used.[13] In *Roshan Beevi* v. *Joint Secretary, Government of T.N.*,[14] the Madras High Court had an occasion to go into the ...meaning of the word 'arrest'. On the basis of the meaning given in the textbooks ...nd lexicons, it has been held that:

> "[T]he word 'arrest' when used in its ordinary and natural sense, means the apprehension or restraint or the deprivation of one's personal liberty.

[12] *Supra* n. 10, 482
[13] *Directorate of Enforcement* v. *Deepak Mahajan,* (1994) 3 SCC 440, 460
[14] 1984 Cri. L. J. 134 (Mad.)

The question whether the person is under arrest or not, depends not on the legality of the arrest, but on whether he has been deprived of his personal liberty to go where he pleases. When used in the legal sense in the procedure connected with criminal offences, an arrest consists in the taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offence. The essential elements to constitute an arrest in the above sense are that there must be an intent to arrest under the authority, accompanied by a seizure or detention of the person in the manner known to law, which is so understood by the person arrested."

The common instances of violations of human rights occur while a person is taken to and kept in custody. The chances of violations get increased if there is option for the arresting authority to take a person into custody without any legal requirements to be complied with. This was considered by the Supreme Court in *Joginder Kumar* v. *State of U.P.*[15] where it observed thus:

"The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, this Court has been receiving complaints about violations of human rights because of indiscriminate arrests. How are we to strike a balance between the two?

A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding

[15] (1994) 4 SCC 260

which comes first, the criminal or society, the law violator or the law abider ...."[16]

The tendency of police to take a person into custody even in minor cases was deprecated and it was opined thus:

"No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another.... No arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter."[17]

In this context the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), may be looked at with benefit.[18] It provides that, where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. For the purpose of deciding upon the appropriateness of discharge or determination of proceedings, a set of established criteria shall be developed within each legal system. For minor cases the prosecutor may impose suitable noncustodial measures, as appropriate.[19] It further provides thus:

"6. Avoidance of pre-trial detention

6.1 Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.

Id., 263-64, paras 8 and 9

Id., 267, para 20

G.A. res. 45/110, annex, 45 U.N. GAOR Supp. (No. 49A) at 197, U.N. Doc. A/45/49 (1990).

Rule 5.1 on Pre-trial dispositions

6.2 Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated under rule 5.1 and shall be administered humanely and with respect for the inherent dignity of human beings.

6.3 The offender shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed."

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment[20] lays down very broad guidelines on this matter. In Principle 4, it specifically states that any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority. Principle 36 provides that a detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden. It lays down various other principles that have been identified and recognised by the Supreme Court as discussed below.

The Supreme Court, *Joginder Kumar*, went on to state certain guidelines for the purpose of regulating the area of arrest.[21] It had the occasion to discuss

G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988).

1. An arrested person being held in custody is entitled, if he so requests to have one friend, relative or other person who is known to him or likely to take an interest in his welfare told as far as is practicable that he has been arrested and where he is being detained; 2. The police

...e same again in *D.K. Basu* v. *State of W.B.*,[22] where, to check the abuse of ...olice power, it was felt that transparency of action and accountability perhaps ...re two possible safeguards which the Court must insist upon. It was sought to ...estow attention to properly develop work culture, training and orientation of the ...olice force consistent with basic human values. It was felt that training ...ethodology of the police needs restructuring. The force needs to be infused ...ith basic human values and made sensitive to the constitutional ethos. And ...efforts must be made to change the attitude and approach of the police personnel ...andling investigations so that they do not sacrifice basic human values during ...terrogation and do not resort to questionable forms of interrogation. For the ...urpose of bringing in transparency, the presence of the counsel of the arrestee at ...ome point of time during the interrogation was considered to possibly deter the ...olice from using third-degree methods during interrogation.[23]

...he Court did recognise the other side also, when it observed thus:

> "We are conscious of the fact that the police in India have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist activities, and among others the increasing number of underworld and armed gangs and criminals. Many hard-core criminals like extremists, terrorists, drug peddlers, smugglers who have organised gangs, have taken strong roots in the society. It is being said in certain quarters that with more and more liberalisation and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes

...ficer shall inform the arrested person when he is brought to the police station of this right; 3. ...e entry shall be required to be made in the diary as to who was informed of the arrest. These ...rections from power must be held to flow from Articles 21 and 22 (1) and enforced strictly. ...further observed that it shall be the duty of the Magistrate, before whom the arrested person ...produced, to satisfy himself that these requirements have been complied with. *Joginder ...mar, supra* n. 15, 266

...1997) 1 SCC 416

...433

committed by such categories of hardened criminals by soft peddling interrogation."

The need to balance the competing claims were felt by the Court, and it said:

"It is felt in those quarters that if we lay too much of emphasis on protection of their fundamental rights and human rights, such criminals may go scot-free without exposing any element or iota of criminality with the result, the crime would go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real. To deal with such a situation, a balanced approach is needed to meet the ends of justice. This is all the more so, in view of the expectation of the society that police must deal with the criminals in an efficient and effective manner and bring to book those who are involved in the crime. The cure cannot, however, be worse than the disease itself."[24]

It quoted the response of Supreme Court of the United States of America to such an argument in *Miranda* v. *Arizona*:[25]

"The Latin maxim *salus populi suprema lex* (the safety of the people is the supreme law) and *salus republicae suprema lex* (safety of the State is the supreme law) coexist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however, must be 'right, just and fair'."[26]

In the particular circumstances, the court felt it necessary to issue certain *requirements* to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures.[27]

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[24] *Id.*, 434, para 31

[25] 384 US 436: 16 L. Ed. 2d. 694 (1966)

[26] SCC pp. 434-35, paragraph 33

[27] *D.K. Basu* v. *State of W.B.*, (1997) 1 SCC 416, 436 (hereinafter referred to as *Basu*). The directions that were given were: (1) The police personnel carrying out the arrest and handling

The Court made it clear that any failure to comply with the requirements mentioned shall, apart from rendering the official concerned liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the country, having territorial jurisdiction over the matter. It was so since, according to the court, the requirements flow from Articles 21 and 22(1) of the Constitution and need to be strictly followed. These were held to be applicable with equal force to the other governmental agencies also to which a reference had been made earlier. It was also made clear that these requirements are in addition to the constitutional and statutory safeguards and do not detract from

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the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register; (2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest; (3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee; (4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest; (5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained; (6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is; (7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee; (8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well; (9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record; (10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation; (11) A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

various other directions given by the courts from time to time in connection with the safeguarding of the rights and dignity of the arrestee.[28] It was felt by the court that creating awareness about the rights of the arrestee would be a step in the right direction to combat the evil of custodial crime and bring in transparency and accountability. It was hoped that these requirements would help to curb, if not totally eliminate, the use of questionable methods during interrogation and investigation leading to custodial commission of crimes.[29]

With regard to the power of arrest, the Report of the Royal Commission on Criminal Procedure in England has recommended that the power to arrest without a warrant must be related to and limited by the object to be served by the arrest, namely, to prevent the suspect from destroying evidence or interfering with witnesses or warning accomplices who have not yet been arrested or where there is a good reason to suspect the repetition of the offence and not to every case irrespective of the object sought to be achieved.[30] It suggested certain restrictions on the power of arrest on the basis of the "necessity principle". It said:

> "... We recommend that detention upon arrest for an offence should continue only on one or more of the following criteria:
>
> (*a*) the person's unwillingness to identify himself so that a summons may be served upon him;
>
> (*b*) the need to prevent the continuation or repetition of that offence;
>
> (*c*) the need to protect the arrested person himself or other persons or property;
>
> (*d*) the need to secure or preserve evidence of or relating to that offence or to obtain such evidence from the suspect by questioning him; and

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[28] *Id.*, 437

[29] For the purpose it was directed that the *requirements* be forwarded to the Director General of Police and the Home Secretary of every State/Union Territory and it shall be their obligation to circulate the same to every police station under their charge and get the same notified at every police station at a conspicuous place. It was also felt that it would also be useful and serve larger interest to broadcast the *requirements* on All India Radio besides being shown on the National Network of Doordarshan and by publishing and distributing pamphlets in the local language containing these requirements for information of the general public.

[30] The police powers of arrest, detention and interrogation in England were examined in depth by Sir Cyril Philips Committee — "*Report of a Royal Commission on Criminal Procedure*" (Command Papers 8092 of 1981). *Basu*, 425

(*e*) the likelihood of the person failing to appear at court to answer any charge made against him."[31]

It further suggested provisions to enable a police officer to issue what is called an 'appearance notice' to obtain attendance at the police station without resorting to arrest provided a power to arrest exists, for example to be fingerprinted or to participate in an identification parade.

The National Police Commission in India, in its Third Report, has suggested that -

"... An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances:

(*i*) The case involves a grave offence like murder, dacoity, robbery, rape etc., and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror-stricken victims.

(*ii*) The accused is likely to abscond and evade the processes of law.

(*iii*) The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint.

(*iv*) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again. It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines. ..."[32]

The Malimath Committee has recommended that the number of offences for which no arrest shall be made should be increased, increase the number of offences where arrest can be made only with the order of the court and reduce the number of cases where arrest can be made without an order or warrant form

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Basu paragraph 15, 425.

Referred to in *Basu*, 428. They remain recommendations yet.

...e Magistrate.[33] It also stated that a provision in the Code be made to provide ...at no arrest shall be made in respect of offences punishable only with fine, ...ences punishable with fine as an alternative to a sentence of imprisonment.[34]

Detention

Article 22(1) embodies a rule which has always been regarded as vital ...d fundamental for safeguarding personal liberty in all legal systems where the ...le of law prevails.[35] In England whenever an arrest is made without a warrant, ...e arrested person has a right to be informed not only that he is being arrested ...t also of the reasons or grounds for the arrest. In *Madhu Limaye, In re*,[36] the ...upreme Court referred to the decision of the House of Lords in *Christie* v. ...*achinsky*,[37] which went into the origin and development of this rule. The ...upreme Court reproduced some of the propositions laid down by Viscount ...mon:

> "1. If a policeman arrests without warrant upon reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized.
>
> 2. * * *
>
> 3. The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are

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...Recommendations 110 and 111

...Recommendation 43

...The 6th Amendment to the Constitution of the United States of America contains similar ...visions and so does article 34 of the Japanese Constitution of 1946.

...1969) 1 SCC 292

...1947] 1 All. E. R. 567

such that he must know the general nature of the alleged offence for which he is detained."[38]

The Court clarified the two requirements of clause (1) of Article 22 are ...eant to afford the earliest opportunity to the arrested person to remove any ...stake, misapprehension or misunderstanding in the minds of the arresting ...thority and, also, to know exactly what the accusation against him is so that he ... exercise the second right, namely, of consulting a legal practitioner of his ...ice and to be defended by him. It said that Clause (2) of Article 22 provides ...e next and most material safeguard that the arrested person must be produced ...ore a Magistrate within 24 hours of such arrest so that an independent ...thority exercising judicial powers may without delay apply its mind to his ...e. The Criminal Procedure Code contains analogous provisions in Sections ... and 340 but our Constitution makers were anxious to make these safeguards ... integral part of fundamental rights.[39]

Though a Constitution Bench in *A.K. Roy* v. *Union of India*[40] upheld the ...s of the Preventive Detention Act, it was pointed out in *Ichhu Devi Choraria* ...nion of India* that:

"The burden of showing that the detention is in accordance with the procedure established by law has always been placed by this Court on the

...69) 1 SCC 292, 298. See also *Ram Narayan Singh* v. *State of Delhi*, AIR 1953 SC 277. ...e question as to how protection can be accorded to women prisoners in police lock-ups was ...up in *Sheela Barse* v. *State of Maharashtra*, (1983) 2 SCC 96 and several directions were ... as a result of meaningful and constructive debate in court in regard to various aspects of ...question argued before it - 103.

... B.R. Ambedkar said while moving for insertion of Article 15-A (as numbered in the Draft ... of the Constitution) which corresponded to present Article 22 said: "Article 15-A merely ... from the provisions of the Criminal Procedure Code two of the most fundamental ...ples which every civilised country follows as principles of international justice. It is quite ... that these two provisions contained in clause (1) and clause (2) are already to be found in ... Criminal Procedure Code and thereby probably it might be said that we are really not ...ing any very fundamental change. But we are, as I contend, making a fundamental change ...use what we are doing by the introduction of Article 15-A is to put a limitation upon the ...ority both of Parliament as well as of the Provincial Legislature not to abrogate these two ...sions, because they are now introduced in our Constitution itself."

... R 1982 SC 710: (1982) 1 SCC 271

detaining authority because Article 21 of the Constitution provides in clear and explicit terms that no one shall be deprived of his life or personal liberty except in accordance with procedure established by law. This constitutional right of life and personal liberty is placed on such a high pedestal by this Court that it has always insisted that whenever there is any deprivation of life or personal liberty, the authority responsible for such deprivation must satisfy the court that it has acted in accordance with the law. This is an area where the court has been most strict and scrupulous in ensuring observance with the requirements of the law, and even where a requirement of the law is breached in the slightest measure, the court has not hesitated to strike down the order of detention or to direct the release of the detenu even though the detention may have been valid till the breach occurred."[41]

Communication to the detenu the grounds on which the order of detention ...been made, and affording him the earliest opportunity of making a ...esentation against the order of detention have been recognised as the barest ...imum safeguards which must be observed before an executive authority can ...permitted to preventively detain a person and thereby drown his right of ...sonal liberty in the name of public good and social security.[42]

The right of a detenu to be informed of the grounds of his detention has ...repeatedly stressed by the Supreme Court. The requirement to inform has ...read in by the Court in other circumstances also, where the statute did not ...citly provide for such a requirement. While considering the scope of ...le 22(5) of the Constitution of India and various other provisions of the

...) 4 SCC 531: AIR 1980 SC 1983; SCC, 538, para 5

...diram Das v. *State of W.B.*, AIR 1975 SC 550: (1975) 2 SCC 81, 87, para 5. See also ...rayan Sukul v. *State of West Bengal*, AIR 1970 SC 675: (1970) 1 SCC 219; *State of* ...han v. *Shamsher Singh*, 1985 Supp SCC 416; *Francis Coralie Mullin* v. *W.C. Khambra*, ...1980 SC 849: (1980) 2 SCC 275; *Wasiuddin Ahmed* v. *D.M.*, (1981) 4 SCC 521: AIR ... SC 2166

...EPOSA Act and the NDPS Act as amended in 1988, a Constitution Bench ...Umleshkumar Ishwardas Patel* v. *Union of India*[43] concluded:

> "Article 22(5) must, therefore, be construed to mean that the person detained has a right to make a representation against the order of detention which can be made not only to the Advisory Board but also to the detaining authority, i.e., the authority that has made the order of detention or the order for continuance of such detention, which is competent to give immediate relief by revoking the said order as well as to any other authority which is competent under law to revoke the order for detention and thereby give relief to the person detained. The right to make a representation carries within it a corresponding obligation on the authority making the order of detention to inform the person detained of his right to make a representation against the order of detention to the authorities who are required to consider such a representation."[44]

The Malimath Committee has by recommended that the rights of the ...used recognized by the Supreme Court may subject to the clarification in ...apter 4 and the manner of their protection be made statutory, incorporating ...same in a schedule to the Criminal Procedure Code.[45]

Custodial violence

The major violations of human rights take place during the course of ...estigation, when the police, with a view to secure evidence or confession, ...sort to inhuman methods, including torture. To avoid legal impediments, it

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...995) 4 SCC 51

...SCC p. 59, para 14. See also *State of Punjab* v. *Baldev Singh*, (1999) 6 SCC 172. See also ...dy of Principles for the Protection of All Persons under Any Form of Detention or ...prisonment, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. ...A/43/49 (1988).

...Recommendation 11

screens the arrest by either not recording the arrest or describing the deprivation of liberty merely as a prolonged interrogation. It has become so common that the Supreme Court observed thus:

> "The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the credibility of the rule of law and the administration of criminal justice system. The community rightly feels perturbed. Society's cry for justice becomes louder.[46]
>
> Custodial violence, including torture and death in the lock-ups, strikes a blow at the rule of law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law-enforcing officers is a matter of deep concern in a free society.... The issues are fundamental."[47]

Speaking about the seriousness of the aspect of torture and the consequences of it, the Supreme Court quoted the following –

> "Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also so intangible that there is no way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone, paralyzing as sleep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself."
>
> Adriana P. Bartow[48]

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[46] *Basu*, 428

[47] *Basu*, 425. In England, torture was once regarded as a normal practice to get information regarding the crime, the accomplices and the case property or to extract confessions, but with the development of common law and more radical ideas imbibing human thought and approach, such inhuman practices were initially discouraged and eventually almost done away with, certain aberrations here and there notwithstanding. *Basu*, 426

[48] *Ibid.*

It is said that discrimination on the basis of gender, religion, caste, ethnicity, social, political and economic background is widespread throughout India and lays the foundations for endemic torture.[49] The police need training for modern scientific investigation and proper equipments.[50] Violation of the human rights by torture has been the subject of so many Conventions and Declarations. 'Custodial torture' is considered as a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilisation takes a step backward — flag of humanity must on each such occasion fly half-mast.

'Custodial violence' has been the concern of international community because the problem is universal and the challenge is almost global. The Universal Declaration of Human Rights 1948 stipulates at Article 5 that:

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

The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[51] at Article 1, states that for the purpose of the Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or

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See Law Commission of India, 152nd Report on Custodial Crime (1994), para 1.5; Concluding observations of the Committee on the Elimination of Discrimination against Women: India, 1 February 2000, A/55/38, para 68, 71

Markandey Katju J., "Torture as a Challenge to Civil Society and Administration of Justice", (2009) 2 SCC (J) 39

G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975). The prohibition of torture has been identified not only as a norm of customary international law, but also as an inderrogable norm of peremptory international law [Human Rights Committee, General Comment 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, UN Doc. HRI\GEN\1\Rev.1 at 14 (1994), para

...timidating him or other persons. It does not include pain or suffering arising ...ly from, inherent in or incidental to, lawful sanctions to the extent consistent ...th the Standard Minimum Rules for the Treatment of Prisoners. It constitutes ...n aggravated and deliberate form of cruel, inhuman or degrading treatment or ...nishment. Article 2 describes any act of torture or other cruel, inhuman or ...grading treatment or punishment as an offence to human dignity and that it ...all be condemned as a denial of the purposes of the Charter of the United ...ations and as a violation of the human rights and fundamental freedoms ...oclaimed in the Universal Declaration of Human Rights. Article 3 prohibits ...y State from permitting or tolerating torture or other cruel, inhuman or ...grading treatment or punishment. Exceptional circumstances such as a state of ...ar or a threat of war, internal political instability or any other public emergency ...ay not be invoked as a justification of torture or other cruel, inhuman or ...grading treatment or punishment. Article 10 requires that if an investigation ...der article 8 or article 9 establishes that an act of torture as defined in article 1 ...ppears to have been committed, criminal proceedings shall be instituted against ...e alleged offender or offenders in accordance with national law. If an ...legation of other forms of cruel, inhuman or degrading treatment or ...unishment is considered to be well founded, the alleged offender or offenders ...all be subject to criminal, disciplinary or other appropriate proceedings.

The Body of Principles for the Protection of All Persons under Any Form ...f Detention or Imprisonment, at Principle 2, prescribes that no detained person ...hile being interrogated shall be subject to violence, threats or methods of ...terrogation which impair his capacity of decision or his judgment. At ...rinciple 6, it mandates that no person under any form of detention or ...mprisonment shall be subjected to torture or to cruel, inhuman or degrading ...eatment or punishment. No circumstance whatever may be invoked as a ...stification for torture or other cruel, inhuman or degrading treatment or

...10]. India has signed, but not ratified the UN Convention against Torture (78 U.N.T.S. 277). ...e also the ICJ Position Paper

...nishment. To ensure avoidance of torture, Principle 23 requires that the ...ration of any interrogation of a detained or imprisoned person and of the ...ervals between interrogations as well as the identity of the officials who ...nducted the interrogations and other persons present shall be recorded and ...rtified in such form as may be prescribed by law.

In the Code of Conduct for Law Enforcement Officials,[52] Article 3 ...pulates that law enforcement officials may use force only when strictly ...cessary and to the extent required for the performance of their duty. It also ...ates, at Article 5, that no law enforcement official may inflict, instigate or ...lerate any act of torture or other cruel, inhuman or degrading treatment or ...nishment, nor may any law enforcement official invoke superior orders or ...ceptional circumstances such as a state of war or a threat of war, a threat to ...ational security, internal political instability or any other public emergency as a ...stification of torture or other cruel, inhuman or degrading treatment or ...nishment.

Principle 4 of the Basic Principles on the Use of Force and Firearms by ...w Enforcement Officials, Eighth United Nations Congress on the Prevention ...Crime and the Treatment of Offenders,[53] stipulates that the law enforcement ...ficials, in carrying out their duty, shall, as far as possible, apply non-violent ...eans before resorting to the use of force and firearms. They may use force and ...earms only if other means remain ineffective or without any promise of ...hieving the intended result. At Principle 5, it states that

'Whenever the lawful use of force and firearms is unavoidable, law ...forcement officials shall:

(a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;

...A. res. 34/169, annex, 34 U.N. GAOR Supp. (No. 46) at 186, U.N. Doc. A/34/46 (1979)
...avana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990)

(b) Minimize damage and injury, and respect and preserve human life;

(c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;

(d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.'

Principle 6 requires that where injury or death is caused by the use of force and firearms by law enforcement officials, they shall report the incident promptly to their superiors, in accordance with principle 22.

Despite the pious declarations, the crime continues unabated, though every civilised nation shows its concern and takes steps for its eradication.

Torture is named as 'sustained interrogation' or 'questioning' or examining.[54] Though prohibition of torture has been advocated ever since the adoption of the Universal Declaration of Human Rights in 1948 and the Geneva Convention of 1949, a definition for torture was attempted by the General Assembly only in 1975.[55] It is claimed that prohibition against torture remains non - derogatory and inalienable right even during emergency.[56] It is to be noted that throughout the development of norms against torture it is seen that the definitions exclude pain and suffering arising from lawful sanctions. This may be considered as a serious loophole with the potential of being abused. It is not the Declaration and the Convention and the other instruments referred to above that deal with the matter of torture exclusively, but there are other international instruments also dealing with this.[57] The 1984 Convention against Torture and

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[54] R. S. Saini, "Freedom from Torture and the United Nations", 29 Ind. J. Intl. L. 24 (1989), 24

[55] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975)

[56] Saini, *supra* n. 54, 26

[57] The other relevant instruments may be the Universal Declaration of Human Rights; Convention on the Prevention and Punishment of the Crime of Genocide 1948 GA Res. 260A III of 9 December 1948; Geneva Convention 1949; Declaration of the Rights of Child, GA Res. 1386 (XIV) of 20 November 1959; International Convention against Racial Discrimination GA Res. 2106A (XX) 21 December 1965; Supplementary Convention on Slavery, ECOSOC Res.

...ther Cruel, Inhuman or Degrading Treatment or Punishment,[58] which entered ...to force on 26 June 1987, for the first time clarified that orders from a superior ...fficer or a public authority may not be invoked as a justification for torture. ...he Convention further provides for a ten member Committee with a reporting ...ystem in place including Inter State and Individual Communication System. ...he Committee is also empowered to take initiatives on its own. As a process of ...reating public opinion, annual reports are required to be submitted to the ...eneral Assembly.

Torture is generally attempted to be justified under the guise of security ...f State. There is no second opinion in the principle that the freedom of the ...ndividual must yield to the security of the State.[59] But, it cannot justify torture. ...hat is argued for generally is sensitisation and training of the police officials.[60] ...he United General Assembly Resolution of December 1997 has declared as ...6th June as UN International Day in Support of Victims of Torture.

In the recent Constitutional development at the international level worth ...oting, the interim constitution of South Africa prohibited torture and cruel, ...nhumane or degrading treatment or punishment.[61] It defined torture to include ...orture of any kind, whether physical, mental or emotional'. It had been argued ...y an author that this definition of torture could make the interpretation of a ...omewhat nebulous concept slightly easier for the Constitutional Court in South

...98 (XXI) of 30 April 1956; the ICCPR 1966: Declaration on the Rights of Mentally Retarded ...ersons 1971; International Convention against Apartheid GA Res. 3068 (XXVIII) of 30 ...ovember 1973; Declaration on the Rights of Disabled Persons 1975; Standard Minimum ...ules for the Treatment of Prisoners 1955; ECHR 1950; ACHR 1969; African Charter of HPR ...986; Inter American Convention to Prevent and Punish Torture 1986

...G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], ...ntered into force June 26, 1987

...*Salus populi est suprema lex* – the safety of people is the supreme law and *salus reipublicae ...st suprema lex* – the safety of the State is the supreme law

...A.S. Anand, Dr., CJI, "Speech at the VIII[th] International Symposium on Torture", (1997) 7 ...CC (J) 10. See also for the change even in Israel brought about by the Israeli Supreme Court

...Section 11 (2)

Africa than it was for the European Court of Human Rights in the Irish case[62] where it attempted to define 'torture' in the context of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[63] The new Constitution specifically deals with this under the right to freedom and security of the person which is to include 'right not to be tortured in any way'[64] and 'right not to be treated or punished in a cruel, inhuman and degrading way.'[65]

It is unfortunate to see that in spite of experiences in this country of torture, there has been legislation granting more powers to the police, especially in the context of terrorism and drug abuse. It is true that these are offences that eat into the vitals of a State and it becomes necessary for the State to take adequate steps to prevent them. It is again a relevant point that these powers, while being justified for the preventive measures addressed to therein, could be exercised in other areas also. The police in India is overburdened, often operates in high risk situations, lack adequate remuneration and appropriate training. Proposals and reports on police reform have not borne fruit until now.[66]

It may also be mentioned that the mere grant of wide powers do not necessarily lead to their striking down of the same by a court on the ground of a mere possibility of abuse. In *People's Union for Civil Liberties* v. *Union of India*, it has been observed thus:

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[62] *Ireland* v. *United Kingdom*, 2 Eur. Ct. H.R. (Ser. A) 25 (1978) referred to in Anton J. Steenkamp, "The South African Constitution of 1993 and the Bill of Rights: An Evaluation in Light of International Human Rights Norms", 17 HRQ 101 (1995), 109

[63] Steenkamp, *supra* n. 62, 109. Article 3 simply reads: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". See further P. J. Duffy, "Article 3 of the European Constitution on Human Rights", 32 Intl. & Comp. L. Q. 316 (1983).

[64] Section 12 (1) (d)

[65] Section 12 (1) (e)

[66] For a background on the many attempts to reform the police see *National Human Rights Commission of India*, Annual Report 2000 – 2001, paragraph 3.50;

"Moreover, we would like to point out that this Court has repeatedly held that mere possibility of abuse cannot be counted as a ground for denying the vesting of powers or for declaring a statute unconstitutional."[67]

It may not be out of place to mention that, in practice, investigations and prosecutions into allegations of custodial violence are not conducted in a consistent and systematic manner as required under Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.[68] This is often due to immunities granted to many state officials, particularly members of the armed forces.[69] The investigations carried out have often lacked the thoroughness and effectiveness warranted by the gravity of the alleged violation. The vast majority of complaints about torture or ill-treatment do not result in conviction or in very minor sanctions.[70] In many cases, victims do not even complain, because they are unaware of their rights, because of the stigma attached to the complaint, especially in rape cases, or because they have

(2004) 9 SCC 580, 599 [hereinafter referred to as *PUCL* (2004)]; See further *State of Rajasthan* v. *Union of India*, (1977) 3 SCC 592, *Collector of Customs* v. *Nathella Sampathu Chetty*, AIR 1962 SC 316; *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225; and *Hafatlal Industries Ltd.* v. *Union of India*, (1997) 5 SCC 536 etc.

E.S.C. res. 1989/65, annex, 1989 U.N. ESCOR Supp. (No. 1) at 52, U.N. Doc. E/1989/89 (1989).

The law protects public officials from prosecution with far reaching immunity clauses. Section 197 of the Criminal Procedure Code provides that no magistrate, public servant or member of the Armed Force not removable from his office may be prosecuted for any act done in the discharge of his duties, except with the previous sanction of the government. Section 7 of the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 and Section 7 of the Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983 and Section 57 of the Prevention of Terrorism Act, 2002 contain similar clauses. The National Human Rights Commission, while having been active in the fight against torture, is limited in its mandate by the Protection of Human Rights, 1993, which prevents it from investigating allegations of human rights violations committed by members of the army or paramilitary forces and incidents which took place more than a year before the complaint was made [Sections 19 and 36 (2) Protection of Human Rights Act, 1993]. The UN Human Rights Committee has demanded that the requirement of consent by government to prosecute officials from security forces should be removed from all legislation, as it creates a climate of impunity and deprives people of remedies to which they may be entitled in accordance with article 2 (3) ICCPR [Concluding Observations of the Human Rights Committee: India, 4 August 1997, CCPR/C/79/Add.81, para 31].

On statistics see National Human Rights Commission of India, Annual Report 2000-2001, Annexures, Charts and Graphs

...een threatened by the perpetrators. Medical doctors have sometimes failed to ...ive truthful reports, often because of pressure from the perpetrators.[71] Despite ...rogressive jurisprudence of the Supreme Court on the matter, there is, as yet, no ...overnment reparation scheme or law.

The Supreme Court, though, has been a crusader as evident by the ...lethora of decisions in the area.[72] Acting upon the recommendations of the ...upreme Court, the Law Commission suggested an amendment in the Indian ...vidence Act to enable the Courts to presume that the police official in whose ...ustody a person dies is responsible for his injuries. In a working paper on 'Injuries in Police Custody', the Commission suggested an amendment of ...ection 114 B of the Evidence Act.[73]

The magistrates, like any other state authority, have a duty to investigate ...llegations of torture and ill-treatment. It must be kept in mind that what we are ...ealing with here is another facet of right to life under Article 21 of the Constitution. This duty of investigation is an obligation for the magistrate to ...onduct the investigation *proprio motu* and *ex officio.* This is important, as ...many detainees or accused brought before a court will not complain about ...having been tortured, as they will often be subject to intimidation by the police. Magistrates should always automatically verify if evidence has not been ...btained through torture or cruel, inhuman or degrading treatment. This ...nternational standard has also been adopted by the Indian Supreme Court, which ...has held that section 54 of the Code of Criminal Procedure required that the magistrate before whom the arrested person is brought shall enquire if the person

[71] See, on the role of the medical profession the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. ...194, annex, 37 U.N. GAOR Supp. (No. 51) at 211, U.N. Doc. A/37/51 (1982).

[72] *State of Maharashtra* v. *Prabhakar Pandurang*, AIR 1966 SC 424; *Niranjan Singh* v. *Prabhakar Rajaram*, AIR 1980 SC 785; *Raghubir Singh* v. *State of Haryana*, AIR 1980 SC ...087; *Kishore Singh* v. *State of Rajasthan*, AIR 1981 SC 625; *State of UP* v. *Ram Sagar Yadav*, AIR 1985 SC 421

[73] Discussed in R. S. Saini, "Custodial Torture in Law and Practice with Reference to India", 36 JILI 166, (1994), 186

has a complaint of torture or ill-treatment and inform the person of his or her right to a medical examination.[74]

It is common for the officers to raise the plea that the acts (custodial violence) committed by them was under the colour of their duty. Such a contention was overruled in *State of Maharashtra* v. *Atma Ram*,[75] where the Supreme Court observed:

> "The provisions of sections 161 and 163 of the Cr.P.C. emphasise the fact that a police officer is prohibited from beating or confining persons with a view to induce them to make statements. In view of the statutory prohibition it cannot possibly be said that the acts complained of in this case are acts done by the respondents under the colour of their duty or authority. In our opinion, there is no connection in this case, between the acts complained of and the office of the respondents (the police officers) and the duties and obligations imposed on them by law. On the other hand, the alleged acts fall outside the scope of the duties of the respondents."

Terrorism

In the context of terrorism, the Honourable Supreme Court has been doing the balancing act when it observed thus:

> "The protection and promotion of human rights under the rule of law is essential in the prevention of terrorism. Here comes the role of law and court's responsibility. If human rights are violated in the process of

[74] *Sheela Barse* v. *State of Maharashtra*, AIR 1983 SC 378. See also Human Rights Committee, General Comment 6, Article 6, UN Doc. HRI\GEN\1\Rev.1 at 14 (1994), para 4; General Comment 20 on Article 7, para 14; the requirements for investigations of the jurisprudence of the European Court of Human Rights have been recently summarized in the case of *Finucane* v. *The United Kingdom*, ECtHR, Judgment of 1 July 2003, paragraphs 67-71. See also the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, recommended by General Assembly resolution 55/89 of 4 December 2000 (so called Istanbul Principles).

[75] AIR 1966 SC 1766

combating terrorism, it will be self-defeating. Terrorism often thrives where human rights are violated, which adds to the need to strengthen action to combat violations of human rights. The lack of hope for justice provides breeding grounds for terrorism. Terrorism itself should also be understood as an assault on basic rights. In all cases, the fight against terrorism must be respectful to the human rights. Our Constitution laid down clear limitations on State actions within the context of the fight against terrorism. To maintain this delicate balance by protecting 'core' human rights is the responsibility of court in a matter like this."[76]

It went on to judge the constitutional soundness of Prevention of Terrorism Act by keeping these aspects in mind in the case. It did recognise that anti-terrorism law is not only a penal statute but also focuses on pre-emptive rather than defensive State action requiring, in the light of global terrorist threats, collective global action.[77] It prescribed that the anti-terrorism laws should be capable of dissuading individuals or groups from resorting to terrorism, denying the opportunities for the commission of acts of terrorism by creating inhospitable environments for terrorism and also leading the struggle against terrorism.

What amounts to terrorist acts is again a bone of contention. In *Hitendra Vishnu Thakur case*[78] the Supreme Court held:

"A 'terrorist' activity does not merely arise by causing disturbance of law and order or of public order. The fallout of the intended activity must be such that it travels beyond the capacity of the ordinary law enforcement agencies to tackle it under the ordinary penal law.... It is in essence a deliberate and systematic use of coercive intimidation."

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[76] *PUCL* (2004), 597

[77] *PUCL* (2004), 596. It quoted Lord Woolf, C.J. in *A, X and Y* v. *Secretary of the State for the Home Deptt.*, 2002 EWCA Civ 1502 - "... Where international terrorists are operating globally and committing acts designed to terrorize the population in one country, that can have implications which threaten the life of another. This is why a collective approach to terrorism is important."

was approved by a three Judge Bench in *State* v. *Nalini* thus:

"[T]he legal position remains unaltered that the crucial postulate for judging whether the offence is a terrorist act falling under the Act or not is whether it was done with the intent to overawe the Government as by law established or to strike terror in the people etc." [79]

The problem of defining terrorism continues to haunt the legislators, locally and internationally. It has also been recognised by our courts when, in *Devender Pal Singh* v. *State of NCT of Delhi*, the Honourable Supreme Court observed:

"... it is a common feature that hardened criminals today take advantage of the situation and by wearing the cloak of terrorism, aim to achieve acceptability and respectability in the society; because in different parts of the country affected by militancy, a terrorist is projected as a hero by a group and often even by many misguided youth."[80]

A definition was first attempted by the League of Nations, but the convention drafted in 1937 never came into existence. There are about 12 sectoral conventions and protocols on terrorism. This affects in putting in place meaningful international countermeasures. It is also true that at times one man's 'terrorist' is another State's 'freedom fighter'. Whether the criminal act is committed with an intention to strike terror in the people or a section of the people would depend upon the facts of each case.[81]

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[79] (1994) 4 SCC 602, 618, para 7: 1994 SCC (Cri) 1087

[80] (2002) 5 SCC 253, 298, paragraph 51.

[81] (2004) 5 SCC 234, 257

It has been noted in *Jayawant Dattatray Suryarao* v. *State of Maharashtra*, (2001) 10 SCC 109: (2001) AIR SCW 4717, that for finding out the intention of the accused, there would hardly be any cases where there would be direct evidence. It has to be mainly inferred from the circumstances of each case. In *Devender Pal Singh* v. *State of NCT of Delhi*, *supra* n. 80, 259, the Supreme Court has reproduced some attempts to define terrorism:

League of Nations Convention (1937)

It has been argued that the terrorism definition of Article 3 POTA ...ntravenes the principle of *nullum crimen, nulla poena sine lege.* The ...dividual must be able to know from the wording of the relevant provision, ...at acts and omission will make him or her criminally liable. In particular in ...spect of the crime of terrorism and the special legal regime it is submitted to, ...e definition must avoid imprecision and ambiguity.[82]

"All criminal acts directed against a State along with intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public."

UN GA Res. 51/210 measures to eliminate international terrorism

"1. Strongly condemns all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed;

2. Reiterates that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them."

Short legal definition proposed by A.P. Schmid to the United Nations Crime Branch (1992)

Act of terrorism = Peacetime equivalent of war crime

Academic consensus definition

"Terrorism is an anxiety-inspiring of repeated violent action, employed by (semi-) clandestine individual, group or State actors, for idiosyncratic, criminal or political reasons, whereby — in contrast to assassination — the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat- and violence-based communication processes between terrorist (organization), (imperilled) victims, and main targets are used to manipulate the main target [audience(s)], turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought." (Schmid, 1988)

Definitions of terrorism used by the Federal Bureau of Investigation:

Terrorism is the use or threatened use of force designed to bring about political change. *Brian Jenkins*

Terrorism constitutes the illegitimate use of force to achieve a political objective when innocent people are targeted. *Walter Laqueur*

Terrorism is the premeditated, deliberate, systematic murder, mayhem, and threatening of the innocent to create fear and intimidation in order to gain a political or tactical advantage, usually to influence an audience. *James M. Poland*

Terrorism is the unlawful use or threat of violence against persons or property to further political or social objectives. It is usually intended to intimidate or coerce a government, individuals or groups, or to modify their behaviour or policies. *Vice-President's Task Force, 1986*

Terrorism is the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.

[82] The Human Rights Committee has criticized the definition of terrorism in Egyptian law as "so broad that it encompasses a wide range of acts of different gravity", Observations and recommendations of the Human Rights Committee: Egypt, UN Doc CCPR/C/79/Add.23, 9

is requirement, it is argued, is not fulfilled by section 3 (1) POTA.[83]

On the aspect of declaring an organization as a Terrorist Organisation it s held in *People's Union for Civil Liberties* v. *Union of India*,[84] that the post-cisional remedy provided under POTA satisfies the *audi alteram partem* quirement in the matter of declaring an organization as a terrorist organization. erefore, the absence of pre-decisional hearing cannot be treated as a ground declaring Section 18 as invalid.

The Malimath Committee has recommended that a comprehensive and clusive definition of terrorists' acts, disruptive activities and organised crimes e provided in the Indian Penal Code 1860 so that there is no legal vacuum in aling with terrorists, underworld criminals and their activities after special s are permitted to lapse as in the case of TADA 1987.[85] It also recommended at the sunset provision of POTA 2002 must be examined in the light of periences gained since its enactment and necessary amendments carried out to aintain human rights and civil liberties.[86]

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gust 1993, para 129; see also the Recommendation of the Inter-American Commission of man Rights according to which States must "ensure that crimes relating to terrorism are ssified and described in precise and unambiguous language that narrowly defines the nishable offense, by providing a clear definition of the criminalized conduct, establishing its ements and the factors that distinguish it from behaviors that are either not punishable enses or are punishable by other penalties" (Report on Terrorism and Human Rights, EA Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, Recommendation No. 10 (a).)

This provision contains a number of terms that are so vague that they fail to meet the gency of clarity required for a criminal offence, and that, moreover, they criminalize tivities which are the exercise of human rights. Under the terms of "any means whatsoever" d "likely to cause disruption of services essential to the life of the community" the exercise the right to demonstrate or to strike could be considered a terrorist crime. The definition also riminates in section 3 (5) membership in a terrorist organization, without the person having en involved in any illegal act such as a killing, which might entail a violation of freedom of sociation under article 22 ICCPR and the principle of individual responsibility in criminal w.

PUCL (2004), 605: Reference was also made to *Mohinder Singh Gill* v. *Chief Election ommr.*, (1978) 1 SCC 405, *Swadeshi Cotton Mills* v. *Union of India*, (1981) 1 SCC 664, *Olga ills* v. *Bombay Municipal Corpn.*, (1985) 3 SCC 545 and *Union of India* v. *Tulsiram Patel*, 985) 3 SCC 398 : 1985 SCC (L&S) 672.

Recommendation 138

Recommendation 139

Drug abuse

There has been recognition at the international level on the after affects of drug trafficking and drug abuse. The menace of drug abuse has been noted by the Apex Court thus:

> "Drug abuse is a social malady. While drug addiction eats into the vitals of the society, drug trafficking not only eats into the vitals of the economy of a country, but illicit money generated by drug trafficking is often used for illicit activities including encouragement of terrorism. There is no doubt that drug trafficking, trading and its use, which is a global phenomena and has acquired the dimensions of an epidemic, affects the economic policies of the State, corrupts the system and is detrimental to the future of a country. It has the effect of producing a sick society and harmful culture. Anti-drug justice is a criminal dimension of social justice."[87]

The United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances held in Vienna, Austria in 1988 was the first effort, at an international level, to tackle the menace of drug trafficking throughout the comity of nations. The Government of India has ratified this Convention. Prior to this there was the International Convention on Psychotropic Substances, 1971. The Parliament, with a view to meet this social challenge, enacted the NDPS Act, 1985 to consolidate and amend existing provisions relating to control over drug abuse etc. and to provide for enhanced penalties particularly for trafficking and various other offences. The NDPS Act,

[87] *State of Punjab* v. *Baldev Singh*, (1999) 6 SCC 172, 184

...985 provides stringent penalties for various offences. Enhanced penalties are ...escribed for the second and subsequent offences.[88]

Investigation

One of the major international efforts in this area is evidenced by the ...ode of Conduct for Law Enforcement Officials.[89] Investigation is one of the ...ssential areas of the criminal justice administration for the ascertainment of ...vidence of acts that constitute offences. The police have to exercise the powers ...onferred by the Code of Criminal Procedure for this purpose. The word ...nvestigation' is defined under Section 2(h). It is an inclusive definition as ...ncluding all the proceedings under the Code for the collection of evidence ...onducted by a police officer or any person (other than a Magistrate) who is ...uthorised by a Magistrate in this behalf. In *H.N. Rishbud* v. *State of Delhi*, it ...as been held that:

> "[U]nder the Code investigation consists generally of the following steps: (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (*a*) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (*b*) the search of places of seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so

[88] The NDPS Act, 1985 was amended in 1988 with effect from 29-5-1989. See also United Nations Convention Against Transnational Organized Crime, G.A. res. 55/25, annex I, 55 U.N. GAOR Supp. (No. 49) at 44, U.N. Doc. A/45/49 (Vol. I) (2001)

[89] G.A. res. 34/169, annex, 34 U.N. GAOR Supp. (No. 46) at 186, U.N. Doc. A/34/46 (1979)

taking the necessary steps for the same by the filing of a charge-sheet under Section 173."[90]

The problem in investigation comes when additional powers are given to the investigating officer for doing his duty. In *State of Haryana* v. *Bhajan Lal* the Honourable Supreme Court has pointed out that:

> "... the field of investigation of any cognizable offence is exclusively within the domain of the investigating agencies over which the courts cannot have control and have no power to stifle or impinge upon the proceedings in the investigation so long as the investigation proceeds in compliance with the provisions relating to investigation...."[91]

It has also been held that the accused has no right to have any say as regards the manner and method of investigation. Save under certain exceptions under the entire scheme of the Code, the accused has no participation as a matter of right during the course of the investigation of a case instituted on a police report till the investigation culminates in filing of a final report under Section 173(2) of the Code or in a proceeding instituted otherwise than on a police report till the process is issued under Section 204 of the Code, as the case may be.[92] Even in cases where cognizance of an offence is taken on a complaint notwithstanding that the said offence is triable by a Magistrate or triable exclusively by the Court of Sessions, the accused has no right to have participation till the process is issued. In case the issue of process is postponed as contemplated under Section 202 of the Code, the accused may attend the subsequent inquiry but cannot participate. But, there are certain provisions

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[90] AIR 1955 SC 196: (1955) 1 SCR 1150, SCR pp. 1157-58. Reiterated in *State of M.P.* v. *Mubarak Ali*, AIR 1959 SC 707. See also *Directorate of Enforcement* v. *Deepak Mahajan*, (1994) 3 SCC 440, 472

[91] 1992 Supp (1) SCC 335:AIR 1992 SC 604, SCC p. 359, para 40; Reference was made to the decision of the Privy Council in *Emperor* v. *Khwaja Nazir Ahmad*, AIR 1945 PC 18 and the decision of the SC in *State of Bihar* v. *J.A.C. Saldanha*, (1980) 1 SCC 554.

[92] *Union of India* v. *W.N. Chadha*, 1993 Supp (4) SCC 260, 291

der the Code empowering the Magistrate to give an opportunity of being heard der certain specified circumstances.

The Supreme Court has warned in *Kishore Chand* v. *State of Himachal radesh* thus:

> "Indulging in free fabrication of the record is a deplorable conduct on the part of an investigating officer which undermines the public confidence reposed in the investigating agency. Therefore, greater care and circumspection are needed by the investigating agency in this regard. It is time that the investigating agencies evolve new and scientific investigating methods, taking aid of rapid scientific development in the field of investigation. It is also the duty of the State i.e. Central or State Governments to organise periodical refresher courses for the investigating officers to keep them abreast of the latest scientific development in the art of investigation and the march of law so that the real offender would be brought to book and the innocent would not be exposed to prosecution."[93]

The Malimath Committee has suggested removing of the distinction etween cognizable and non-cognizable offences and making it obligatory on the Police Officer to investigate all offences in respect of which a complaint is nade.[94] It would like to see that the law is amended to the effect that the literate witness signs the statement and illiterate one puts his thumb impression thereon. It requires that a copy of the statement should be mandatorily given to the witness.[95] It recommends that audio/video recording of statements of witnesses, dying declarations and confessions should be authorized by law.[96]

The recommendations of the Malimath Committee with regard to the area of investigation are very wide and drastic. The major recommendations are[97]

(1991) 1 SCC 286:AIR 1990 SC 2140, SCC p. 297, para 12

Recommendation 107

Recommendation 19

Recommendation 20

The order nos. of the recommendations are accompanied in the brackets

- Section 167 (2) of the Code be amended to increase the maximum period of Police custody to 30 days in respect of offences punishable with sentence more than seven years (28);
- Section 167 of the Code which fixes 90 days for filing charge sheet failing which the accused is entitled to be released on bail be amended empowering the Court to extend the same by a further period up to 90 days if the Court is satisfied that there was sufficient cause, in cases where the offence is punishable with imprisonment above seven years (29);
- A suitable provision be made to enable the police take the accused in police custody remand even after the expiry of the first 15 days from the date of arrest subject to the condition that the total period of police custody of the accused does not exceed 15 days (30);
- A suitable provision be made to exclude the period during which the accused is not available for investigation on grounds of health, etc. , for computing the permissible period of police custody (31);
- Section 161 of the Code be amended to provide that the statements by any person to a police officer should be recorded in the narrative or question and answer form (33);
- In cases of offences where sentence is more than 7 years it may also be tape / video recorded (34);
- Section 162 be amended to require that it should then be read over and signed by the maker of the statement and a copy furnished to him (36);
- Section 162 of the Code should also be amended to provide that such statements can be used for contradicting and corroborating the maker of the statement (35);
- Suitable amendments be made to remove the distinction between cognizable and non-cognizable offences in relation to the power of the police to investigate offences and to make it obligatory on the police officer to entertain complaints regarding commission of all offences and to investigate them (40);

Refusal to entertain complaints regarding commission of any offence ...ll be made punishable (41).

The recommendations to extend the length of police custody from 15 to ... days may workout injustice since a prolongation of police custody may ...mount to an increase in the risk of torture by those carrying out criminal ...vestigations. The Special Rapporteur on torture and the Committee against ...rture, has, as a protection from torture in police custody, asked that detention ...d interrogation facilities should be separate, so that those who have an interest ... the outcome of the investigation are not the same as those who decide on and ...e in charge of detention.[98]

Audi alteram partem during investigation

On the lines discussed above regarding investigation (prior to the discussion on Malimath Committee recommendations), it has been declared in *Union of India* v. *W.N. Chadha* that:

> "... when the investigating officer is not deciding any matter except collecting the materials for ascertaining whether a *prima facie* case is made out or not and a full enquiry in case of filing a report under Section 173(2) follows in a trial before the Court or Tribunal pursuant to the filing of the report, it cannot be said that at that stage rule of *audi alteram partem* superimposes an obligation to issue a prior notice and hear the accused which the statute does not expressly recognise. The question is not whether *audi alteram partem* is implicit, but whether the occasion for its attraction exists at all."[99]

[98] Concluding observations of the Committee against Torture: Colombia, 9 July 1996, A/51/44 para 78; Concluding observations of the Committee against Torture: Jordan, A/52/44, para. 176; Consolidated recommendations of the Special Rapporteur on torture, para. 39 (f).
[99] 1993 Supp (4) SCC 260, 291

...e Court went on to state further thus:

> "If prior notice and an opportunity of hearing are to be given to an accused in every criminal case before taking any action against him, such a procedure would frustrate the proceedings, obstruct the taking of prompt action as law demands, defeat the ends of justice and make the provisions of law relating to the investigation lifeless, absurd and self-defeating. Further, the scheme of the relevant statutory provisions relating to the procedure of investigation does not attract such a course in the absence of any statutory obligation to the contrary."[100]

It is observed that the legislature should make the presence of a lawyer ...mpulsory for interrogations by the police. This has been recommended by ...ternational human rights bodies,[101] and is stated as a right in the Rome Statute ...r the International Criminal Court.[102] Equally, the Basic Principles of the Role ...f Lawyers establish a right to legal assistance at all stages of criminal ...roceedings, including during interrogation and the right to be informed of this ...ght.[103]

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[100] *Id.*, 293

[101] Concluding Comment of the Committee against Torture: Democratic Republic of Korea, 11 ...ovember 1996, A/52/44, para. 68; Concluding Comments of the Committee against Torture: ...nited Kingdom, 9 July 1996, A/51/44, para. 65 (e).

[102] Article 55(2)(d) of the Rome Statute of the International Criminal Court, U.N. Doc. ...CONF.183/9, entered into force 1 July 2002; The Supreme Court of India, in the case of ...K. *Basu* v. *West Bengal*, 18 December 1996, [1997] 2 LRC 1, para 36 (10) has recommended ...e right to presence of a lawyer during, but not throughout the interrogation: though it is a ...ogressive approach, it still falls short of the international standard.

[103] Principles 1 and 17 of the Basic Principles on the Role of Lawyers See *infra*.

Privileged communication

The question of defence of privileged communication has gained importance in the context of POTA. The constitutional validity of section 14 of the Act was challenged in *People's Union for Civil Liberties* v. *Union of India*[104] with the argument that it gives unbridled powers to the investigating officer to compel any person to furnish information if the investigating officer has reason to believe that such information will be useful or relevant to the purpose of the Act. It was pointed out that the provision is without any checks and is amenable to misuse by the investigating officers. It was also argued that it does not exclude lawyers or journalists who are bound by their professional ethics to keep the information rendered by their clients as privileged communication.[105]

It was argued by the State that this provision is essential for the detection and prosecution of terrorist offences; and that the underlying rationale of the obligation to furnish information is the salutary duty of every citizen. The Supreme Court made reference to Section 39 of the Code of Criminal Procedure, 1973, which casts a duty upon every person to furnish information regarding offences. It observed thus:

> "Criminal justice system cannot function without the cooperation of people. Rather it is the duty of everybody to assist the State in detection of the crime and bringing criminals to justice. Withholding such information cannot be traced to right to privacy, which itself is not an absolute right.[106] Right to privacy is subservient to that of security of State."

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[104] *PUCL* (2004), 604

[105] It was argued that Section 14 was violative of Articles 14, 19, 20(3) and 21 of the Constitution.

[106] *Sharda* v. *Dharmpal*, (2003) 4 SCC 493

It adverted to *State of Gujarat* v. *Anirudhsing*,[107] where it was observed ...at it is the salutary duty of every witness who has the knowledge of the ...ommission of crime, to assist the State in giving evidence.

The power conferred under Section 14 to the investigating officer to ask ...r furnishing information that will be useful for or relevant to the purpose of the ...t to the investigating officers was found to be quite necessary in the detection ...terrorist activities or terrorists by the Court, more so because such information ...ould be asked only after obtaining a written approval from an officer not below ...he rank of a Superintendent of Police.

On the question of the position of lawyer or a journalist, it was observed ...hus:

> "It is settled position of law that a journalist or lawyer does not have a sacrosanct right to withhold information regarding crime under the guise of professional ethics. A lawyer cannot claim a right over professional communication beyond what is permitted under Section 126 of the Evidence Act. There is also no law that permits a newspaper or a journalist to withhold relevant information from courts though they have been given such power by virtue of Section 15(2) of the Press Council Act, 1978 as against the Press Council."[108]

As if a concession, it was stated that, of course, the investigating officers ...will be circumspect and cautious in requiring them to disclose information. In ...he process of obtaining information, if any right of a citizen is violated, nothing ...prevents him from resorting to other legal remedies. The section was upheld on ...he ground that the main purpose is only to allow the investigating officers to

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(1997) 6 SCC 514, 526, para 29: 1997 SCC (Cri) 946

[108] References were made to *M.S.M. Sharma* v. *Sri Krishna Sinha*, AIR 1959 SC 395: 1959 Supp (1) SCR 806 and *Sewakram Sobhani* v. *R.K. Karanjia*, (1981) 3 SCC 208: 1981 SCC (Cri) 698 which quoted *Arnold* v. *King Emperor*, (1913-14) 41 IA 149: 15 Cri LJ 309 with approval and also *British Steel Corpn.* v. *Granada Television*, (1981) 1 All ER 417: 1981 AC 1096: (1980) 3 WLR and *Branzburg* v. *Hayes*, 408 US 665: 33 L Ed 2d 626 (1972)

procure certain information that is necessary to proceed with the further investigation

The Malimath Committee has recommended that a suitable provision be made on the lines of sections 36 to 48 of POTA 2002 for interception of wire, electric or oral communication for prevention or detection of crime.[109]

This is against the right to privacy which is protected in Article 17, ICCPR. Any interference with this right must be clearly provided for in law and must be proportionate to the aim sought by the interference.[110] The Human Rights Committee has stated that in principle, 'telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited';[111] it has required clear legislation setting out the conditions for interference with privacy and providing for safeguards against unlawful interferences.[112] Communications between the accused and his lawyer should be exempt from interception, in accordance with Principle 22 of the Basic Principles on the Role of Lawyers, which states that governments shall recognise and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.[113] In the same vein, the Supreme Court of India, in the judgment of *People's Union for Civil*

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[109] Recommendation 39

[110] *Toonen* v. *Australia*, 4 April 1994, CCPR/C/50/D/488/1992, para 8.3. In a comparative legal perspective: In France, interception of telephone conversation is only permitted for crimes for which punishment is two years or more , for the specific purposes of obtaining information concerning national security, for the protection of essential elements of scientific and economic capacities of France, for the prevention of terrorism or organized crime and for the prevention of some unlawful paramilitary groups, and for a maximum duration of four months [Articles 100-100-7 of the French Code of Criminal Procedure and Loi n° 91-646 du 10 juillet 1991 relative au correspondances émises par la voie des telecommunications]. In Germany, interception of communications is only admissible for some specifically designated crimes and only if specific facts justify the suspicion that this crime has been committed [section 100a et seq. German Code of Criminal Procedure]

[111] General Comment 16, Article 17, UN Doc. HRI\GEN\1\Rev.1 at 14 (1994), para 8

[112] Concluding observations of the Human Rights Committee: Russian Federation, 26 July 1995, CCPR/C/79/Add.83, para 19

[113] See also section 148 of the German Code of Criminal Procedure, which guarantees the confidentiality of communications between the accused and his or her lawyer, with some very limited exception in cases of terrorism suspects; see, on these proposed safeguards *Amnesty International*, Briefing in the Prevention of Terrorism Ordinance, 15 November 2001, ASA 21/049/2001, 10

...erties v. *Union of India and another* has specifically ordered procedural ...guards to be observed for telephone tapping.[114]

The European Court of Human Rights also has held that any interference ...state authorities with the private life of the individual must be justified by ...islation which clearly sets out the conditions for such interference in a precise ...nner foreseeable to the individual,[115] and respects the principle of ...portionality.[116]

...lf incrimination

Clause (3) of Article 20 of the Constitution declares that no person ...used of any offence shall be compelled to be a witness against himself.[117] ...is is a facet of fair trial, but extends to investigations stage also to protect the ...used from making incriminating statements at this stage. What amounts to ...lf incrimination has been subject of decisions.

An eleven-Judge Bench of the Supreme Court in *State of Bombay* v. ...thi Kalu Oghad*, by majority, concluded that an accused person cannot be said ... have been compelled to be a witness against himself simply because he made ... statement while in police custody, without anything more.[118] What is that ...ything more' required has been explained in the following words:

> '(6) 'To be a witness' in its ordinary grammatical sense means giving oral testimony in Court. Case-law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning,

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... AIR 1997 SC 1203, para 35

... *Malone* v. *The United Kingdom*, ECtHR, Judgment of 2 August 1984, Series A No 82

... *Kopp* v. *Switzerland*, ECtHR, Judgment of 25 March 1998, Reports 1998-II, para 55; ...mman v. *Switzerland*, ECtHR, Judgment of 16 February 2000, Reports 2000-II, para. 50; ...otaru v. *Romania*, ECtHR, Judgment of 4 May 2000, Reports 2000-V, para 52

... Article 20(3); Indian Evidence Act – Ss. 24, 26 and 27; Cr.P.C. – Ss 162, 163(1), 315, ...2(a)

... (1962) 3 SCR 10: AIR 1961 SC 1808: (1961) 2 Cri LJ 856

namely, bearing testimony in Court or out of Court by a person accused of an offence, orally or in writing.

(7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused any time after the statement has been made.'[119]

It was further held that section 53 Code of Criminal Procedure is not violative of Article 20 (3) and that a person cannot be said to have been compelled 'to be a witness' against himself if he is merely required to undergo a medical examination in accordance with the provision.[120] It was also ruled thus:

"The giving of finger impression or of specimen signature or of handwriting, strictly speaking, is not 'to be a witness'. ... When an accused person is called upon by the court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony to the nature of a 'personal testimony'. The giving of a 'personal testimony' must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness'....

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[119] Id. 37

[120] Section 53 empowers senior police officers to compel the accused person in custody to submit to medical examination. See also *Neeraj Sharma* v. *State of UP*, 1993 Cri.L.J. 2266 (All HC) where a Magistrate and not a police ordered taking sample of hair of the accused for examination and was held to be not violative of Article 20 (3). In this connection it may also be noted that section 4 of the Identification of Prisoners Act 1920 also empowers a police officer to take measurements, including finger and foot print impressions, of a person arrested in connection with an offence punishable with imprisonment of one year or more.

They are only materials for comparison in order to lend assurance to the court that its inference based on other pieces of evidence is reliable."[121]

It has been held that the essence of the above decisions is that to bring a erson within the meaning of 'accused of any offence', that person must ssimilate the character of an 'accused person' in the sense that he must be ccused of any offence.[122]

The Law Commission, in its 37th Report, after considering this decision, as opined that the privilege under Article 20(3) is confined to only oral or ritten testimony.[123]

In *Nandini Satpathy* v. *P.L. Dani*, the Supreme Court, considering Article 0(3) and section 161(2) of Cr.P.C., pointed out that the accused person cannot e forced to answer questions merely because they do not implicate him, when iewed in isolation. He is entitled to remain silent if the answer sought has a easonable prospect of exposing him to guilt in some other accusation actual or mminent.[124] The Court was clear in pointing out that, fanciful claims, nreasonable apprehensions and vague possibilities cannot be hiding ground for an accused person. He is bound to answer when there is no clear tendency to criminate.[125] The Supreme Court went on to lay down the following guidelines:

"1) if an accused person wishes to have his lawyer by his side when the police interrogate him, this facility shall not be denied to him.

2) the police must invariably warn, and record that fact, about the right to silence against self – incrimination; and where the accused is literate, take his written acknowledgement; …."[126]

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[121] *Supra* n. 114, AIR, 1814-15, paragraphs 11-12
[122] *Directorate of Enforcement* v. *Deepak Mahajan,* (1994) 3 SCC 440, 466
[123] Law Commission of India, 37th Report on Code of Criminal Procedure, 1898 (1967), 205
[124] (1978) 2 SCC 424, 434. See also *Yusuf Ali* v. *State of Maharashtra*, AIR 1968 SC 148, 150
[125] *Id.*, 267
[126] *Id.*, 268 – 69

Variations have been introduced to these guidelines when the courts dealt with comparatively grave criminal offences that do not fit into the conventional mould. In *Ramesh Chandra Mehta case*,[127] the appellant was searched at the Calcutta Airport and diamonds and jewelleries of substantial value were found on his person as also currency notes in a suitcase with him, and in pursuance to a statement made by him more pearls and jewellery were recovered from different places. He was charged with offences under the Sea Customs Act. During the trial reliance was placed on his confessional statements made before the Customs authorities, which were objected to on the ground that the same were inadmissible in evidence *inter alia* in view of the provisions of Article 20(3). While rejecting the objection, the Supreme Court held that in order that the guarantee against testimonial compulsion incorporated in Article 20(3) may be claimed by a person, it has to be established that when he made the statement in question, he was a person accused of an offence.[128]

In *Ramanlal Bhogilal Shah* v. *D.K. Guha*,[129] *Ramesh Chandra Mehta* was distinguished and it was held on the facts of that case that the person served with summons under the FERA, was an accused within the meaning of Article 20(3) of the Constitution of India.

In *Veera Ibrahim* v. *State of Maharashtra*[130] the Supreme Court, following *Ramesh Chandra Mehta,* observed that in order to claim the benefit of the guarantee against testimonial compulsion embodied in clause (3) of Article 20 it must be shown that the person who made the statement was "accused of any offence"; and additionally that he made the statement under compulsion.

The argument that the protection under Article 20(3) is not to be limited to persons who are already accused but should extend to cover a potential accused also, especially a person under interrogation, since he may himself be

[127] *Ramesh Chandra Mehta* v. *State of WB*, AIR 1970 SC 940
[128] Observations in the judgment by three Judges in *Nandini Satpathy* v. *P.L. Dani*, AIR 1978 SC 1025: (1978) 2 SCC 424 were distinguished
[129] AIR 1973 SC 1196: (1973) 1 SCC 696
[130] AIR 1976 SC 1167: (1976) 2 SCC 302

...a potential accused, enabling him to require the presence of a lawyer who ...advise him as to which of the questions he may refuse to answer in view of ... protection under Article 20(3) was turned down in *Poolpandi* v. ...erintendent, Central Excise.*[131] It was held that Article 20(3) does not refer ...e hypothetical person who may in the future be discovered to have been ...y of some offence. The decision in *Ramanlal Bhogilal* which had taken a ...erent view to that of *Ramesh Chandra Mehta* was examined and was ...nguished on the ground that a first information report in *Ramanlal Bhogilal* ... had been lodged earlier and, consequently, it was settled that the person ...s accused of an offence within the meaning of Article 20(3).

The aspects of self incrimination have been raised in the context of POTA ... Under Section 27 of the Act, a police officer investigating a case could ...k a direction through the Court of Chief Judicial Magistrate or the Court of a ...ef Metropolitan Magistrate for obtaining samples of handwriting, ...gerprints, footprints, photographs, blood, saliva, semen, hair, voice of any ...used person reasonably suspected to be involved in the commission of an ...ence under the Act. The court could also draw adverse inference if an ...used refuses to do so. This was challenged in *People's Union for Civil ...erties* v. *Union of India,* on the ground that this section falls foul of Articles ... 20(3) and 21 of the Constitution for the reason that no power has been left ...th the court to decide whether the request for samples from a suspect person ...ught for by the investigating officer is reasonable or not; that no power has ...en given to the court to refuse the request of the investigating officer; that it is ...t obligatory for the court to record any reason while allowing the request; and ...t the section is a gross violation of Article 20(3) because it amounts to compel ...person to give evidence against himself.[132]

...1992) 3 SCC 259, 263. In this case it was held that a person being interrogated during ...estigation under Customs Act or FERA is not a person accused of any offence within the ...aning of Article 20(3) of the Constitution. See also *Percy Rustomji Basta* v. *State of ...harashtra*, AIR 1971 SC 1087: (1971) 1 SCC 847

...*PUCL* (2004), 607

The Court went for a close reading of the section and observed that it is ...that:

> "... upon a 'request' by an investigating police officer it shall only 'be lawful' for the court to grant permission. Nowhere is it stated that the court will have to positively grant permission upon a request. It is very well within the ambit of court's discretion. If the request is based on a wrong premise, the court is free to refuse the request. This discretionary power granted to the court presupposes that the court will have to record its reasoning for allowing or refusing a request."[133]

There is no blanket responsibility for the court to grant permission ...mediately upon receipt of a request. It further said that it was meaningful to ...ok into Section 91 CrPC that empowers a criminal court as also a police officer ...order any person to produce a document or other thing in his possession for ...e purpose of any inquiry or trial.[134] And that this section is only a step in aid ...r further investigation and the samples so obtained can never be considered as ...nclusive proof for conviction. The contention was, therefore, turned down.[135]

The Supreme Court in *D.K. Basu* v. *State of W.B.*,[136] referred to the ...ecision of the American Supreme Court to such an issue in *Miranda* v. *...izona*,[137] and considered it to be instructive. The Court there had said:

> 'A recurrent argument, made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of Government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged.'

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[133] *PUCL* (2004), 608. Reference was made to *Kathi Kalu Oghad case*, AIR 1961 SC 1808: (1962) 3 SCR 10: (1961) 2 Cri LJ 856

[134] *Ibid.*, reference was made to *State of Gujarat* v. *Shyamlal Mohanlal Choksi*, AIR 1965 SC 1251: (1965) 2 Cri LJ 256 in this regard.

[135] See also *Goutam Kundu* v. *State of W.B.*, (1993) 3 SCC 418: 1993 SCC (Cri) 928: AIR 1993 SC 2295; For the position in civil cases see *Sharda* v. *Dharmpal*, (2003) 4 SCC 493, 510

[136] *Basu*, 434

[137] 384 US 436: 16 L. Ed. 2d. 694. Also See *Chambers* v. *Florida*, US 60 S Ct 472 (1940)

The Malimath Committee has recommended that, without subjecting the ...cused to any duress, the court should have the freedom to question the accused ...o elicit the relevant information and if he refuses to answer, to draw adverse ...ference against the accused. The Committee felt that the accused should be ...quired to file a statement to the prosecution disclosing his stand.[138] It also ...commended that the Identification of Prisoners Act 1920 be suitably amended ...o empower the Magistrate to authorize taking from the accused fingerprints, ...otprints, photographs, blood sample for DNA, fingerprinting, hair, saliva or ...emen etc., on the lines of Section 27 of POTA 2002.[139]

Confessions

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,[140] at Principle 21 stipulates that it shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person. The UN Convention against Torture expressly prohibits the use of evidence extracted through torture in article 15. A similar prohibition can be found in Principle 16 of the UN Guidelines *on the Role of Prosecutors.*[141]

As per section 164 of the Cr.P.C., confessions are to be recorded by a Judicial Magistrate.[142] It provides for the procedure to be followed by him while recording the confession and the memorandum to be made by him. Section

[138] Recommendations 8, 9 and 10
[139] Recommendation 38
[140] G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988)
[141] See *infra* section on role of prosecutors
[142] He can do so whether he has jurisdiction or not

...3(1) lays down the guidelines for the investigating authorities.[143] These ...idelines have been held to be applicable not just to police but all persons in ...thority.[144] The Law Commission has opined that these guidelines should not ...migrate into idle formalities.[145] The Supreme Court has held that the object of ...nferring the power on the judicial officer is to create a safeguard for the ...nefit of the accused person.[146] The Magistrate should exercise jurisdiction to ...cord confession on having reason to believe that the confession is being ...luntarily made.[147] He should give the person the statutory warning and ...dequate time to think and reflect, so that his mind is completely freed from any ...ssible police influence.[148] The Magistrate should order removal of handcuffs, ...present, and the police and other persons who are likely to have any influence ...er the accused should be ordered out in order to create free atmosphere.[149] ...t, the Magistrate's failure to ask why the accused wanted to confess was held ...ly to be a curable defect under section 463 of the Cr.P.C.[150] The Magistrate is ...ther required to record the confession in open court and during court hours.[151] ...e requirements are mandatory so much so that if a Magistrate records a ...nfession without following the procedures mentioned in section 164 of ...r.P.C., the oral evidence of the confession is inadmissible.[152]

But, under certain enactments the confessions recorded by a police officer ...s also treated to be admissible and these have been upheld by the Supreme

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...It requires them not to offer or make, or cause to be offered or made any inducement, threat ...r promise as mentioned in section 24 of the Evidence Act, which declares such evidence ...admissible

...*P. Sirajuddin* v. *State of Madras*, (1970) 1 SCC 595

...37th Report, p. 132, para 468

...*State of UP* v. *Singhara Singh*, AIR 1964 SC 358

...*Chandran* v. *State of TN*, (1978) 4 SCC 90; *Shankaria* v. *State of Rajasthan*, (1978) 3 SCC ...55

...*Aher Raja Khima* v. *State of Saurashtra*, AIR 1956 SC 217; *Sarwan Singh Rattan Singh* v. ...*State of Punjab*, AIR 1957 SC 637

...*Sarwan Singh*, *supra* n. 148

...*Kehar Singh* v. *State (Delhi Admn.)*, (1988) 3 SCC 609

...*Hem Raj* v. *State of Ajmer*, AIR 1954 SC 462; *Ram Chandra* v. *State of UP*, AIR 1957 SC ...61

...*State of UP* v. *Singhara Singh* AIR 1964 SC 358

Court. In *Raj Kumar Karwal* v. *Union of India,*[153] a case involving NDPS Act 1985, a confessional statement recorded by the Officers of the Department of Internal Revenue (who had been conferred with the powers of the officers of a police station) has been held to be admissible for the purpose of examining existence of *prima facie* case. It has been held, in this context, that if the Magistrate recording a confession of an accused person produced before him in the course of a police investigation, does not certify in clear and categorical terms that the confession is voluntary, nor testifies orally, the defect is fatal to the admissibility and use of the confession against the accused.[154]

Major deviations have also been made from the general legal position enunciated above, especially in specific enactments brought about for dealing with terrorism. Section 15 of the TADA Act contained a drastic departure from the existing provisions of the Evidence Act, in particular Section 25 thereof, and provided that notwithstanding anything contained in the Indian Evidence Act, 1872, but subject to the provisions of that section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded in the manner provided in the section shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under the TADA Act or Rules made thereunder. The co-accused, abettor or conspirator was, for the purpose, required to be charged and tried in the same case together with the accused for the applicability of Section 15(1) of the TADA Act.

In *Kartar Singh* v. *State of Punjab*[155] a serious challenge was made to the constitutional validity of the section. But, in the light of Section 15(2), which stipulated that the police officer shall, before recording any confession under Section 15(1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning

[153] (1990) 2 SCC 409: 1991 Cri. L.J. 97
[154] *Chandran* v. *State of TN*, (1978) 4 SCC 90
[155] (1994) 3 SCC 569: 1994 SCC (Cri) 899: (1994) 2 SCR 375

person making it, he has reason to believe that it is being made voluntarily, provision was upheld on the ground that it was made in consonance with rticle 20(3) of the Constitution as the compulsion on an accused to make a atement against him has been interdicted by the Constitution.

The Court observed thus:

> "Though we at the first impression thought of sharing the view of the learned counsel that it would be dangerous to make a statement given to a police officer admissible (notwithstanding the legal position making the confession of an accused before the police admissible in some advanced countries like United Kingdom, United States of America, Australia and Canada etc.) — having regard to the legal competence of the legislature to make the law prescribing a different mode of proof, the meaningful purpose and object of the legislation, the gravity of terrorism unleashed by the terrorists and disruptionists endangering not only the sovereignty and integrity of the country but also the normal life of the citizens, and the reluctance of even the victims as well as the public in coming forward, at the risk of their life, to give evidence — hold that the impugned section cannot be said to be suffering from any vice of unconstitutionality. In fact, if the exigencies of certain situations warrant such a legislation then it is constitutionally permissible as ruled in a number of decisions of this Court, provided none of the fundamental rights under Chapter III of the Constitution is infringed."[156]

But, the Court did stress the importance of procedure when it observed –

> "[W]e state that there should be no breach of procedure and the accepted norms of recording the confession which should reflect only the true and voluntary statement and there should be no room for hypercriticism that the authority has obtained an invented confession as a source of proof irrespective of the truth and creditability as it could be ironically put that

[156] *Id.*, 680, para 253

when a Judge remarked, 'Am I not to hear the truth', the prosecution giving a startling answer, 'No your Lordship is to hear only the evidence'."[157]

The Court did also mention that there was a burden on the trial court, ...ough it is entirely for the court trying the offence to decide the question of ...dmissibility or reliability of a confession in its judicial wisdom strictly adhering ...o the law, it must, while so deciding the question should satisfy itself that there ...as no trap, no track and no importune seeking of evidence during the custodial ...nterrogation and all the conditions required are fulfilled.[158]

In spite of the judgment that procedural requirements were to be ...crupulously complied with, the Supreme Court in *S.N. Dube* v. *N.B. Bhoir* ...onsidered the issue in a different perspective. While considering the question ...whether the certificate and the memorandum, to be required to be made along ...with the record of confession, are required to be written in the same form and ...erms as required by the Rule 15 of the Rules framed under the TADA Act, the Court held that -

"Writing the certificate and making the memorandum are thus made mandatory to prove that the accused was explained that he was not bound to make a confession and that if he made it, it could be used against him as evidence, that the confession was voluntary and that it was taken down by the police officer fully and correctly. These matters are not left to be proved by oral evidence alone. The requirement of the rule is preparation of contemporaneous record regarding the manner of recording the confession in the presence of the person making it. Though giving of the statutory warning, ascertaining the voluntariness of the confession and preparation of a contemporaneous record in the presence of the person making the confession are mandatory requirements of that rule, we see no

[157] *Ibid.*, para 254
[158] *Id.*, 683, para 264

good reason why the form and the words of the certificate and memorandum should also be held mandatory. What the mandatory requirements of a provision are cannot be decided by overlooking the object of that provision. They need not go beyond the purpose sought to be achieved. The purpose of the provision is to see that all formalities are performed by the recording officer himself and by others to ensure full compliance with the procedure and seriousness of recording a confession. We fail to appreciate how any departure from the form or the words can adversely affect the object of the provision or the person making the confession so long as the court is able to conclude that the requirements have been substantially complied with. No public purpose is likely to be achieved by holding that the certificate and memorandum should be in the same form and also in the same terms as are to be found in Rule 15(3)(b). We fail to appreciate how the sanctity of the confession would get adversely affected merely because the certificate and the memorandum are not separately written but are mixed up or because different words conveying the same thing as is required are used by the recording officer."[159]

'ayawant Dattatray case[160] it was observed thus:

"Confessional statement before the police officer under Section 15 of the TADA is substantive evidence and it can be relied upon in the trial of such person or co-accused, abettor or conspirator for an offence punishable under the Act or the Rules. The police officer before recording the confession has to observe the requirement of sub-section (2) of Section 15. Irregularities here and there would not make such confessional statement inadmissible in evidence. If the legislature in its wisdom has provided after considering the situation prevailing in the

:C pp. 285-87, para 31
001) 10 SCC 109: 2001 AIR SCW 4717

society that such confessional statement can be used as evidence, it would not be just, reasonable and prudent to water down the scheme of the Act on the assumption that the said statement was recorded under duress or was not recorded truly by the officer concerned in whom faith is reposed. It is true that there may be some cases where the power is misused by the authority concerned. But such contention can be raised in almost all cases and it would be for the court to decide to what extent the said statement is to be used. Ideal goal may be: confessional statement is made by the accused as repentance for his crime but for achieving such ideal goal, there must be altogether different atmosphere in the society. Hence, unless a foolproof method is evolved by the society or such atmosphere is created, there is no alternative, but to implement the law as it is."[161]

In *Ayyub* v. *State of U.P.*,[162] while considering the contention that the police officer, who recorded the confessional statement, had not certified that he believed that the confession was voluntarily made, the Supreme Court held that as the confession made under Section 15 of the TADA Act is made admissible in evidence, the strict procedure laid down therein for recording confession is to be followed. Any confession made in defiance of these safeguards cannot be accepted by the court as reliable evidence. The confession should appear to have been made voluntarily and the police officer who records the confession should satisfy himself that the same had been made voluntarily by the maker of that statement. The recorded confession must indicate that these safeguards have been fully complied with.[163]

On the question as to on whom would the burden be to show that the procedural requirements have or have not been complied with, the Supreme Court in *Gurdeep Singh* v. *State (Delhi Admn.)*,[164] held that whenever an

[161] *Id.*, 146, paragraph 60
[162] (2002) 3 SCC 510
[163] *Id.*, 519, paragraph 18
[164] (2000) 1 SCC 498: 2000 SCC (Cri) 449

accused challenges that his confessional statement is not voluntary, the initial burden is on the prosecution for it has to prove that all requirements under section 15 of TADA and Rule 15 of the Terrorist and Disruptive Activities Prevention) Rules, 1987 have been complied with. Once this is done, the prosecution discharges its burden and then it is for the accused to show and satisfy the court that the confessional statement was not made voluntarily. The confessional statement of the accused can be relied upon for the purpose of conviction, and no further corroboration is necessary if it relates to the accused himself.

In *Bharatbhai* v. *State of Gujarat*,[165] after discussing the cases in the area, the Apex Court concluded thus:

"In view of the aforesaid discussion, our conclusions are as follows:

A. Writing the certificate and making the memorandum under Rule 15(3)(*b*) is mandatory.

B. The language of the certificate and the memorandum is not mandatory.

C. In case the certificate and memorandum is not prepared but the contemporaneous record shows substantial compliance with what is required to be contained therein, the discrepancy can be cured if there is oral evidence of the recording officer based on such contemporaneous record.

D. In the absence of contemporaneous record, discrepancy cannot be cured by oral evidence based on the memory of the recording officer."

In *Nalini case*,[166] by majority, it was held that as a matter of prudence the court may look for some corroboration if confession is to be used against a co-accused though that will be again within the sphere of appraisal of evidence. But, in *Devender Pal Singh* v. *State of NCT of Delhi*, the acquittal of a co-accused on the ground of non-corroboration was held, by the majority, not to

[165] (2002) 8 SCC 447, 465

[166] *State* v. *Nalini*, (1999) 5 SCC 253: 1999 SCC (Cri) 691

...e made the prosecution case brittle, as the accused making the confessional ...ement can be convicted on the basis of that alone without any ...roboration.[167] The minority felt that before solely relying upon the ...fessional statement, the court has to find out whether it is made voluntarily ...truthfully by the accused. Even if it is made voluntarily, the court has to ...ther decide whether it is made truthfully or not.[168]

On the question of confession the Supreme Court used confession under ...ADA as a basis for conviction for non TADA offence, in spite of the fact that ... persons were acquitted under TADA.[169] Thomas J. wrote that Section 12 ...ADA was not brought to the notice of the court in a precedent and went on to ...nvict under section 302 read with Section 120 B of IPC with a confessional ...atement under TADA.[170] The Court further relied on Section 15 in such a ...rcumstance overlooking the judgment of a larger Bench in *Kartar Singh*[171] ...here Section 15 was listed vis-à-vis Article 14 and 21 and upheld by a slender ...ajority on the premise that it provided for a 'limited' exception of making ...onfession admissible only in respect of TADA offences.

Section 15 of TADA was amended in 1993 by virtue of which confession ...ade by an accused was made admissible against an accomplice. Prior to this it ...ould be used only against him. In the *Nalini* case, the Supreme Court took aid ...f the amended section and convicted persons though confessions were recorded

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...(2002) 5 SCC 234, 269

...In the instant case when rest of the accused who were named in the confessional statement ...re not convicted or tried, the Minority observed that it would not be a fit case for convicting ...e appellant solely on the basis of the so-called confessional statement recorded by the police ...ficer. Finally, it observed that such type of confessional statement as recorded by the ...vestigating officer cannot be the basis for awarding death sentence. *Id.*, 256

...Rajiv Gandhi Case taking just the reverse of the position in *Bilas Kaloo*, (1997) 7 SCC 43, ...here Thomas J. did not look into confessional statement made under section 15 TADA for ...ffences under IPC/Arms Act since the accused were acquitted of all offences under TADA.

...On the question as to whether Section 12 TADA could have at all been brought to its aid by ...e Supreme Court see Manoj Goel, "Supreme Court in Rajiv Gandhi Case: Overlooked Law, ...enied Justice", to be published in SCC Jour. The author criticises the Court as they club the ...ue of admissibility of confession under TADA, in a trial for non TADA offence, with ...pability of the accused under TADA. He further argues that the Court misread and ...sinterpreted Section 15.

...(1994) 3 SCC 569

August 91, September 91 and February 92. This is argued to be contrary to ... 20 (1), the principles of which are also applicable to procedures, as ...mulated in *Maneka Gandhi*.[172]

The entire issue of confession to the police officer that was considered in ...rtar Singh was re-agitated, with additional grounds, in *People's Union for ...il Liberties* v. *Union of India*,[173] where the challenge was to section 32, which ...ade it lawful of certain confessions made to police officers to be taken into ...nsideration.[174]

The Apex Court turned down the contentions raised by the petitioners and ...served thus:

> "At the outset it has to be noted that Section 15 of TADA that was similar to this section was upheld in *Kartar Singh case*. While enacting this section Parliament has taken into account all the guidelines, which were suggested by this Court in *Kartar Singh case*. Main allegation of the petitioners is that there is no need to empower the police to record confession since the accused has to be produced before the Magistrate within forty-eight hours in which case the Magistrate himself could

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[172] Manoj Goel, *supra* n. 170

[173] *PUCL* (2004), 611

[174] The petitioners submitted that there is no need to empower the police to record confession ...nce the accused has to be produced before the Magistrate within forty-eight hours, in that case ...e Magistrate himself could record the confession; that there is no justification for extending ...e time-limit of forty-eight hours for producing the person before the Magistrate; that it is not ...ear in the section whether the confession recorded by the police officer will have validity ...fter the Magistrate has recorded the fact of torture and has sent the accused for medical ...xamination; that it is not clear as to whether both the confession before the police officer as ...ell as confessional statement before the Magistrate shall be used in evidence; that the ...Magistrates cannot be used for mechanically putting seal of approval on the confessional ...tatements by the police; that, therefore, the section has to be nullified. The State defended on ...e grounds that the provisions relating to the admissibility of confessional statements, which ...re similar to that of Section 32 in POTA was upheld in *Kartar Singh case* that the provisions ...f POTA are an improvement over TADA by virtue of enactment of Sections 32(3) to 32(5); ...hat the general principles of law regarding the admissibility of a confessional statement is ...pplicable under POTA; that the provision which entails the Magistrate to test and examine the ...oluntariness of a confession and complaint of torture is an additional safeguard and does not ...n any manner inject any constitutional infirmity; that there cannot be perennial distrust of the ...olice; that Parliament has taken into account all the relevant factors in their totality and same ...s not unjust or unreasonable.

record the statement or confession. In the context of terrorism the need for making such a provision so as to enable police officers to record the confession was explained and upheld by this Court in *Kartar Singh case*. We need not go into that question at this stage. If the recording of confession by the police is found to be necessary by Parliament and if it is in tune with the scheme of law, then an additional safeguard under Sections 32(4) and (5) is *a fortiori* legal. In our considered opinion the provision that requires producing such a person before the Magistrate is an additional safeguard. It gives that person an opportunity to rethink over his confession. Moreover, the Magistrate's responsibility to record the statement and the enquiry about the torture and provision for subsequent medical treatment makes the provision safer. It will deter the police officers from obtaining a confession from an accused by subjecting him to torture. It is also worthwhile to note that an officer who is below the rank of a Superintendent of Police cannot record the confessional statement. It is a settled position that if a confession was forcibly extracted, it is a nullity in law. Non-inclusion of this obvious and settled principle does not make the section invalid. Ultimately, it is for the court concerned to decide the admissibility of the confessional statement. Judicial wisdom will surely prevail over irregularity, if any, in the process of recording confessional statement. Therefore we are satisfied that the safeguards provided by the Act and under the law are adequate in the given circumstances and we don't think it is necessary to look more into this matter. Consequently, we uphold the validity of Section 32."[175]

Though this has been prescribed as the position of law on the admissibility of confessions made to police, as they are special enactments intended to deal with special circumstances, it may not be out of place to note a caution that the trend that has been set by enactments like TADA and POTA

[175] *PUCL* (2004), 612 para 64

not seem well for those who expect the domestic legislation to conform to international obligations.

The Malimath Committee has recommended that Section 25 of the dence Act may be suitably amended on the lines of Section 32 of POTA so that a confession recorded by the Superintendent of Police or Officer ve him and simultaneously audio/video recorded is admissible in evidence ject to the condition that the accused was informed of his right to consult a yer.[176]

If confessions are extracted under duress and used as evidence against the cused it will be a clear violation of international law.[177] It is argued that an estigation and criminal justice system based on confessions and coupled with blic pressure on police to fight crime results in a systematic resort to torture in der to coerce confession.[178] As observed by the ICJ Position Paper, even in stems of free proof where all evidence is in principle admitted in trial, feguards exist. To quote them, in France, for instance, any record of oceedings only has probative value if it fulfils all formal conditions, and any cord of interrogation must contain all questions that have been answered.[179] en then, any confession, like any other piece of evidence, is subject to the free preciation of the judges.[180] In Germany, no confession made to the police is

Recommendation 37

According to the Human Rights Committee, "the law must prohibit the use of admissibility judicial proceedings of statements or confessions obtained through torture or other prohibited atment" - General Comment 20, Article 7, para 12; It has also made clear that the use of idence extracted through torture violates the right not to confess guilt and stated that national s "should require that evidence provided by means of such methods or any other form of mpulsion is wholly unacceptable" – General Comment 13, Article 14, UN Doc. U\GEN\1\Rev.1 at 14 (1994), para. 14. The UN Convention against Torture expressly hibits the use of evidence extracted through torture in article 15. A similar prohibition can found in Principle 16 of the UN Guidelines on the role of prosecutors

Opinion of the Commission on the Prevention of Terrorism Bill, 2000, Annex 2 to the nual Report of the Human Rights Commission of India 2000-2001

Article 429 of the French Criminal Procedure Code

Article 428 of the French Criminal Procedure Code

...missible as evidence;[181] only declarations made to the magistrate may be read ...the hearing in order to take evidence of a confession.[182]

...earch

Many international documents and various constitutions of different ...untries have recognised the inviolability of a person and his home. But, ...arch and seizure are essential steps in the armoury of an investigator in the ...vestigation of a criminal case. The Code of Criminal Procedure itself ...cognises the necessity and usefulness of search and seizure during the ...vestigation as is evident from the provisions of Sections 96 to 103 and Section ...5 of the Criminal Procedure Code.

In *M.P. Sharma* v. *Satish Chandra, District Magistrate, Delhi*,[183] the ...allenge to the power of issuing a search warrant under Section 96(1) CrPC as ...olative of the fundamental rights was turned down by a Constitution Bench of ...e Supreme Court observing thus:

> "A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under Article 20(3) would be defeated by the statutory provisions for searches."

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[181] See §§ 250 of the German Criminal Procedure Code
[182] § 254 of the German Criminal Procedure Code

It was also held that a search by itself is not a restriction on the right to hold and enjoy property, though a seizure may be a restriction on the right of possession and enjoyment of the seized property, but it is only temporary and for the limited purpose of an investigation by observing thus:

> "A search and seizure is, therefore, only a temporary interference with the right to hold the premises searched and the articles seized. Statutory regulation in this behalf is a necessary and reasonable restriction and cannot per se be considered to be unconstitutional. The damage, if any, caused by such temporary interference if found to be in excess of legal authority is a matter for redress in other proceedings. We are unable to see how any question of violation of Article 19(1)(*f*) is involved in this case in respect of the warrants in question which purport to be under the first alternative of Section 96(1) of the Criminal Procedure Code."[184]

But, in *Roy V.D.* v. *State of Kerala*,[185] the Court had observed that the life and liberty of an individual is so sacrosanct that it cannot be allowed to be interfered with except under the authority of law, in the context of search and seizure. In *K.R. Suraj* v. *Excise Inspector, Parappananqadi*, it was clarified that the holding in *Roy's* case was because under our Constitution there is no protection against search and seizure as is the case under the fourth and the fifth amendments to the U.S. Constitution.[186]

It has been consistently held that illegal arrest would not have any impact on the legality or otherwise in proceedings from *HN Rishbud* v. *State of Delhi*[187] onwards. Similarly, evidence obtained by illegal search cannot be shut out on that ground alone as the evidentiary rule is not applicable in India as observed in

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[184] 1954 SCR 1077: AIR 1954 SC 300, SCR 1096-97
[185] *Ibid.*
[186] (2000) 8 SCC 590
[187] (2001) 1 SCC 327, 334
[188] AIR 1955 SC 196. Reiterated in *Mobarik Ali Ahmed* v. *State of Bombay*, AIR 1957 SC 857

...ran Mal v. *Director of Inspection*[188] where it was observed by a Constitution ...nch thus –

> "So far as India is concerned its law of evidence is modelled on the rules of evidence which prevailed in English law, as courts in India and England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure."[189]

Intermittently, however, it was held by the Supreme Court that a search or ...rest in violation of the provisions, of the NDPS Act in this case, vitiates trial in *...tate of Punjab* v. *Balbir Singh*.[190] The common question which arose for ...onsideration in a batch of appeals filed by the State of Punjab was 'whether any ...rest or search of a person or search of a place conducted without conforming to ...e provisions of the NDPS Act would be rendered illegal and consequently ...itiate the conviction'. The Court went on to hold that failure to inform the ...erson to be searched of that right and if he so requires, failure to take him to the ...azetted officer or the Magistrate, would mean non-compliance with the ...rovisions of Section 50, which is mandatory, which in turn would 'affect the ...rosecution case and vitiate the trial'.[191] A three-Judge Bench in *Saiyad Mohd. ...aiyad Umar Saiyad* v. *State of Gujarat*[192] upheld the view taken in *Balbir Singh* ...ase on the point of *duty* of the empowered officer to *inform* the suspect about ...is right to be searched before a gazetted officer or a Magistrate. It observed ...hus:

> ".... When the officer concerned has not deposed that he had followed the procedure mandated by Section 50, the court is duty-bound to conclude that the accused had not had the benefit of the protection that Section 50

...(1974)1 SCC 345

...*Id.*, 364, paragraph 24. It was reiterated by another Constitution Bench in *State of Kerala* v. ...*lassery Mohammed*, (1978) 2 SCC 386 and later approved in *Joginder Kumar* v. *State of UP*, ...994) 4 SCC 260

...(1994) 3 SCC 299

...*Id.*, 320-22, paragraph 25

...(1995) 3 SCC 610

affords; that, therefore, his possession of articles which are illicit under the NDPS Act is not established; that the precondition for his having satisfactorily accounted for such possession has not been met; and to acquit the accused."[193]

It later came back to its original position as held right from *Pooran Mal* in *State of Punjab* v. *Jasbir Singh*.[194] And in *State of Punjab* v. *Baldev Singh*, it was held that an illicit article seized from the person of an accused, during search conducted in violation of the safeguards provided in Section 50 of the Act, cannot *by itself* be used as admissible *evidence of proof of unlawful possession* of the contraband on the accused. Any other material/article recovered during that search may, however, be relied upon by the prosecution in *other/independent* proceedings against an accused notwithstanding the recovery of that material during an illegal search and its admissibility would depend upon the relevancy of that material and the facts and circumstances of that case.[195]

The power to search has raised serious issues in the context of terrorist activities and the legislation to deal with them. While dealing with powers of forfeiture after seizure under the provisions of the POTA, the Apex Court, in *People's Union for Civil Liberties* v. *Union of India*, has recognised that funding and financing play a vital role in fostering and promoting terrorism and it is only with such funds terrorists are able to recruit persons for their activities and make payments to them and their family to obtain arms and ammunition for furthering terrorist activities and to sustain the campaign of terrorism. Therefore, seizure, forfeiture and attachment of properties are essential in order to contain terrorism and is not unrelated to the same.

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[193] *Id.*, 615, paragraph 8

[194] (1996) 1 SCC 288. Followed in *State of HP* v. *Pirthi Chand*, (1996) 2 SCC 37. For a discussion on the same see J.K. Mathur J., "Illegal Search and Arrest – Its Effect on Trial", (1997) 6 SCC (J) 12

[195] (1999) 6 SCC 172, 207 (emphasis original)

It took note of the resolution passed by the United Nations Security uncil[196] which emphasised the need to curb terrorist activities by freezing and feiture of funds and financial assets employed to further terrorist activities. It so noted the United Nations International Convention for the Suppression of e Financing of Terrorism without going into the details. It observed that the heme of the provisions indicates that the principles of natural justice are duly served and they do not confer any arbitrary power and forfeiture can only be ade by an order of the court against which an appeal is also provided to the igh Court and the rights of bona fide transferee are not affected. Therefore, for e present, it was considered not necessary to pronounce the constitutional lidity of these provisions and it proceeded on the basis that they are valid.

Disappearance cases

In our country Article 21 of the Constitution encompasses the right to life which disappearance cases are derogations. The Supreme Court has in certain ases order investigation and where it found appropriate payment of ompensation has been ordered.[197] However, the cases are far and few that each the Apex Court. The right not be a victim of such atrocities have been ubject to international attention.

Article 6 (1) of the International Covenant on Civil and Political Rights[198] eads –

Every human being has inherent right to life.

Resolution No. 1373 dated 28-9-2001. Declaration on the Protection of All Persons from nforced Disappearances, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. 47/49 (1992). Adopted by General Assembly resolution 47/133 of 18 December 1992

See Chapter VI, *infra.*

Adopted by the General Assembly of the United Nations in Resolution 2200A (XXI) of 16 ecember 1966 and entered into force on 23 march 1976.

The UN Secretariat's summary of discussions which took place in the ommission of Human Rights and the Third Committee of the General ssembly states that there was general agreement regarding the importance of afeguarding the right of everyone to life through the Covenant although various pinions were held as to how the right should be formulated.[199] In the scussion, three distinct views emerged.

First - that the Covenant should categorically state that no one should be eprived of life under any circumstances. Critics contended that the Covenant ust be realistic and recognise that some circumstances existed under which the aking of life might be justified.

The second view was that the Covenant ought to spell out precisely the xact scope of the right and limitations thereto since the Covenant was generally ne of an immediate applicable standard and this would allow State parties to now exactly what obligation they would be assuming on acceptance.

Here, the critics opined that any list of exceptions would necessarily be ncomplete and might convey the impression that greater importance was being iven to the exceptions than to the right.

The third view was the general formulation, which did not list the xceptions. And this was preferable, as the Article would simply and ategorically affirm that 'no one shall be arbitrarily deprived of his life' and that veryone's right to life shall be protected by law'. It was explained that a ause providing that no one shall be deprived of his life 'arbitrarily' would dicate that the right was not absolute and obviate the necessity of setting out e possible exceptions in detail. However, the use of the term 'arbitrarily' was avily criticised both in the Commission of Human Rights and in the Third ommittee on the ground that it was vague and open to many different terpretations.[200]

P. R. Gandhi, "The Human Rights Committee and Article 6 of the International Covenant on Civil Political Rights", 29 Ind. J. Intl. L. 326 (1989), 328

Ibid. One further point that clearly emerges from the *travaux preparatories* is that it was not visaged that the right to life should be protected by law from the moment of conception as

By the Declaration on the Protection of All Persons from Enforced ...isappearances,[201] the General Assembly recalled its resolution 33/173 of 20 ...ecember 1978, in which it expressed concern about the reports from various ...arts of the world relating to enforced or involuntary disappearances, as well as ...out the anguish and sorrow caused by those disappearances, and called upon ...overnments to hold law enforcement and security forces legally responsible for ...xcesses which might lead to enforced or involuntary disappearances of persons. ...also referred to the Body of Principles for the Protection of All Persons under ...y form of Detention or Imprisonment and the Principles on the Effective ...revention and Investigation of Extra-legal, Arbitrary and Summary ...xecutions.[202] At Article l, it declared that any act of enforced disappearance is ...n offence to human dignity. It is condemned as a denial of the purposes of the ...harter of the United Nations and as a grave and flagrant violation of the human ...ights and fundamental freedoms proclaimed in the Universal Declaration of ...Human Rights and reaffirmed and developed in international instruments in this ...ield.

It said that any act of enforced disappearance places the persons subjected ...hereto outside the protection of the law and inflicts severe suffering on them ...nd their families. It constitutes a violation of the rules of international law ...guaranteeing, *inter alia*, the right to recognition as a person before the law, the ...ight to liberty and security of the person and the right not to be subjected to ...orture and other cruel, inhuman or degrading treatment or punishment. It also ...iolates or constitutes a grave threat to the right to life.

...pposed to the moment of birth, *Id.*, 329. See also the Basic Principles on the Use of Force and ...irearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of ...rime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. ...CONF.144/28/Rev.1 at 112 (1990)

... G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992). ...dopted by General Assembly resolution 47/133 of 18 December 1992.

... E.S.C. res. 1989/65, annex, 1989 U.N. ESCOR Supp. (No. 1) at 52, U.N. Doc. E/1989/89 ...989).

Article 2 mandates that no State shall practice, permit or tolerate nforced disappearances. Article 3 requires each State to take effective egislative, administrative, judicial or other measures to prevent and terminate cts of enforced disappearance in any territory under its jurisdiction. Article 4 equires that all acts of enforced disappearance shall be offences under criminal aw punishable by appropriate penalties which shall take into account their xtreme seriousness. Article 19 lays down that the victims of acts of enforced isappearance and their family shall obtain redress and shall have the right to dequate compensation, including the means for as complete a rehabilitation as ossible. In the event of the death of the victim as a result of an act of enforced isappearance, their dependants shall also be entitled to compensation.

The Body of Principles for the Protection of All Persons under Any Form f Detention or Imprisonment,[203] at Principle 34, stipulates that whenever the eath or disappearance of a detained or imprisoned person occurs during his etention or imprisonment, an inquiry into the cause of death or disappearance hall be held by a judicial or other authority, either on its own motion or at the nstance of a member of the family of such a person or any person who has nowledge of the case. When circumstances so warrant, such an inquiry shall be eld on the same procedural basis whenever the death or disappearance occurs hortly after the termination of the detention or imprisonment. The findings of uch inquiry or a report thereon shall be made available upon request, unless oing so would jeopardize an ongoing criminal investigation.

The Principles on the Effective Prevention and Investigation of Extra-egal, Arbitrary and Summary Executions requires, by Principle 1, that the Governments to prohibit by law all extra-legal, arbitrary and summary xecutions and shall ensure that any such executions are recognised as offences nder their criminal laws, and are punishable by appropriate penalties which take nto account the seriousness of such offences. Exceptional circumstances ncluding a state of war or threat of war, internal political instability or any other

public emergency may not be invoked as a justification of such executions. To ensure compliance, it recommends, at Principle 9, that there shall be thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances. Governments shall maintain investigative offices and procedures to undertake such inquiries. The purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death. It shall include an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from witnesses. The investigation shall distinguish between natural death, accidental death, suicide and homicide.

The Human Rights Committee, in its General Comment on Article 6 (1) of the ICCPR for the purpose of assisting the state parties to fulfill their reporting obligations under Article 40(1) of the Covenant, has considered the right to life as the supreme right from which no derogation is permitted even in terms of public emergency which threatens the life of the nation. It characterised the ban on arbitrary deprivation of life as being of 'paramount importance'. It further stressed the duty of state parties to prevent arbitrary killing by their own security forces which it described as being 'a matter of utmost gravity' enjoining the state to take specific and effective measures to prevent 'disappearance of individual'.[204]

The ECHR 1950, in Article 2, confines justification of deprivation of life to three exceptions and then only when it results from the use of force which is no more than absolutely necessary – (a) in defence of any person from unlawful

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G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988)

First General Comment adopted by the Committee on 27 July 1982 at its Sixteenth Session GAOR 37th session, supplement number 40(A/37/40), Reports of HR Committee pp. 93-4 Gandhi *supra* n. 199, 331. See also the observation of the Committee on Article 6 in *Suarez de Guerrero* v. *Colombia*. See also the Second General Comment (No.4) adopted by the Committee on 2 Nov 1984 at its 23rd session - GAOR 40th session, suppl. no. 40(A/40/40)

olence; (b) in order to effect a lawful arrest or to prevent the escape of a person awfully detained; and (c) in action lawfully taken for the purpose of quelling a ot or insurrection.[205]

The decision that brought a sea change to right to life jurisprudence under rticle 2 of the European Convention of Human Rights[206] was *Mc Cann* case[207] here the European Court confirmed that any exception to the right to life would e narrowly and strictly constructed. In this case, the status of victims as errorists was not considered to be a means to lessen the value of the right to em *per se*. The decision has made right to life a strict scrutiny right subject to nhanced review.[208] In *Mc Cann* and subsequent decisions, the Court appears to e reinforcing that whether the deceased is an ordinary citizen or a member of aramilitary organisation, a substantive measure of life protection is due to them. hat protection is not solely limited to the moment of fatality. Rather it extends efore the death to the planning of the operation which may apprehend a suspect, nd in its aftermath, where the state must thoroughly and independently nvestigate whether their own agents acted with due consideration to the right to ife of the deceased.

It is further suggested that the Court must seek to create a common uropean Standard which holds good across different legal culture and systems nd for that lay down basic principles of independence, promptness, horoughness, and efficiency demanded by its own jurisprudence, of other

eports of the HR Committee p. 162 where it is stated that right to life, protected in Article 6 of e Covenant is the same as that enshrined in Article 3 of the UDHR

Gandhi, *supra* n. 199, 333

Signed in Rome on 4 November 1950 and came into force in September 1953

Mc Cann, *Farrell and Savage* v. *UK*., Case 17/1994/464/545 Appl. No.18984/91, series A o 324, E.Ct. H.R., Judgement of 27 Sep1995 cited in Fionnuala Ni Aolain, "The Evolving risprudence of the European Convention Concerning the Right to Life", 19 Neth. Q. Hum. s.21 (2001), 28

Concept of rigid scrutiny has its origin in US Supreme Court doctrine of heightened scrutiny here in certain circumstances governmental action has been subject to a form of more igorous review see *Korematsu* v. *US*, 323 US 214, 1944

ional human rights courts and the developed 'Soft Law' standards of the N.[209]

Even a country like the US, an affluent society that can easily compensate tims of unlawful arrests or detention mandated under Article 9(5) of the CPR has subjected it to an understanding that victim redress is subjected to asonable requirements of domestic law".[210]

Though every state has the inherent right of self defence and consequent a ht to derogation acknowledged under many international law instruments of man rights,[211] there are certain rights which remain unaffected even during blic emergency and are to be treated as non-derogable. Right to life and edom from torture are two of them.[212]

ght to Counsel

Article 22(1) of the Constitution of India specifically deals with this right. CPR, at 14(3)(b), also declares this to be an inherent right. The Basic inciples on the Role of Lawyers, adopted at the Eighth United Nations ngress on the Prevention of Crime and the Treatment of Offenders has to be oked into with benefit.[213] It refers to the Body of Principles for the Protection All Persons under Any Form of Detention or Imprisonment which provides at a detained person shall be entitled to have the assistance of, and to mmunicate and consult with, legal counsel. It further refers to the Standard inimum Rules for the Treatment of Prisoners which recommended, in rticular, that legal assistance and confidential communication with counsel ould be ensured to untried prisoners. The Body of Principles for the

Aolain, *supra* n. 207, 34-35
Upendra Baxi, "A Work in Progress?" The US Report to the United Nations Human Rights mmittee", 36 Ind. J. Intl. L. 34 (1996), 37
ICCPR- Article 4(1) ; ECHR Article 15(1); Am CHR Article 27(1)
ICCPR- Article 4(2); ECHR- Article 15(2) and AmCHR – Articles 27(2)
Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990)

Protection of All Persons under Any Form of Detention or Imprisonment,[214] at Principle 17, mandates that a detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it. At Principle 2, it stipulates that if a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

In England, the right to counsel were first recognised only for the prisoners charged with felony, that too only in 1836.[215] The first opportunity in the US Supreme Court was in the *Scottsboro* Case in 1932.[216] The Court struck down the conviction and observed that there was a duty to assign a counsel. Justice Sutherland observed:

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge and convicted on improper evidence. He requires the guiding hand of a counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish innocence. If that be true of a man of intelligence how much more true is it of the ignorant and illiterate, and those of feeble intellect."[217]

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[214] G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988)

[215] Santosh Paul, "Right to Counsel", (1997) 8 SCC (J) 14

[216] *Powell* v. *Alabama*, 287 US 45 (1932) – Nine negro boys were tried for the rape of two white women, all were found guilty and sentenced to be hanged in a trial that lasted for a day without the aid of a counsel

[217] The principles laid down here were later expanded in *Escobedo* v. *Illinois*, 378 US 478 (1964) and *Miranda* v. *Arizona*, 384 US 436 (1966)

In *Janardhan Reddy* v. *State of Hyderabad*,[218] the Supreme Court ecifically held that Art 22(1) does not provide the accused person the right to services of a legal practitioner at the state cost. But, it did recognise that a urt of appeal or revision is not powerless to interfere, if it is found that the cused was so handicapped for want of legal aid that the proceedings against n may be said to amount to negation of a fair trial.

Section 304 was introduced in the Criminal Procedure Code as per the commendations of the Law Commission in its 48th Report.[219] The Supreme ourt recognised it in *RM Wasawa* v. *State of Gujarat*.[220]

Article 39A,[221] requires state to provide free legal aid by suitable gislation or schemes so that opportunities for securing justice were not denied a citizen on account of his economic and other disabilities.

The later decisions of the Supreme Court have held that a procedure hich does not make legal service available to an accused person who is too oor to afford a lawyer and who would, therefore, have to go through the trial ithout legal assistance, cannot possibly be regarded as reasonable, fair and just rocedure guaranteed under Art.21. In *Hussainara Khatoon (IV)*,[222] the Court bserved thus:

> "The right to free legal services is, therefore, clearly an essential ingredient of 'reasonable, fair and just' procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so required, provided of course the accused person does not object to the provision of such lawyer."[223]

AIR 1951 SC 227

See also the Report of the Expert Committee on Legal Aid 1973

(1974) 3 SCC 581. In this case the SC pointed out the need to appoint competent advocates handle complex cases, and not raw entrants to the bar.

It was inserted in the Constitution by the 42nd Amendment 1978 as one of the Directive inciples of State Policy.

Hussainara Khatoon (IV) v. *Home Secy. State of Bihar*, (1980) 1 SCC 98; *MH Hoskot* v. *ate of Maharashtra*, (1978) 3 SCC 544

Id., 105

In *Khatri (II)* v. *State of Bihar*,[224] the Supreme Court clarified that the State cannot avoid its constitutional obligation to provide free legal services to indigent accused persons by pleading financial or administrative inabilities. It went on to further state that the constitutional obligation does not arise only when the trial commences but starts when the accused is for the first time produced before the Magistrate, as also when he is remanded from time to time to enable him to apply for bail. It further held that the accused should be informed by the Magistrates and Sessions Judges that he had this right unto him if he is indigent. [225] Unfortunately, however, it restricted the availability of the right by saying that there may be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where, according to it, social justice may require that free legal services need not be provided by the State. The particular stand taken by the Supreme Court defies logic.

Francis Coralie Mullin v. *Administrator, Union Territory of Delhi,* it was held that the right of a detenu is to consult a legal adviser of his choice for any purpose and it is not necessarily limited to defence in a criminal proceeding. It also extends to securing release from preventive detention or filing a writ petition or prosecuting any claim or proceeding, civil or criminal. It is included in the right to live with human dignity and is also part of personal liberty and the detenu cannot be deprived of this right nor can this right of the detenu be interfered with except in accordance with reasonable, fair and just procedure established by a valid law. The prison regulation in the case which prescribed that the legal adviser can have interview with a detenu only by prior appointment after obtaining permission of the District Magistrate was held to be violative of Articles 14 and 21 as it prescribed the right of a detenu to have interview with a legal adviser in a manner which is reasonable, fair and just. It was held that it

[224] (1981) 1 SCC 627. But see *Rishi Nandan* v. *State of Bihar*, 2000 SCC (Cri) 21
[225] *Id.*, 632; See also *Ranjan Dwivedi* v. *Union of India*, (1983) 3 SCC 307; *Suk Das* v. *Union Territory of Arunachal Pradesh*, (1986) 2 SCC 401

ould be quite reasonable if a detenu were to be entitled to have interview with s legal adviser at any reasonable hour during the day after taking appointment om the Superintendent of the Jail, which appointment should be given by the uperintendent without any avoidable delay.[226]

Bail

The Body of Principles for the Protection of All Persons under Any Form f Detention or Imprisonment, at Principle 37, stipulates that a person detained n a criminal charge shall be brought before a judicial or other authority rovided by law promptly after his arrest. Such authority shall decide without elay upon the lawfulness and necessity of detention. No person may be kept nder detention pending investigation or trial except upon the written order of uch an authority. A detained person shall, when brought before such an uthority, have the right to make a statement on the treatment received by him hile in custody.

Bail is the security for appearance of the accused person on giving of hich he is released pending trial or investigation.[227] What is contemplated by ail is to procure the release of a person from legal custody, by undertaking that e shall appear at the time and place designated and submit himself to the risdiction and judgment of the court. The Code expects the investigating gency to finish investigation as early as possible. In case investigation cannot e completed in 24 hours, the detained person ought to be produced before the Magistrate and any further detention can be ordered only by him. Similarly, if he investigation of offences is not completed within the time stipulated by the ode, the detained persons would become entitled to bail.[228] It has been held by

(1981) 1 SCC 608, 621

Govind Prasad v. *State of WB*, 1975 Cri.L.J. 1249 (Cal HC)

90 days for those offences for which punishment of more than 10 years is prescribed and in l other cases, 60 days.

e Supreme Court that if the investigation cannot be completed within the pulated period, then even in serious and ghastly types of crimes the accused ill be entitled to be released on bail.[229] Of course in all these cases the person ay be released on conditions and subject to the satisfaction of the officer or agistrate of the sureties. It ought to be kept in mind that the object of tention pending criminal proceedings is not punishment and the law favours owance of bail, which is the rule, and refusal is the exception.[230] However, e guidelines have not been consistently followed by all the courts and the fferent benches of the same court so much so the practice of bench hunting me to be in vogue. The practice was, however, condemned by the Supreme ourt.[231] In *Narinderjit Singh Sahni* v. *Union of India*,[232] the petitioners were voured with an order of bail in one case but were being detained by reason of oduction warrant in another matter and resultantly the petitioners were nguishing in the jails being deprived of the order of grant of bail. Though this as challenged as violative of Article 21, the contention was turned down. pplication for bail by an accused in a pending case is to be considered peditiously and orders passed on the date of such application. It has been early stated by the Kerala High Court that unless compelling reasons are there rders must be passed on such applications on the date of surrender itself.[233]

The Courts have been extremely cautious in granting bail in certain cases. or example, anticipatory bail is not granted in cases of dowry death and SC/ST Prevention of Atrocities) Act etc.[234] The position is more problematic in case of emand and bail under some special enactments like NDPS Act[235] and POTA. In

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Matabar Parida v. *State of Orissa*, (1975) 2 SCC 220

See *Gudikanti Narasimhulu* v. *Public Prosecutor*, (1978) 1 SCC 240 and *Gurcharan Singh State (Delhi Admn.)*, (1978) 1 SCC 118 where the circumstances to be looked into by the courts for grant of bail in non – bailable offences is concerned.

Shahzad Hasan Khan v. *Ishtiaq Hasan Khan*, AIR 1987 SC 1613; *State of Maharashtra* v. *Buddhikota Subha Rao*, 1989 Supp (2) SCC 605

(2002) 2 SCC 210

Alice George v. *Dy. Supdt. of Police*, 2003 (1) KLT 339

Samunder Singh v. *State of Rajasthan*, 1987 Cri.L.J. 705 – dowry death and *State of MP* v. *Ram Kishan Balothia*, (1995) 3 SCC 221 – SC/ST (Prevention of Atrocities) Act

Dadu v. *State of Maharashtra*, (2000) 8 SCC 437

me cases the Supreme Court has held that the provision under the special actment will override the provisions in the Code.[236]

In *Sanjay Dutt case*[237] it was held that if a challan is not filed after expiry 180 days or extended period, the indefeasible right of an accused to be eleased on bail is ensured under section 167 of the Code of Criminal Procedure, rovided that the same is exercised before filing of challan.

Section 49 POTA mainly deals with the procedure for obtaining bail for accused. Section 49(7) of the POTA was challenged on the grounds that a ourt could grant bail only if it is satisfied that there are grounds for believing hat an accused 'is not guilty of committing such offence'; since such a atisfaction could be attained only after recording of evidence, there is every hance that the accused will be granted bail only after minimum one year of etention; and that the proviso to Section 49(7), which is not there under TADA, akes it clear that for one year from the date of detention no bail could be ranted. This was challenged in *People's Union for Civil Liberties* v. *Union of ndia.*[238] The Court turned down the contention thus:

> "The offences under POTA are more complex than that of ordinary offences. Usually the overt and covert acts of terrorism are executed in a chillingly efficient manner as a result of high conspiracy, which is invariably linked with anti-national elements both inside and outside the country. So an expanded period of detention is required to complete the investigation. Such a comparatively long period for solving the case is quite justifiable. Therefore, the investigating agencies may need the custody of the accused for a longer period. Consequently, Sections 49(6) and (7) are not unreasonable. In spite of this, bail could be obtained for an accused booked under POTA if the 'court is satisfied that there are grounds for believing that he is not guilty of committing such offence'

[236] *Narcotics Control Bureau* v. *Kishan Lal*, (1991) 1 SCC 705. In this case it was held that ection 439 of the Code is subject to section 34 of the NDPS Act
[237] (1994) 5 SCC 410: 1994 SCC (Cri) 1433, SCC, 439, paras 43 - 48
[238] *PUCL* (2004)

after hearing the Public Prosecutor. It is the general law that before granting the bail the conduct of the accused seeking bail has to be taken into account and evaluated in the background of the nature of crime said to have been committed by him. That evaluation shall be based on the possibility of the likelihood of his either tampering with the evidence or committing the offence again or creating threat to the society. Since the satisfaction of the court under Section 49(7) has to be arrived at based on the particular facts and after considering the abovementioned aspects, we do not think the unreasonableness attributed to Section 49(7) is fair."[239]

In *Akhtari Bi* v. *State of M.P.*,[240] the Supreme Court has emphasised that have speedy justice is a fundamental right that flows from Article 21 of the Constitution and that prolonged delay in disposal of the trials and thereafter in appeals in criminal cases, for no fault of the accused, confers a right upon him to apply for bail.

The Malimath Committee has recommended for increasing the number of offences which are bailable and reducing the number of offences which are not bailable.[241] Recommendation No 14 provides that the victim should be heard in respect of the grant or cancellation of bail.

Handcuffing

As is the case of torture or detention, indiscriminate handcuffing of detainees has also got the attention of the Supreme Court. In *Prem Shankar Shukla* v. *Delhi Admn.*[242] it was held as follows:

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[239] *Id.*, 613
[240] (2001) 4 SCC 355
[241] Recommendation 112
[242] (1980) 3 SCC 526: AIR 1980 SC 1535, SCC, 537, paragraph 22

"Handcuffing is prima facie inhuman and, therefore, unreasonable, is overharsh and at the first flush, arbitrary. Absent fair procedure and objective monitoring, to inflict 'irons' is to resort to zoological strategies repugnant to Article 21. Thus, we must critically examine the justification offered by the State for this mode of restraint. Surely, the competing claims of securing the prisoner from fleeing and protecting his personality from barbarity have to be harmonised. To prevent the escape of an undertrial is in public interest, reasonable, just and cannot, by itself, be castigated. But to bind a man hand-and-foot, fetter his limbs with hoops of steel, shuffle him along in the streets and stand him for hours in the courts is to torture him, defile his dignity, vulgarise society and foul the soul of our constitutional culture."

It was declared that the rule, regarding a prisoner in transit between ...ison house and court house, is freedom from handcuffs and the exception, ...der conditions of judicial supervision, will be restraints with irons, to be ...stified before or after. The judicial officer before whom the prisoner is ...oduced is mandated to interrogate the prisoner, as a rule, whether he has been ...bjected to handcuffs or other 'irons' treatment and, if he has been, the official ...ncerned shall be asked to explain the action forthwith The same principles are ...iterated in *Sunil Gupta* v. *State of M.P.*[243]

In *Sunil Batra* v. *Delhi Admn.*,[244] the Court held that undertrials shall be ...emed to be in custody, but not undergoing punitive imprisonment. Fetters, ...pecially bar fetters, were directed to be shunned as violative of human dignity, ...th within and without prisons. It declared illegal the indiscriminate resort to ...ndcuffs when accused persons are taken to and from court and the expedient ...forcing irons on prison inmates and shall be stopped forthwith save in small ...tegory of cases where an undertrial has a credible tendency for violence and

[243] (1990) 3 SCC 119
[244] AIR 1978 SC 1675: (1978) 4 SCC 494

scape, a humanely graduated degree of 'iron' restraint is permissible if other sciplinary alternatives are unworkable. The burden of proof of the ground, as er the Court, is on the custodian. And if he fails, he will be liable in law since ckless handcuffing and chaining in public was observed to degrade and put to ame finer sensibilities and is a slur on our culture.

In *Citizens for Democracy* v. *State of Assam*, it was directed that where e police or the jail authorities have well-grounded basis for drawing a strong ference that a particular prisoner is likely to jump jail or break out of the stody then the said prisoner should be produced before the Magistrate oncerned and a prayer for permission to handcuff the prisoner be made before e said Magistrate. Save in rare cases of concrete proof regarding proneness of e prisoner to violence, his tendency to escape, he being so dangerous/desperate d the finding that no other practical way of forbidding escape is available, the Magistrate may grant permission to handcuff the prisoner.[245]

The Malimath Committee has recommended a specific provision in the ode prescribing reasonable conditions to regulate handcuffing, including ovision for taking action for misuse of the power by the Police Officers.[246]

Conclusion

It can thus be safely said that the Supreme Court has been the forerunner ensuring compliance with the international norms in the areas discussed ove. It sometimes falls back on the constitutional principle alone and metimes draws support for its opinion from the international norms. Even in ses where it does not specifically refer to the international norms, it does not atter as long as the ideas get implemented. However, it should also be pointed ut that, possibly for the reason of non interference with policy matters on

[245] (1995) 3 SCC 743, 750. See also *Khedat Mazdoor Chetna Sangath* v. *State of M.P.*, (1994) 6 SCC 260

[246] Recommendation 12

ous crimes affecting the State, the Supreme Court have been wanting in ing the benefit of the benign principles enunciated in the international norms certain cases mentioned above. That does not make us overlook the provements brought about already.

CHAPTER – V

TRIAL STAGE

Fair Trial

India is a party to many international human rights conventions dealing ...th different aspects of trial. It has ratified the International Covenant on Civil ...d Political Rights (ICCPR);[1] the International Covenant on Economic, Social ...d Cultural Rights,[2] the Convention on the Elimination of All Forms of Racial ...scrimination,[3] the Convention on the Elimination of All Forms of ...scrimination against Women,[4] and the Convention on the Rights of the Child.[5] ...he customary international law, formulated to a large extent in the Universal ...eclaration on Human Rights,[6] is legally binding upon India. The customary ...les on the right to a fair trial and the prohibition of torture or cruel, inhuman or ...egrading treatment or punishment, which is also a peremptory norm of ...ternational law, are also relevant.

Apart from the above, there are also international standards of a non-...inding nature which illustrate human rights in the administration of justice, and ...n particular criminal justice. These are declaratory in nature and influence ...ternational standards on the right to fair trial as interpreted by national and ...ternational human rights bodies and tribunals. On a universal level, there are, ...n particular: the Basic Principles on the Role of Lawyers,[7] the Guidelines on the ...ole of Prosecutors,[8] the Basic Principles on the Independence of the Judiciary,[9] ...he Declaration of Basic Principles of Justice for Victims of Crime and Abuse of ...Power,[10] the Principles on the Effective Investigation and Documentation of

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...999 U.N.T.S. 171 India has made reservations to articles 1, 9, 13 and declarations on arts. 12, ...9(3), 21, 22

...993 U.N.T.S. 3

...660 U.N.T.S. 195

...249 U.N.T.S. 13

...G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989)

...G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)

...Adopted in Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at ...18 (1990)

...Adopted in Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at ...89 (1990)

...Adopted in Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 ...1985)

...Adopted by General Assembly resolution 40/34 of 29 November 1985, U.N. Doc. A/40/53 ...1985)

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[11] the Resolution of the Human Rights Commission on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms,[12] and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.[13] The Basic Principles on the Independence of the Judiciary, adopted at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in Principle 5, states that everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals. Principle 6 stipulates that the principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

Every criminal trial is a voyage of discovery in which truth is the quest. The operating principles for a fair trial permeate the common law in both civil and criminal contexts. The very basis upon which a judicial process can be resorted to is reasonableness and fairness in a trial. Under our Constitution, as also the international treaties and conventions, the right to get a fair trial is a basic fundamental human right. Any procedure which comes in the way of a party in getting a fair trial would be violative of Article 14 of the Constitution of India. Right to a fair trial by an independent and impartial Tribunal is part of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.[14] The Supreme Court has declared that 'Life'

Adopted by General Assembly resolution 55/89 Annex, 4 December 2000

Commission on Human Rights Resolution 2003/34

Final report of the Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms

Clark (Procurator Fiscal, Kirkcaldy) v. *Kelly*, (2003) 1 All ER 1106 (PC); *Dwarka Prasad Agarwal* v. *B.D. Agarwal*, (2003) 6 SCC 230, 245

...eans more than mere animal existence in *Kharak Singh* v. *State of UP*[15] ...llowing *Munn* v. *People of Illinois*.[16]

In the context of Article 21, it has been held in *K. Anbazhagan* v. *...perintendent of Police*,[17] that -

> "Free and fair trial is sine qua non of Article 21 of the Constitution. It is trite law that justice should not only be done but it should be seen to have been done. If the criminal trial is not free and fair and not free from bias, judicial fairness and the criminal justice system would be at stake shaking the confidence of the public in the system and woe would be the rule of law. It is important to note that in such a case the question is not whether the petitioner is actually biased but the question is whether the circumstances are such that there is a reasonable apprehension in the mind of the petitioner."

Our courts have recognised that the primary object of criminal procedure ...to ensure a fair trial of accused persons.[18] The Law Commission has also ...served that fair trial relates to character of the court, the venue, the mode of ...nducting the trial, rights of the accused in relation to defence and other ...ghts.[19] The problem of defining a fair trial has been considered by the ...upreme Court thus:

> "There can be no analytical, all-comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice

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...IR 1963 SC 1295

...4 US 113: 24 L Ed 77 (1877). See further Arijit Pasayat J. "Public Interest Litigation vis-à-...Human Rights", (2001) 7 SCC (J) 11

...2004) 3 SCC 767, 784

...*H Hussain* v. *M PMondkar* AIR 1958 SC 376; *Iqbal Sodawala* v. *State of Maharashtra* ...4 Cri.L.J. 1291

...th Report of the Law Commission, p. 2, para 8

has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated."[20]

The Court went on to observe that these principles have to be applied by the courts with a delicate judicial balancing of competing interests in a criminal trial, including the interests of the accused. At the same time interest of the public, and to a great extent that of the victim, have to be weighed since there is a public interest involved in the prosecution of persons who commit offences.[21] It was of the view that the principle of fair trial now informs and energises many areas of the law. It is reflected in numerous rules and practices. It is considered as a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation, peculiar at times and related to the nature of crime, persons involved directly or operating behind, social impact and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system. The principles of fair trial manifest themselves in virtually every aspect of our practice and procedure, including the laws of evidence.[22] Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice often referred to as the duty to vindicate and uphold the "majesty of the law".

[20] *Zahira Habibulla H. Sheikh* v. *State of Gujarat*, (2004) 4 SCC 158, 184 (hereinafter referred to as *Zahira*)
[21] *Id.*, 182
[22] *Id.*, 183

There has been a growing trend of arguing for an inquisitorial system. Although there are a lot of differences between the adversarial and the inquisitorial system, the issue is one more of different instruments and safeguards rather than of basic goals and principles. Both systems strive for the same end: to convict the guilty and to discharge the non-guilty by seeking the truth by fair means."[23]

In *Abdul Nazar Madani* v. *State of T.N.*,[24] it was observed in the context of a prayer for transfer of the case, that the purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that public confidence in the fairness of a trial would be seriously undermined, any party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 CrPC. The apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias, before any court or even at any place, the appropriate court may transfer the case to another court where it feels that holding of fair and proper trial is conducive. No universal or hard-and-fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case.

In *Maneka Sanjay Gandhi* v. *Rani Jethmalani*,[25] it was stressed that assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the court is to exercise its power of

[23] *A. Eser*, "Collection and Evaluation of Evidence in Comparative Perspective", 31 Israel Law Review 429, (1997)
[24] (2000) 6 SCC 204: AIR 2000 SC 2293, para 7, SCC, 210-11
[25] (1979) 4 SCC 167: AIR 1979 SC 468, para 2, SCC, 169

...nsfer. This is the cardinal principle although the circumstances may be myriad ...d vary from case to case.

The Courts have gone to the extent of declaring that fairness means that ...ere must be sufficient material to frame charges in *Satish Mehra* v. *Delhi ...dministration,*[26] lest it should be unfair. Similarly, the Court has to give ...asons for framing the charges, as was held in the TADA case of *State of ...aharashtra* v. *Som Nath Thapa.*[27]

The Malimath Committee has recommended some drastic changes to the ...hole system as evident right from the Preamble recommended by it.[28] It states ...at quest for truth should be the fundamental duty of every court[29] and, with ...at in mind, it has recommended changes to section 482 of Cr.P.C. The ...ommittee recommended thus:

> "Every Court shall have inherent powers to make such orders as may be necessary to discover truth or to give effect to any order under this Code or to prevent abuse of the process of court or otherwise to secure the ends of justice."[30]

It has also prescribed summary procedures for a larger number of ...ffences.

Whatever standards are fixed or whatever procedures are prescribed, each ...as to comply with fair trial standards as provided in Article 14 (3) ICCPR. In ...rinciple, international law, and particularly, Article 14 ICCPR allows for fast

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...(1996) 9 SCC 766; See also *Century Spg. and Mfg. Co. Ltd.* v. *State of Maharashtra*, (1972) ...SCC 282 and *State of Karnataka* v. *L. Muniswamy*, (1977) 2 SCC 699

...(1996) 4 SCC 659

...(1) A preamble shall be added to the Code [of Criminal Procedure] on the following lines:
"Whereas it is expedient to constitute a criminal justice system for punishing the guilty and ...rotecting the innocent.
"Whereas it is expedient to prescribe the procedure to be followed by it,
"Whereas quest for truth shall be the foundation of the criminal justice system,
"Whereas it shall be the duty of every functionary of the criminal justice system and everyone ...ssociated with it in the administration of justice, to actively pursue the quest for truth.
...t is enacted as follows:"

...Recommendation 2 asking for additions to section 311 of the present Code

...Recommendation 5

procedures, and the Human Rights Committee has even suggested special courts to deal with petty offences where a state system suffers from a great backlog of cases.[31]

Presumption of innocence and burden of proof

One of the cardinal principles which has always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the Court can raise the statutory presumption and it would then be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal. Under the English law also, the defendant has to satisfy only balance of probabilities when the balance is shifted on to him in criminal law.[32]

Concluding Observations of the Human Rights Committee: Brazil, 24 July 1996, CCPR/C/79/Add.66, para 24

Patrick Devlin, *The Criminal Prosecution in England*, Oxford University Press, London, 1960

It has to be noted that the lowering of the standard of proof in criminal justice below "proof beyond reasonable doubt" would constitute a violation of the presumption of innocence, one of the cornerstones of national and international human rights law and criminal justice.[33] The presumption of innocence prohibits the sentencing of a person, unless the state authority has proven his guilt. If a doubt remains, the accused cannot be convicted (*in dubio pro reo*). The Human Rights Committee has clearly stated that -

> "[b]y reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt."[34]

Article 14 (2) does not leave the determination of the standard of proof to the states and any conviction on evidence which does not fulfill the standard of proof beyond reasonable doubt constitutes a violation of India's obligations under the ICCPR.

Similarly, if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the Court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the Court entertains reasonable

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[33] See Article 14 (2) ICCPR

[34] General Comment 13, Article 14, para. 14, para. 7; Similarly, the Inter- American Court of Human Rights has stated that the principle of presumption of innocence "demands that a person cannot be convicted unless there is clear evidence of his criminal liability. If the evidence presented is incomplete or insufficient, he must be acquitted, not convicted," *Cantoral Benavides Case*, Inter Am. Court HR, Judgment of August 18, 2000, Series C No. 69, para. 120

...oubt regarding the guilt of the accused, the accused must have the benefit of ...at doubt.[35]

But then, the doubt regarding the guilt of the accused should be ...asonable. The rule regarding the benefit of doubt does not warrant acquittal of ...e accused by report to surmises, conjectures or fanciful considerations since a ...iminal trial is not like a fairy tale wherein one is free to give flight to one's ...agination and fantasy.[36] In arriving at the conclusion about the guilt of the ...ccused charged with the commission of a crime, the Court, in its words, has to ...dge the evidence by the yardstick of probabilities, its intrinsic worth and the ...nimus of witnesses. Every case in the final analysis would have to depend ...pon its own facts. Although the benefit of every reasonable doubt should be ...iven to the accused, the Courts should not at the same time reject evidence ...hich is *ex facie* trustworthy on grounds which are fanciful or in the nature of ...onjectures.

Again but, the Courts would not be justified in withholding that benefit of doubt because the acquittal might have an impact upon the law and order situation or create adverse reaction in society or amongst those members of the society who believe the accused to be guilty. The guilt of the accused has to be adjudged not by the fact that a vast number of people believe him to be guilty but whether his guilt has been established by the evidence brought on record.[37]

In *Shivaji Sahabrao Bobade* v. *State of Maharashtra*[38] Justice Krishna Iyer lamented the undue adherence to the presumption of innocence. He said:

> "The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand special emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public

[35] *Kali Ram* v. *State of H.P.*, (1973) 2 SCC 808, 820
[36] *State of Punjab* v. *Jagir Singh*, AIR 1968 SC 43
[37] *Kali Ram* v. *State of H.P.*, (1973) 2 SCC 808, 820
[38] 1973 SCC (Cri) 1033, para 6, 1039

accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community".

He further said -

"We must observe that even if a witness is not reliable, he need not be false and even if the police have trumped up one witness or two or has embroidered the story to give a credible look to their case that cannot defeat justice if there is clear and unimpeachable evidence making out the guilt of the accused."[39]

But, Justice Khanna, immediately thereafter, clarified the observations of Krishna Iyer J. in the subsequent decision in *Kali Ram* v. *State of H.P.*[40] thus:

"Observations in a recent decision of this Court, *Shivaji Sahabrao Bobade* v. *State of Maharashtra* to which reference has been made during arguments were not intended to make a departure from the rule of the presumption of innocence of the accused and his entitlement to the benefit of reasonable doubt in criminal cases. One of the cardinal principles, which has always to be kept in view in our system of administration of justice for criminal cases, is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of

[39] *Id.*, 1047, paragraph 19
[40] *Supra* n. 35

that burden, the courts cannot record a finding of the guilt of the accused."[41]

The importance and the rationale of these fundamental principles were dealt with thus:

"Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to this innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of that doubt.[42]

.... It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilized society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable".[43]

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[41] *Id.*, 820, paragraph 23
[42] *Id.*, 821, paragraph 25
[43] *Ibid.*, paragraph 27

The Law Commission has opined that the criticism against the presumption of innocence appears to be more of a criticism of the manner in which this principle and the principle of giving the accused the benefit of doubt, has been applied by weak and incompetent judges.[44]

The tendency to acquit an accused on fragile grounds in recent times has got the attention of the Supreme Court. It is very easy to pass an order of acquittal on the basis of minor points raised in the case by a short judgment, presumably to achieve the yardstick of disposal. In the words of the Court:

> "Some discrepancy is bound to be there in each and every case which should not weigh with the court so long it does not materially affect the prosecution case. In case discrepancies pointed out are in the realm of pebbles, the court should tread upon it, but if the same are boulders, the court should not make an attempt to jump over the same. These days when crime is looming large and humanity is suffering and the society is so much affected thereby, duties and responsibilities of the courts have become much more. Now the maxim "let hundred guilty persons be acquitted, but not a single innocent be convicted" is, in practice, changing the world over and courts have been compelled to accept that "society suffers by wrong convictions and it equally suffers by wrong acquittals."[45]

In the case *Inder Singh* v. *State (Delhi Admn.)*, Krishna Iyer, J. laid down that:

> "Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes." [46]

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[44] 14th Report of the Law Commission of India, Vol. II, p. 836

[45] *Krishna Mochi* v. *State of Bihar*, (2002) 6 SCC 81, 104

[46] (1978) 4 SCC 161: AIR 1978 SC 1091, SCC 162, paragraph 2

In the case of *State of U.P.* v. *Anil Singh*,[47] it was held that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform. Similarly, in *State of W.B.* v. *Orilal Jaiswal*,[48] it was held that justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent. Letting the guilty escape is not doing justice, according to law.

The Supreme Court, in *Mohan Singh* v. *State of M.P.*,[49] held that the courts have to remove the chaff from the grain. It has to disperse the suspicious cloud and dust out the smear of dust as all these things clog the very truth. So long chaff, cloud and dust remain, the criminals are clothed with this protective layer to receive the benefit of doubt. So it is a solemn duty of the courts, not to merely conclude and leave the case the moment suspicions are created. It is the onerous duty of the court, within permissible limit to find out the truth. It means, on one hand no innocent man should be punished but on the other hand to see no person committing an offence should get scot-free. If in spite of such effort suspicion is not dissolved, it remains writ at large, benefit of doubt has to be credited to the accused.

Arijit Pasayat J., in a separate but concurring judgment in *Krishna Mochi* v. *State of Bihar*, reminded us of *Gurcharan Singh* v. *State of Punjab*,[50] while holding that merely because a person is acquitted, his co-accused need not necessarily be entitled to the same. In his words:

> "The doctrine is a dangerous one, specially in India, for if a whole body of the testimony were to be rejected, because the witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help

[47] 1988 (Supp) SCC 686, 692, paragraph 17
[48] (1994) 1 SCC 73: AIR 1994 SC 1418
[49] (1999) 2 SCC 428, 434, Paragraph 11
[50] AIR 1956 SC 460. See also *Sohrab* v. *State of M.P.*, (1972) 3 SCC 751 and *Ugar Ahir* v. *State of Bihar*, AIR 1965 SC 277

in giving embroidery to a story, however true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care."

The Court went on to state that, where it is not feasible to separate the truth from falsehood, because the grain and the chaff are inextricably mixed up, and in the process of separation, an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence *in toto*.[51] The Court had earlier observed in *State of Rajasthan* v. *Kalki*,[52] that normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there, however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so.

The Malimath Committee has observed that there is a third standard of proof which is higher than 'proof on preponderance of probabilities' and lower than 'proof beyond reasonable doubt' described in different ways, one of the being 'clear and convincing' standard. The Committee came to the conclusion

[51] Referring to *Zwinglee Ariel* v. *State of M.P.*, AIR 1954 SC 15 and *Balaka Singh* v. *State of Punjab*, (1975) 4 SCC 511:AIR 1975 SC 1962
[52] AIR 1981 SC 1390: (1981) 2 SCC 752

at the standard of proof beyond reasonable doubt presently followed in minal cases should be done away with and in its place a standard of proof wer than 'proof beyond reasonable doubt' and higher than the standard of roof on preponderance of probabilities'. The Committee favoured a mid level andard of proof of 'courts conviction that it is true'. Accordingly, the ommittee has made certain recommendations.[53]

In this context, it may be sufficient to point out one of the possibilities of roblems. As per the law laid down by the Supreme Court, in a matter where here is only circumstantial evidence, the fundamental rule is that the ircumstances from which the conclusion of guilt is to be drawn should in the irst instance be fully established, and all the facts so established should be onsistent only with the hypothesis of the guilt of the accused. The ircumstances should be of a conclusive nature and tendency and they should be uch as to exclude every hypothesis but the one proposed to be proved. There ust be a chain of evidence so far complete as not to leave any reasonable round for a conclusion consistent with the innocence of the accused and it must e such as to show that within all human probability the act must have been done y the accused.[54]

It must not be lost sight of the fact that, both the adversarial and the nquisitorial systems require the same standard of proof, namely proof beyond easonable doubt. In the light of the same, it would have to be seen how far the ecommendation of the Malimath Committee can hold water.

Recommendation 13

SP Bhatnagar v. *State of Maharashtra*, (1979) 1 SCC 535; *HG Nargundkar* v. *State of MP*, IR 1952 SC 343; *Palvinder Kaur* v. *State of Punjab*, AIR 1952 SC 354; *Charan Singh* v. tate of UP, AIR 1967 SC 520

Role of the Judge

The Basic Principles on the Independence of the Judiciary enunciated by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders has covered all the essentials required for ensuring a fair trial.[55]

In *Ram Chander* v. *State of Haryana,* Chinnappa Reddy, J., observed thus:

> "The adversary system of trial being what it is, there is an unfortunate tendency for a Judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a criminal court is to be an effective instrument in dispensing justice, the presiding Judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth."[56]

The Court said so in the context of protecting the weak and the innocent. It was quick to caution that the Court must, of course, not assume the role of a prosecutor in putting questions. The functions of the Counsel, particularly those of the Public Prosecutor, are not to be usurped by the judge, by descending into the arena, as it were. Similarly, any questions put by the Judge must be so as not to frighten, coerce, confuse or intimidate the witnesses.

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[55] Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985)
[56] (1981) 3 SCC 191, 192

Lord Justice Denning's words in *Jones* v. *National Coal Board* was oted with benefit:

> "The Judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of the Judge and assumes the role of an advocate; and the change does not become him well."[57]

The Court went further than Lord Denning and said that it is the duty of a udge to discover the truth and for that purpose he may 'ask any question, in any orm, at any time, of any witness, or of the parties, about any fact, relevant or rrelevant'.[58] But this he must do, without unduly trespassing upon the functions f the Public Prosecutor and the defence Counsel, without any hint of artisanship and without appearing to frighten or bully witnesses. He must take he prosecution and the defence with him. In words of the Court:

> "The court, the prosecution and the defence must work as a team whose goal is justice, a team whose captain is the judge. The Judge, like the conductor of a choir, must, by force of personality, induce his team to work in harmony; subdue the raucous, encourage the timid, conspire with the young, flatter and (*sic* the) old."[59]

It has been held in the context of hijacked trials that the Presiding Judge nust cease to be a spectator and a mere recording machine by becoming a

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(1957) 2 All. E. R. 155
Section 165 Evidence Act
Supra n. 56, 194

...rticipant in the trial evincing intelligence, active interest and elicit all relevant ...aterials necessary for reaching the correct conclusion, to find out the truth, and ...minister justice with fairness and impartiality both to the parties and to the ...mmunity it serves.[60]

The Supreme Court found it impossible to justify the model employed by ...rial judge in *Ram Chander* v. *State of Haryana*[61] where he tried to compel the ...itnesses to speak what he thought must be the truth even threatening them with ...osecution for perjury. It did not accept any portion of the evidence of the two ...ewitnesses recorded by the Sessions Judge.

In spite of these warnings, there have been instances where the courts ...ve been broadening ambits of section 165 of the Code itself.[62] The Kerala ...igh Court in *Vincent* v. *State of Kerala*[63] through Justice K.T. Thomas (as he ...en was) declared:

> "The contention that the trial Judge cannot be permitted to put questions to fill up the lacuna in the prosecution evidence is equally fallacious because it is the duty of the Judge to put all necessary questions to discover or obtain proof of all relevant facts. Even if it results, sometimes, in filing the lacuna in prosecution evidence, the trial Judge is not inhibited from putting such questions. It is only an exhibition of judicial weakness if a trial Judge points out in his judgment that the cause suffers due to failure of the prosecution of the defence counsel in eliciting proof of relevant facts."

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[60] *Zahira*, 183
[61] 1981 SCC (Cri) 683
[62] K.N. Chandrasekharan Pillai, "Burden of Proof in Criminal Cases and the Supreme Court – New Trends", (2003) 8 SCC (J) 49
[63] 1984 KLT 950

Justice Thomas reiterated this view in the Supreme Court as evident from his observations in *State of Rajasthan* v. *Ani*[64] where he observes:

> "The said Section 165 was framed by lavishly studding it with the word 'any' which could only have been inspired by the legislative intent to confer unbridled power on the trial court to use the power wherever he deems it necessary to elicit truth. Even if any of such question crosses into irrelevancy the same could not transgress beyond the contours of powers of the court. This is clear from the words relevant or irrelevant in Section 165. Neither of the parties has any right to raise objection to any such question."

According to Justice Thomas, the active role assigned to the trial judge in the process of reasoning, it seems, would embolden him to draw inferences from facts even when the prosecutor fails to cull out information by way of examination or cross-examination. For, in *State of W.B.* v. *Mohd. Omar*,[65] where the Public Prosecutor had failed to ask the doctor about the nature of the injury and the court did not have the benefit of the view of the doctor to decide the gravity of the offence, it was observed thus:

> "No doubt it would have been of advantage to the court if the Public Prosecutor had put the said question to the doctor when he was examined. But mere omission to put that question is not enough for the court to reach wrong conclusion. Though not an expert as PW 30, the Sessions Judge himself would have been an experienced judicial officer. Looking at the injuries he himself could have deduced whether those injuries were sufficient in the ordinary course of nature to cause death."

He suggested the need for a change of outlook on presumption of innocence while observing that:

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[64] 1997 SCC (Cri) 851
[65] 2000 SCC (Cri) 1516

"The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilized doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the about rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offence would be the major beneficiaries and the society would be the casualty.....

In this case, when the prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this."[66]

In *State of U.P.* v. *Lakshmi*,[67] the Court, again through KT Thomas J., ...ent to the extent of weaving out a new story not contemplated either by ...rosecution or defence to give benefit to the accused. It has been argued that the ...owers that are being discussed here are tremendous. They have been conferred ...nder the presumption that a judicial officer with experience will not abuse these ...owers. It may also be reminded that the Supreme Court does not have the ...andate to change these fundamental principles.[68]

It has been held by the Supreme Court that while assessing the evidence ...iven by a witness, the magistrate or the judge should express his opinion in ...emperate language usually associated with and reflecting the impersonal dignity ...f judicial restraint.[69]

The Malimath Committee has recommended, in tune with its general ...one, a wider role for the judge with the object of discovering the truth in the

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...at 1525

... 1998 SCC (Cri) 929

... See *supra* n. 62

... *NSK Ghobe* v. *State of Maharashtra*, 1973 Cri.L.J. 664; *State of UP* v. *Mohammad Naim*, AIR 1964 SC 703

se. The Judge can question the accused at any stage and if the accused mains silent or refuses to answer any question put to him by the court which he not compelled by law to answer, the court may draw such appropriate ference including adverse inference as it considers proper in the circumstances. recommends that on charge being framed the accused should be required to bmit a 'Defence Statement' in response to a prosecution statement. And after nsidering the two, the judge shall arrive at the points to be determined and as on whom the burden of proof lies.[70]

The Law Commission of India has warned against a curtailing of the right silence as contrary to Article 20 (3) of the Constitution of India.[71] The right to lence also comprises the right not to comment on allegations of the rosecution, and not thereby concede to them.

The Human Rights Committee considers the drawing of adverse ferences to be in violation of Article 14 (3) (g) ICCPR. It has urged countries here such presumptions exist to 'reconsider, with a view to repealing it, this pect of criminal procedure, in order to ensure compliance with the rights uaranteed under Article 14 of the Covenant.'[72]

The European Court of Human Rights has set strict conditions for the mpliance of inferences of guilt with the right to remain silent and the privilege gainst self-incrimination protected under Article 6 ECHR. It has held that it is lf-evident that it is incompatible with the immunities under consideration to se a conviction solely or mainly on the accused's silence or on a refusal to

Recommendations 8 and 9

Law Commission of India, 180th Report on Article 20 (3) of the Constitution of India and the ight to Silence, May 2002

Concluding Observations of the Human Rights Committee: United Kingdom, 6 December 01, CCPR/CO/73/UKOT, para. 17

nswer questions or to give evidence himself. In the opinion of the Court, nference to the detriment of the accused may only be drawn -

"in situations which clearly call for an explanation from him" and only to assess the "persuasiveness of evidence adduced by the prosecution".[73]

According to the Court, the question in each particular case is whether the vidence adduced by the prosecution is sufficiently strong to require an answer. he national court cannot conclude that the accused is guilty merely because he hooses to remain silent. Also, the Court considers that the drawing of such nferences can only be compatible with the principle of fair trial if the accused is ranted access to a lawyer already at the stage of the police interrogation. Where he accused is tried by jury, the judge must give the jury proper direction on hese conditions.[74] In sum, the European Court of Human Rights, while having o accept that each member state is free to adopt the system of criminal justice hat it chose to, has set strict limits to the possibility of drawing adverse nference; it may never be the only evidence.

Recommendation No 137 of the Malimath Committee suggests that "[c]rime units comprising dedicated investigators and prosecutors and Special Courts by way of Federal Courts should be set up to expeditiously deal with the challenges of 'terrorist and organized' crimes. The Human Rights Committee has held that Special Courts may only exceptionally try civilians and in full respect of the rights of fair trial.[75]

John Murray v. *The United Kingdom*, ECtHR, Judgment of 8 February 1996, Reports 1996-I, para. 47.

Condron v. *The United Kingdom*, ECtHR, Judgment of 2 May 2000, Reports 2000-V, para. 56.

General Comment 13, Article 14, para 4.

Role of Prosecutors

The Guidelines on the Role of Prosecutors adopted in the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders is a useful guide among the international documents.[76] It recognises that the prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned principles, thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime. It requires, in Guideline 1, that persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications. Guideline 3 recognises that Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession. Guideline 4 requires States to ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability. In their role in criminal proceedings, as per Guidance 12, shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system. Guideline 16 prescribes that when prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the

[76] Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990).

court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

The duty of a prosecutor, keeping in mind that the object of a trial is to get to the truth, is not merely to secure a conviction at any cost. He should place before the court whatever evidence is available with him, whether they are in favour of the accused or against him. The prosecutor is expected to be indifferent to the result of the prosecution. The Law Commission, in its 14th Report has observed:

> "A Public Prosecutor should be personally indifferent to the result of the case. His duty should consist only in placing all the available evidence irrespective of the fact whether it goes against the accused or helps him, before the court, in order to aid the court in discovering the truth. It would thus be seen that in the machinery of justice a Public Prosecutor has to play a very responsible role; the impartiality of his conduct is as vital as the impartiality of the court itself."[77]

In the context of withdrawal of prosecution under section 321 of the Cr.P.C., the position of the Public Prosecutor was described in *Sheonandan Paswan* v. *State of Bihar*,[78] thus:

> "Unlike the judge, the Public prosecutor is not an absolutely independent officer. He is an appointee of the Government, ..., appointed for conducting in court any prosecution or other proceedings on behalf of the Government concerned. So there is the relationship of counsel and client between the Public Prosecutor and the Government. A Public Prosecutor cannot act without instructions of the Government; a Public Prosecutor cannot conduct a case absolutely on his own, or contrary to the instruction of his client, namely, the Government."

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[77] Vol. II p.765, para 2; Observations of the Supreme Court in *Mohd. Mumtaz* v. *Nandini Satpathy*, 1987 Cri.L.J. 778; *Sheonandan Paswan* v. *State of Bihar*, (1987) 1 SCC 288; *Shrilekha Vidyarthi* v. *State of UP*, (1991) 1 SCC 212

The Court held that section 321 does not lay any bar on the Public secutor to receive any instruction from the Government before he files an plication under that section. On the contrary, the Public Prosecutor cannot file application for withdrawal of a case on his own without instructions from the vernment. This decision was, however, reviewed in the next *Sheonandan wan* v. *State of Bihar*.[79] The Court here held that a Public Prosecutor can idraw the case at any stage of the prosecution and that the only limitation is requirement of the consent of the court. On the position of Prosecutors, it served thus:

> "There can be no doubt that this function of the Public Prosecutor relates to a public purpose entrusting him with the responsibility of so acting only in the interests of administration of justice. In the case of Public Prosecutors, this additional public element flowing from the statutory provisions in the Code of Criminal Procedure, undoubtedly, invest the Public Prosecutors with the attribute of holder of a public office which cannot be whittled down by the assertion that their engagement is purely professional between a client and his lawyer with no public element attaching to it."

It has been held that if in such matters the Public Prosecutor does not take independent decision but blindly follows the instructions from the government, the result would be disastrous not only for the accused but also for administration of justice.

(1983) 1 SCC 438
(1987) 1 SCC 279

Rea

It is again a cardinal principle of criminal law that a guilty mind should pany a wrong act. *Actus non facit reum nisi mens sit rea* is another facet principle of fair trial. It is the general rule that a penal statute presupposes *rea* element. It will be excluded only if the legislature expressly postulates wise. In *Kartar Singh case* the Supreme Court said thus:

"... unless a statute either expressly or by necessary implication rules out '*mens rea*' in case of this kind, the element of '*mens rea*' must be read into the provisions of the statute".[80]

Mens rea by necessary implication could be excluded from a statute only ee it is absolutely clear that the implementation of the object of the statute ld otherwise be defeated. In each case it would be necessary to find out ther there are sufficient grounds for inferring that Parliament intended to lude the general rule regarding *mens rea* element.[81] The prominent method understanding the legislative intention is to see whether the substantive visions of the Act require *mens rea* element as a constituent ingredient for an ence.

The legislature in India has resorted to the exclusion of *mens rea* in quite w statutes, generally involving white collar crimes. Recently, however, it nd it necessary to extend the same to offences under TADA and POTA.

In the context of unauthorised possession under TADA, a Constitution nch in *Sanjay Dutt* v. *State (II)*[82] clearly held that once the prosecution has ved unauthorised conscious possession of any of the specified arms and

994) 3 SCC 569: 1994 SCC (Cri) 899: (1994) 2 SCR 375, para 115, 645 SCC
State of Maharashtra v. *Mayer Hans George*, (1994) 3 SCC 569: 1994 SCC (Cri) 899: 94) 2 SCR 375; *Nathulal* v. *State of M.P.*, AIR 1966 SC 43: 1966 Cri LJ 71; and *Inder Sain State of Punjab*, (1973) 2 SCC 372: 1973 SCC (Cri) 813 for the general principles ncerning the exclusion or inclusion of *mens rea* element vis-à-vis a given statute
1994) 5 SCC 410. See also *State of Punjab* v. *Baldev Singh*, (1999) 6 SCC 172

mmunition etc. in a notified area by the accused, the offence is complete and he conviction must follow on the strength of the statutory presumption, unless he accused proves the non-existence of a fact essential to constitute any of the ngredients of that offence. That is, the presumption, even though statutory in nature, was held to be rebuttable. In *People's Union for Civil Liberties* v. *Union of India*,[83] challenge to Section 4 of POTA, which provided for punishing a erson who is in 'unauthorised possession' of arms or other weapons on the asis that the knowledge element is absent, was turned down in the light of the *Sanjay Dutt* case that possession here means conscious possession only.

While dealing with meaning of the word 'abets' in the context of POTA, *People's Union for Civil Liberties* v. *Union of India*, it was held that in order o bring a person abetting the commission of an offence under the provisions of PC it is necessary to prove that such person has been connected with those steps f the transactions that are criminal. '*Mens rea*' element is *sine qua non* for ffences under IPC. The same applies to POTA also since the word 'abet' is not efined in the Act and, by virtue of 2(1)(i) of POTA, words and expressions not efined in the Code gets the meaning from the Cr.P.C., which in turn directs us the definition in IPC.[84]

The constitutional validity of some of the special provisions in POTA ere upheld on the ground of necessity. It noted that Sections 20, 21 and 22 of OTA are similar to Sections 11, 12 and 15 of the Terrorism Act, 2000 of the nited Kingdom. Such provisions are found to be quite necessary all over the orld in anti-terrorism efforts. Sections 20, 21 and 22 are penal in nature that emand strict construction. These provisions are a departure from the ordinary w since the said law was found to be inadequate and not sufficiently effective o deal with the threat of terrorism. Moreover, the crime referred to herein under OTA is aggravated in nature. Hence special provisions are contemplated to ombat the new threat of terrorism. Support, either verbal or monetary, with a

[83] (2004) 9 SCC 580
[84] *Id.*, 600

iew to nurture terrorism and terrorist activities is causing new challenges. Therefore, Parliament finds that such support to terrorist organisations or errorist activities needs to be made punishable. In the context of the above iscussion by the Court, it held that it cannot be said that these provisions are obnoxious.[85] But, it went on to give certain clarifications while upholding the ame limiting them only to those activities that have the intent of encouraging or urthering or promoting or facilitating the commission of terrorist activities.[86]

Ex post facto laws

Article 20 (1) of the Constitution provides thus:

> No person shall be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence.

The jurisprudential philosophy of the same was considered in *State* v. *Gian Singh*.[87] It is a fundamental right of every person that he should not be subjected to greater penalty than what the law prescribes, and no *ex post facto* legislation is permissible for escalating the severity of the punishment. But, if any subsequent legislation would downgrade the harshness of the sentence for the same offence, it would be a salutary principle for administration of criminal justice to suggest that the said legislative benevolence can be extended to the accused who awaits judicial verdict regarding sentence.

In *Rattan Lal* v. *State of Punjab*,[88] it was unequivocally declared by the Supreme Court that an *ex post facto* criminal law, which only mollifies the rigour of law is not hit by Article 20(1) of the Constitution and that if a

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[85] *Id.*, 606
[86] *Id.*, 607
[87] (1999) 9 SCC 312, 321
[88] AIR 1965 SC 444: (1965) 1 Cri LJ 360

articular law makes provision to that effect, though retrospective in operation, it ould still be valid. In *T. Barai* v. *Henry Ah Hoe*,[89] this view was reiterated and was emphasised that if an amending Act reduces the punishment for an ffence, there is no reason why the accused should not have the benefit of such educed punishment. It was said:

> "The rule of beneficial construction requires that even *ex post facto* law of such a type should be applied to mitigate the rigour of the law. The principle is based both on sound reason and common sense."[90]

An interesting question arose when the provisions of the NDPS Act, 1985 ere amended by the amending Act 9 of 2001, which rationalised the structure f punishment under the Act by providing graded sentences linked to the uantity of narcotic drug or psychotropic substance in relation to which the ffence was committed. The application of strict bail provisions was also stricted only to those offenders who indulged in serious offences. The benefits f this amendment were made applicable to (*a*) all cases pending before the ourt on 2-10-2001; and (*b*) all cases under investigation as on that date. The roviso, however, made an exception and excluded the application of the tionalised sentencing structure to cases pending in appeal.

It was contended in *Basheer* v. *State of Kerala*,[91] that the benefit of the tionalised structure of punishment introduced by the amending Act of 2001 ould also be made available to all pending cases (including appeals) in courts n the date of the amendment coming into force, as otherwise it would be nreasonable and violative of the equality right guaranteed by Article 14 of the onstitution, resulting in hostile discrimination. The Court did find that the mendments (at least the ones rationalising the sentencing structure) are more neficial to the accused and amount to mollification of the rigour of the law. It

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(1983) 1 SCC 177; AIR 1983 SC 150
Id., 191, paragraph 22
(2004) 3 SCC 609

id consequently that, despite retrospectivity, they ought to be applied to the ses pending before the Court or even to cases pending investigation on the te on which the amending Act came into force as such application would not hit by Article 20(1) of the Constitution. But, when it came to extending it to peals, it observed that merely because the classification has not been carried with mathematical precision, or that there are some categories distributed ross the dividing line, is hardly a ground for holding that the legislation falls ul of Article 14, as long as there is broad discernible classification based on lligible differentia, which advances the object of the legislation, even if it be ss legislation. As long as the extent of over-inclusiveness or under-clusiveness of the classification is marginal, the constitutional vice of fringement of Article 14 would not infect the legislation.[92] It referred to *State A.P.* v. *Nallamilli Rami Reddi*, where a similar contention, urged to impugn a tutory provision as infringing Article 14 of the Constitution, was dismissed by e Court in the following words:

> "What Article 14 of the Constitution prohibits is 'class legislation' and not 'classification for purpose of legislation'. If the legislature reasonably classifies persons for legislative purposes so as to bring them under a well-defined class, it is not open to challenge on the ground of denial of equal treatment that the law does not apply to other persons. The test of permissible classification is twofold: (*i*) that the classification must be founded on intelligible differentia which distinguishes persons grouped together from others who are left out of the group, and (*ii*) that differentia must have a rational connection to the object sought to be achieved. Article 14 does not insist upon classification, which is scientifically perfect or logically complete. A classification would be justified unless it is patently arbitrary. If there is equality and uniformity in each group, the law will not become discriminatory, though due to some fortuitous circumstance arising out of (sic) peculiar situation some included in a class get an advantage over others so long as they are not singled out for special treatment. In substance, the differentia required is that it must be real and substantial, bearing some just and reasonable relation to the object of the legislation."[93]

2004) 3 SCC 615
2001) 7 SCC 708, 715, para 8

Thus, the principle of *ex post facto law* as applied in India also largely satisfy the requirements under the international norms except for the case mentioned above.

Double jeopardy

The rule against double jeopardy is stated in the maxim *nemo debet bis vexari pro una et eadem causa*. It is a significant basic rule of criminal law that no man shall be put in jeopardy twice for one and the same offence. The rule provides foundation for the pleas of *autrefois acquit* and *autrefois convict*. Article 20(2) of the Constitution provides that no person shall be prosecuted and punished for the same offence more than once. To attract applicability of Article 20(2) there must be a *second prosecution* and punishment for the *same offence* for which the accused has been prosecuted and punished previously. A subsequent trial or a prosecution and punishment are not barred if the ingredients of the two offences are distinct.

The manifestation of the rule can also be found contained in Section 26 of the General Clauses Act, 1897, Section 300 of the Code of Criminal Procedure, 1973 and Section 71 of the Indian Penal Code.[94]

[94] Section 26 of the General Clauses Act provides: "26. Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence." Section 300 CrPC provides, *inter alia*, "300. (1) A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of Section 221, or for which he might have been convicted under sub-section (2) thereof." Section 71 IPC provides "71. Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such of his offences, unless it be so expressly provided - Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or; where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence; the offender shall not be punished with a more severe punishment than the court which tries him could award for any one of such offences."

Though Article 20(2) of the Constitution of India embodies a protection gainst a second trial after a conviction of the same offence, the ambit of the ause is held to be narrower than the protection afforded by Section 300 of the riminal Procedure Code.[95] It was held by the Supreme Court *Manipur Admn. Thokchom Bira Singh*[96] that 'if there is no punishment for the offence as a sult of the prosecution, Article 20(2) has no application.' While Article 20(2) mbodies the principle of *autrefois convict*, Section 300 of the Criminal rocedure Code is said to combine both *autrefois convict* and *autrefois acquit.* ection 300 has further widened the protective wings by debarring a second trial gainst the same accused on the same facts even for a different offence if a ifferent charge against him for such offence could have been made under ection 221(1) of the Code, or he could have been convicted for such other ffence under Section 221(2) of the Code.[97]

The authority on the rule against double jeopardy with reference to rticle 20 (2) of the Constitution is the Constitution Bench decision is *Maqbool ussain* v. *State of Bombay*,[98] where it was held that if the offences are distinct, here is no question of the rule as to double jeopardy being extended and applied. n *State of Bombay* v. *S.L.* Apte,[99] another Constitution Bench held that the trial nd conviction of the accused under Section 409 IPC did not bar the trial and onviction for an offence under Section 105 of the Insurance Act because the wo were distinct offences constituted or made up of different ingredients though

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State v. *Nalini*, (1999) 5 SCC 253, 337

AIR 1965 SC 87

Section 221 of the Criminal Procedure Code provides for: "221. *Where it is doubtful what ence has been committed.*—(1) If a single act or series of acts is of such a nature that it is oubtful which of several offences the facts which can be proved will constitute, the accused ay be charged with having committed all or any of such offences, and any number of such harges may be tried at once; or he may be charged in the alternative with having committed me one of the said offences. (2) If in such a case the accused is charged with one offence, and appears in evidence that he committed a different offence for which he might have been harged under the provisions of sub-section (1), he may be convicted of the offence which he is hown to have committed, although he was not charged with it." *State* v. *Nalini*, (1999) 5 SCC 53, 344

AIR 1953 SC 325: 1953 Cri LJ 1432

AIR 1961 SC 578: (1961) 1 Cri LJ 725

the allegations in the two complaints made against the accused may be substantially the same.

In *Om Parkash Gupta* v. *State of U.P.*[100] and *State of M.P.* v. *Veereshwar Rao Agnihotri*,[101] it was held that prosecution and conviction or acquittal under Section 409 IPC do not debar the accused being tried on a charge under Section 5(2) of the Prevention of Corruption Act, 1947 because the two offences are not identical in sense, import and content.

An interesting interpretation is found in *Roshan Lal* v. *State of* Punjab,[102] where the accused had caused disappearance of the evidence of two offences under Sections 330 and 348 IPC and, therefore, he was alleged to have committed two separate offences under Section 201 IPC. It was held that neither Section 71 IPC nor Section 26 of the General Clauses Act came to the rescue of the accused and the accused was liable to be convicted for two sets of offences under Section 201 IPC though it would be appropriate not to pass two separate sentences.

In an interesting question on Article 20(2) in *State of Rajasthan* v. *Hat Singh*,[103] the accused was charged under two sections *viz.*, Section 5 which punishes the glorification of sati and Section 6 which punishes the contravention of prohibitory order issued by the Collector and District Magistrate. The Supreme Court held that what is punished under Section 5 is the criminal intention for glorification of sati and what is punishable under Section 6 is the criminal intention to violate or defy the prohibitory order issued by the lawful authority. And, therefore, they did not consider that the ingredients of the offences contemplated by Section 5 and Section 6(3) were the same or that they necessarily and in all cases overlap or that prosecution and punishment for the

[0] AIR 1961 SC 578: (1961) 1 Cri LJ 725
[1] AIR 1957 SC 592: 1957 Cri LJ 892
[2] AIR 1965 SC 1413: (1965) 2 Cri LJ 426. See also the discussion in *Union of India* v. *P.D. Yadav*, (2002) 1 SCC 405
[3] (2003) 2 SCC 152, 159. See with benefit *State of Bombay* v. *S L Apte*, AIR 1961 SC 578

offences under Sections 5 and 6(3) both are violative of Article 20(2) of the Constitution or of the rule against double jeopardy.

Again to get the benefit of protection under section 300, it has been held that, the accused should show that he had been tried by 'a court of competent jurisdiction' for an offence. For exam0ple it has been held that the adjudication proceedings before the Collector of Customs has been held as not a 'prosecution' and the Collector not a 'court'.[104]

Witness protection

The fair trial for a criminal offence is said to consist not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice. 'Witnesses' are the eyes and ears of justice. Hence, the Supreme Court has been lately bestowing a great attention to the aspect of witness protection as contemplated under certain enactments. It is important since the quality of trial process depends on it. In the words of the Supreme Court:

> "If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clout and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests

[104] *Asstt. Collector of Customs* v. *LR Melwani*, AIR 1970 SC 962; *Maqbool Hussain* v. *State of Bombay*, AIR 1953 SC 325; *Thomas Dana* v. *State of Punjab*, AIR 1959 SC 375

> of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery."[105]

The falling standards of value have been noted by the Supreme Court when it observed that it is a matter of common experience that in recent times there has been a sharp decline of ethical values in public life even in developed countries much less a developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons.[106] The court notes that one of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers including muscle power.[107]

While on the on the one side the need for protection to witnesses has been raised, on the other, the legislative provisions making way for such protection have been subject to challenge. The most recent was the challenge to section 30 of POTA which confers discretion to the court concerned to keep the identity of

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[105] *Zahira*, 188

[106] *Krishna Mochi* v. *State of Bihar*, (2002) 6 SCC 81, 104

[107] Recently, the Supreme Court in *State of Maharashtra* v. *Dr. Praful B. Desai*, (2003) 4 SCC 601 in the context of examining a witness through video conferencing has held that the development of science and technology has paved the way to ascertain the genuineness of the deposition and further the presence of an office from the consulate/embassy would ensure such objective (s. 273 Cr.P.C.). See also *Maryland* v. *Santa Ausa Craig*, 497 US 836 (1990) and *Basavaraj R. Patil* v. *State of Karnataka*, (2000) 8 SCC 740

witness secret if the life of such witness is in danger.[108] The court lamented that it cannot shy away from the unpleasant reality that often witnesses do not come forward to depose before court even in serious cases and this precarious situation creates challenges to the criminal justice administration in general and terrorism-related cases in particular. It further observed that witnesses do not volunteer to give evidence mainly due to fear for their lives and ultimately, the non-conviction affects the larger interest of the community, which lies in ensuring that the executors of heinous offences like terrorist acts are effectively prosecuted and punished. They held that legislature drafted Section 30 by taking all these factors into account and has struck a fair balance between the rights and interest of witness, rights of accused and larger public interest. The Court also recognised that the section is also aimed to assist the State in justice administration and encourage others to do the same under the given circumstances. What weighed in the mind of the court was that anonymity of witness is not the general rule under Section 30 and that the identity will be withheld only in exceptional circumstance when the Special Court is satisfied that the life of the witness is in jeopardy.[109] The Court observed thus:

> "If such witnesses are not given appropriate protection, they would not come forward to give evidence and there would be no effective prosecution of terrorist offences and the entire object of the enactment may possibly be frustrated. Under compelling circumstances this can be dispensed with by evolving such other mechanism, which complies with natural justice and thus ensures a fair trial."[110]

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[108] *People's Union for Civil Liberties* v. *Union of India*, (2004) 9 SCC 580. This section is similar to section 16 of TADA, the vires of which were upheld in *Kartar Singh case*, (1994) 3 SCC 569: 1994 SCC (Cri) 899: (1994) 2 SCR 375 (see pp. 683-89 of SCC).

[109] See *Gurbachan Singh* v. *State of Bombay*, AIR 1952 SC 221: 1952 SCR 737: 1952 Cri LJ 1147; *Hira Nath Mishra* v. *Principal, Rajendra Medical College*, (1973) 1 SCC 805; and *A.K. Roy* v. *Union of India*, (1982) 1 SCC 271: 1982 SCC (Cri) 152.) While deciding the validity of Section 16 of TADA, the Court quoted all these cases with approval. See also the subsequent decision in *Jamaat-e-Islami Hind* v. *Union of India*, (1995) 1 SCC 428

[110] *PUCL* (2004), 610

The provision has been challenged mainly due to the fact that it takes away the opportunity of the accused to cross examine the witness which is essential if the trial is to be considered fair in an adversarial system. It is true that reasons for keeping the identity and address of a witness secret are required to be recorded in writing by the Court and such reasons should be weighty. Though the attention of the Court was drawn to the legal position in USA, Canada, New Zealand, Australia and UK as well as the view expressed in the European Court of Human Rights in various decisions, it considered it unnecessary to refer any of them because, according to it, the legal position has been fully set out and explained in *Kartar Singh* and provision of POTA in Section 30 sub-section (2) has been modelled on the guidelines set out therein.[111] The Court did caution that the Special Courts will have to exercise utmost care and caution to ensure fair trial. The reason for keeping identity of the witness has to be well substantiated. It said that it is not feasible for the Supreme Court to suggest the procedure that has to be adopted by the Special Courts for keeping the identity of witness a secret and that it shall be appropriate for the courts concerned to take into account all the factual circumstances of individual cases and to forge appropriate methods to ensure the safety of individual witness. More so since keeping secret the identity of witness, though in the larger interest of the public, is a deviation from the usual mode of trial and it is in extraordinary circumstances that this path, which is less traveled, is taken.

The Malimath Committee has, by Recommendation 81, stated that a law should be enacted for giving protection to the witnesses and their family members on the lines of the laws in USA and other countries.

This could be done only after ensuring that the interest of the defence[112] and the rights of the accused are not in any way compromised due to this since it

[111] *Id.*, 611

[112] Cf. Human Rights Committee, *Peart and Peart* v. *Jamaica*, 19 July 1994, CCPR/C/57/1, para 11.5; Concluding Observations of the Committee against Torture: Colombia, 9 July 1996, A/51/44 para 78

...kes away his opportunity to cross examine the witnesses.[113] They must be ...ounter-balanced by safeguards to preserve equality of arms at the trial,[114] and ...e reasoned by the court. The aspect of secrecy may constitute a violation of ...rticle 14 (1) ICCPR, which stipulates that any judgment shall be made public ...ave for the narrow exceptions mentioned in the paragraph, and which are not ...ulfilled in the case of terrorism trials.[115]

In August 2004, the Law Commission of India has made some proposals ...n their Consultation Paper in this area which are being discussed now.[116]

Juvenile justice

Juvenile Justice is one area that stands out on the aspect of direct impact ...f international efforts for the development of criminal justice administration in ...ndia. The United Nations General Assembly, in the Declarations of the Rights ...f the Child Principles 1959, has laid down that the child shall in all ...ircumstances be protected against all forms of neglect, cruelty and exploitation. The Second United Nations Congress on the Prevention of Crime and Treatment ...f Offenders, London, 1960 passed a resolution that stated:

> "The Congress considers the scope of the problem of juvenile delinquency should not be unnecessarily inflated .... It recommends that the meaning of the term juvenile delinquency should be restricted as far

[113] See the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power: "the views and concerns of victims should be presented and considered at appropriate stages of the proceedings (...) without prejudice to the accused." See also the Concluding observations of the Human Rights Committee: Colombia, CCPR/C/79/Add.75, para. 21

[114] See, inter alia, *Doorson* v. *The Netherlands*, ECtHR, Judgment of 26 March 1996, Reports 1996-II, para.54

[115] "(...) except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children", the Human Rights Committee has recalled the obligation to publish the judgments save in those "strictly defined exceptions", General Comment 13, Article 14, para 6

[116] Consultation Paper on "Witness Identity Protection and Witness Protection Programmes", Law Commission of India, August 2004, available on www.lawcommissionofindia.nic.in. In this a comparative position is laid down with the examples taken from a few countries.

as possible to violations of the criminal laws and that even for protection, specific offences which would penalize small irregularities, or maladjusted behaviour of the minor but for which the adult would not be prosecuted, should not be created."[117]

Prior to the enactment of the Juvenile Justice Act, 1986 there were several laws prevailing in different States and the need for a uniform legislation for juveniles for the whole of India was expressed regularly. Such uniform legislation was not being enacted on the ground that the subject-matter of such a legislation fell in the State List of the Constitution. The U.N. Standard Minimum Rules for the Administration of Juvenile Justice[118] enabled Parliament exercising its powers under Article 253 of the Constitution read with Entry 14 of the Union List to make any law for the whole of India to fulfill international obligations.[119] Now, of course, the Act stands replaced by the Juvenile Justice (Care and Protection of Children) Act 2000. The experience with the Juvenile Justice Act has been largely pleasant except for some areas that have prompted the reenactment of Act with different thrust and a new name.

The Central Children Act 1960 had for the first time attempted a uniform definition of a child which could be adopted for the whole country. It provided for the establishment of Child Welfare Board and Children's Court.[120] Though this enactment made some progress in the field, consistency and uniformity were far from achieved.

In *Rohtas* v. *State of Haryana*,[121] the Supreme Court had held that the trial of a young offender accused of an offence punishable with death or life

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[117] 'New Forms of Juvenile Delinquency: Their Origin, Prevention and Treatment', Report prepared by the Secretariat, A/Conference 17 – 7

[118] Also called the Beijing Rules adopted by the General Assembly 1985

[119] See Ved Kumari, *Treatise on the Juvenile Justice Act*, Indian Law Institute, New Delhi, p. 5

[120] Section 4

[121] 1979 Cri.L.J. 1365. See also *Hiralal Mallick* v. *State of Bihar*, AIR 1979 SC 2236: (1977) 4 SCC 44

imprisonment will be under the provisions of the Children Act and not in accordance with the provisions of the Code of Criminal Procedure.

In *Raghbir* v. *State of Haryana*,[122] the Supreme Court held that the Children Act, State as well as Central, gives exclusive jurisdiction to children's court while dealing with juvenile accused in respect of all offences and prescribe special procedure in the inquiry and trial of such cases. This was held so in spite of the fact that section 27 of the Cr.P.C., which prescribes offences other than for which punishment of death or life imprisonment can be given are the ones to be tried by special courts.[123]

The Supreme Court recognised the need for an Act for the whole of the country in *Sheela Barse* v. *Union of India*.[124] It suggested that the enactment should contain not only provisions for investigation and trial of offences but should also contain mandatory provisions for ensuring social, economic and psychological rehabilitation of the children who are either accused of offences or are abandoned or destitute or lost. It was directed in the decision that where a complaint is filed or FIR lodged against a child below 16 years of age for an offence punishable with imprisonment of not more than 7 years, the investigation should be completed within a period of 3 months from the date of filing the complaint or the FIR. In such cases, where a charge sheet is filed within 3 months, the case must be disposed of within further a period of 6 months.[125]

[122] (1981) 4 SCC 210

[123] See also J.P.Sirohi, *Crminology and Criminal Administration*, 5th edn., Allahabad Law Agency, Faridabad, 2003 for some statistical data and case studies.

[124] (1986) 3 SCC 632

[125] See also the right to speedy trial in *Hussainara Khatoon II* v. *State of Bihar*, (1980) 1 SCC 91

It is in the light of decisions and other suggestions from various quarters that the Parliament passed the Juvenile Justice Act of 1986.[126] Under the same, Juvenile Welfare Boards and Juvenile Courts were set up. The Act was aimed categorically at bringing the operation of juvenile justice system in the country in conformity with the United Nations Standard Minimum Rules for the Administration of Juvenile Justice. Though the Act recognised the time limit of three months for completing the investigation, it did not prescribe the other limit of further six months for completing the trial.[127]

For granting the benefits of the Children Act, the person ought to be a juvenile, and for that it is necessary for us to consider the relevant date with reference to which the age of the person is to be ascertained. For, if the person commits an act while a juvenile and then is apprehended when he is crossed the stage of juvenile, the problem arises. In *Santenu Mitra* v. *State of W.B.*,[128] *Bhola Bhagat* v. *State of Bihar*[129] and *Gopinath Ghosh* v. *State of W.B.*[130] the question whether the person, arrayed as the accused-appellant before the Court, was a juvenile or not was decided by taking into consideration the age of the accused on the date of the occurrence or the date of the commission of the offence. The Supreme Court in *Arnit Das* v. *State of Bihar*,[131] considered the impact of these decisions and held that generally speaking these cases are authorities for the propositions that:

(*i*) the technicality of the accused having not claimed the benefit of the provisions of the Juvenile Justice Act at the earliest opportunity or before any of the courts below should not, keeping in view the intendment of the

[126] See also *Sushil Chaudhary* v. *State of Bihar*, (1979) 4 SCC 765 and *Shri Narain Sahu* v. *State of Bihar*, AIR 1980 SC 83.

[127] In spite of this certain High Courts held that *Sheela Barse*, being the law of the land, mandates dismissal of the case if trial is not completed within six months – e.g. *Jitender Kumar* v. *State of Haryana*, AIR 1986 SC 1773

[128] (1998) 5 SCC 697

[129] (1997) 8 SCC 720

[130] AIR 1984 SC 237: 1984 Supp SCC 228

[131] (2000) 5 SCC 488. Court has to lean in favour of Juveniles in case of doubt – *Rajinder Chandra* v. *State of Chhattisgarh*, (2002) 2 SCC 287

legislation, come in the way of the benefit being extended to the accused-appellant even if the plea was raised for the first time before this Court;

(*ii*) a hypertechnical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile and if two views may be possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases; and

(*iii*) the provisions of the Act are mandatory and while implementing the provisions of the Act, those charged with responsibilities of implementation should show sensitivity and concern for a juvenile.[132]

But, it observed that in none of the cases the specific issue - by reference to which date (the date of the offence or the date of production of the person before the competent authority), the court shall determine whether the person was a juvenile or not, was either raised or decided.[133] The Court went on to hold that the date the person is brought before the Court or the authority, as the case may be, shall be the relevant date for determining whether he is a juvenile or not.

In *Ramdeo Chauhan* v. *State of Assam*,[134] despite holding that the petitioner was neither a juvenile nor were the provisions of the Act applicable to the case, the Court examined this matter from another angle *i.e.* to find out as to whether the petitioner was 'near or about' the age of a juvenile for the purposes of ascertaining as to whether the death sentence can be substituted by imprisonment for life. It was done so because the Court felt that the technicalities of law cannot come in the way of dispensing justice in a case where the accused is likely to be given the extreme penalty imposable under law.

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[132] *Arnit Das* v. *State of Bihar*, (2000) 5 SCC 488, 499

[133] On the ground that a decision not expressed, not accompanied by reasons and not proceeding on a conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. That which has escaped in the judgment is not the *ratio decidendi*. This is the rule of *sub silentio*, in the technical sense when a particular point of law was not consciously determined. See *State of U.P.* v. *Synthetics & Chemicals Ltd.*, AIR 1990 SC 1927: (1990) 1 SCC 109, paragraph 41

[134] (2001) 5 SCC 714

The defence counsel had sought the court to take notice that the marginal error in age ascertained by radiological examination is two years on either side.[135] The Court, however, came to the conclusion that he was not a juvenile even by these standards.

Speedy Trial

Speedy trial has been adjudged to be integral and essential part of Article 21 in the *Hussainara Khatoon* series.[136] It referred to the Sixth Amendment to the US Constitution[137] and also Article 3 of the European Convention on Human Rights which provides that:

> "Every one arrested or detained . . . shall be entitled to trial within a reasonable time or to release pending trial."

It observed:

> "We think that even under our Constitution, though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21 as interpreted by this Court in *Maneka Gandhi* v. *Union of India*. We have held in that case that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law and it is not enough to constitute compliance with the requirement of that article that some semblance of a procedure should be prescribed by law, but that the procedure should be 'reasonable, fair and just.' If a person is

[135] Relying upon *Jaya Mala* v. *Home Secy., Govt. of J & K*, AIR 1982 SC 1297: (1982) 2 SCC 538

[136] *Hussainara Khatoon I* v. *State of Bihar*, (1980) 1 SCC 81; *Hussainara Khatoon II* v. *State of Bihar*, (1980) 1 SCC 91; *Hussainara Khatoon III* v. *State of Bihar*, (1980) 1 SCC 93; *Hussainara Khatoon IV* v. *State of Bihar*, (1980) 1 SCC 98; *Hussainara Khatoon V* v. *State of Bihar*, (1980) 1 SCC 108; *Hussainara Khatoon VI* v. *State of Bihar*, (1980) 1 SCC 115

[137] It provides that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial"

deprived of his liberty under a procedure which is not 'reasonable, fair or just,' such deprivation would be violative of his fundamental right under Article 21 and he would be entitled to enforce such fundamental right and secure his release. Now obviously procedure prescribed by law for depriving a person of liberty cannot be 'reasonable, fair or just' unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21."[138]

In *Hussainara Khatoon IV* v. *State of Bihar*,[139] the Court went on to observe thus:

"The State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State. It is also the constitutional obligation of this Court, as the guardian of the fundamental rights of the people, as a *sentinel on the qui vive*, to enforce the fundamental right of the accused to speedy trial by issuing necessary directions to the State which may include taking positive action, such as augmenting and strengthening the investigative machinery, setting up new courts, building new court houses, providing more staff and equipment to the court, appointment of additional judges and other measures calculated to ensure speedy trial."

[138] *Hussainara Khatoon (I)*, 89

[139] (1980) 1 SCC 98, 107. See also *S. Guin* v. *Grindlays Bank Ltd.*, (1986) 1 SCC 654 and *A.R. Antulay* v. *R. S. Nayak*, (1992) 1 SCC 225

But, the question which arises is as to what would be the consequence if a person accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Article 21. Would he be entitled to be released unconditionally freed from the charge leveled against him on the ground that trying him after an unduly long period of time and convicting him after such trial would constitute violation of his fundamental right under Article 21?

In *"Common Cause", A Registered Society* v. *Union of India*[140] the Supreme Court prescribed a time limit within which the trial ought to be completed and in *Raj Deo Sharma II* v. *State of Bihar*,[141] the court ordered to close the prosecution cases, if the trial had been delayed beyond a certain period in certain specified cases involving serious offences.

In order to avoid delay due to frequent objections raised, by both the prosecution and defence, it was recently observed by the Supreme Court that where the objection is raised during evidence stage of any material or oral evidence, the court can mark the objections tentatively and proceed with the trial and these objections could be considered at the final stage (except where it is one of deficiency of stamp duty on a document).[142] It has been argued that this practice may create complications and delay and may not even be considered at the final stages. In the alternative, it is suggested that the superior courts should be strict in admitting revision and writ petitions during pendency of trials.[143]

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[140] (1996) 4 SCC 33. This was further clarified in *Common Cause, A Registered Society (Undertrials matter)* v. *Union of India,* (1996) 6 SCC 775, 776

[141] (1998) 7 SCC 507

[142] *Bipin Shantalal Panchal* v. *State of Gujarat*, (2001) 3 SCC 1 – in this case under NDPS in the Sessions Court there was an undue delay due to the objections raised at the trial and the person was remanded to jail for several years as the court denied him bail

[143] K.N. Goyal J., "Issuing Practice Directions – Need for Review", (2002) 1 SCC (J) 1. The author also argues for a proper procedure for Practice Directions after due consideration by Full Court or the Administrative Committee or a Special Committee constituted for the purpose as is followed in England instead of piecemeal approach by certain Judges and Benches.

Locus Standi

It is one thing to confer the rights and at the same time another to ensure that these rights are being enjoyed. In a country like India, litigation awareness apart, it is rare that a majority of the population even have an awareness of their rights. A major chunk of the population is a mute sufferer. It is in this context that the concept of *locus standi* got a different colour under the Supreme Court jurisprudence.

In *S.P. Gupta* v. *Union of India*,[144] the law relating to *locus standi* was explained so as to give a wider meaning to the phrase. The Supreme Court laid down that:

> "... practising lawyers have undoubtedly a vital interest in the independence of the judiciary; they would certainly be interested in challenging the validity or constitutionality of an action taken by the State or any public authority which has the effect of impairing the independence of the judiciary."[145]

The concept of *locus standi* has been diluted to a great extent by the Supreme Court in entertaining matters relating to the pathetic conditions some of the persons involved in the criminal system have to undergo.[146] The right to speedy trial was considered in *Hussainara Khatoon* cases.[147] Law Professors were allowed to bring to light the inhuman conditions prevailing in the protective homes, long pendency of trials, trafficking in women, importation of children for homosexual purposes, non payment of wages to bonded labourers and inhuman conditions of prisoners in jail in *Upendra Baxi (Dr.)* v. *State of*

[144] AIR 1982 SC 149: 1981 Supp SCC 87
[145] *Id.*, paragraph 26
[146] AS Anand J., MC Bhandari Memorial Lectures – "Public Interest Litigation as Aid to Protection of Human Rights", (2001) 7 SCC (J) 1
[147] *Supra* n. 136

U.P.[148] Custodial violence to women prisoners in police lock ups in Bombay was raised in *Sheela Barse* v. *State of Maharashtra.*[149]

In the context of public interest litigation, however, the Supreme Court in its various judgments has given the widest amplitude and meaning to the concept of *locus standi.*

In *People's Union for Democratic Rights* v. *Union of India*,[150] it was laid down that public interest litigation could be initiated not only by filing formal petitions in the High Court but even by sending letters and telegrams so as to provide easy access to court. In *Bangalore Medical Trust* v. *B.S. Muddappa*,[151] the Court held that the restricted meaning of aggrieved person and the narrow outlook of a specific injury has yielded in favour of a broad and wide construction in the wake of public interest litigation. The Court further observed that public-spirited citizens having faith in the rule of law are rendering great social and legal service by espousing causes of public nature. They cannot be ignored or overlooked on a technical or conservative yardstick of the rule of *locus standi* or the absence of personal loss or injury. Recently, in *Chairman, Railway Board* v. *Chandrima Das*,[152] the Supreme Court recognised the *locus standi* of a lawyer to seek compensation for the rape of a Bangladeshi national within the railway precincts.

The Malimath Committee recommends that the victim, and if he is dead, his legal representative shall have the right to be impleaded as a party in every criminal proceeding where the offence is punishable with 7 years imprisonment

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[148] (1983) 2 SCC 308
[149] (1983) 2 SCC 96
[150] (1982) 2 SCC 494. See also *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161 and *State of H.P.* v. *A Parent of a Student of Medical College*, AIR 1985 SC 910: (1985) 3 SCC 169 on the right to approach the court in the realm of public interest litigation
[151] AIR 1991 SC 1902: (1991) 4 SCC 54
[152] (2000) 2 SCC 465

r more.[153] He has a right to be represented by an advocate of his choice; rovided that an advocate shall be provided at the cost of the State if the victim s not in a position to afford a lawyer. It prescribes that the victim's right to articipate in criminal trials shall, *inter alia*, include - a) to produce evidence, ral or documentary, with leave of the Court and/or to seek directions for roduction of such evidence; b) to ask questions to the witnesses or to suggest to he court questions which may be put to witnesses; c) to know the status of nvestigation and to move the court to issue directions for further to the nvestigation on certain matters or to a supervisory officer to ensure effective nd proper investigation to assist in the search for truth; d) to be heard in respect f the grant or cancellation of bail; e) to be heard whenever prosecution seeks to withdraw and to offer to continue the prosecution; f) to advance arguments after he prosecutor has submitted arguments; g) to participate in negotiations leading o settlement of compoundable offences

It seems to be a good suggestion. However, one may be skeptical about he implications of its implementation.

Conclusion

On the whole, it may be observed that the concept of fair trial as nvisaged in the international norms is largely satisfied. However, the Courts nay be required to look into those cases where they have resorted to a hands off olicy on the pretext of security of State. If the trend of the day is to be gone by, nything and everything could be brought within the purview of such laws. The ourts have to be more vigilant.

[153] Recommendation 14

CHAPTER – VI

POST TRIAL STAGES

After finishing a trial, the next stage arises in case the offender is convicted. As observed by Justice Krishna Iyer, sentencing is a serious task when compared to trial. He quoted the words of Justice Henry Alfred McCardie:

> "Trying a man is easy, as easy as falling off a log, compared with deciding what to do with him when he has been found guilty."[1]

Sentencing

There are many objects sought to be achieved by sentencing. Apart from the fact that it should reflect the abhorrence of the society towards the crime that is committed and should be just dessert, the sentences should also attempt to make an offender a non offender. Only as Judges impose effective sentences with a proper attitude and manner will they perform their expected function of decreasing the rising number of criminal and quasi-criminal activities in this nation.

The United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules),[2] in the section dealing with trial and sentencing stage prescribes, at Rule 7, that if the possibility of social inquiry reports exists, the judicial authority may avail itself of a report prepared by a competent, authorized official or agency.

The report should contain social information on the offender that is relevant to the person's pattern of offending and current offences. It should also contain information and recommendations that are relevant to the sentencing procedure. The report shall be factual, objective and unbiased, with any expression of opinion clearly identified.

Rule 8, on sentencing dispositions, observes that the judicial authority, having at its disposal a range of non-custodial measures, should take into

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[1] *Hiralal Mallick* v. *State of Bihar*, (1977) 4 SCC 44, 49

[2] G.A. res. 45/110, annex, 45 U.N. GAOR Supp. (No. 49A) at 197, U.N. Doc. A/45/49 (1990)

consideration in making its decision the rehabilitative needs of the offender, the protection of society and the interests of the victim, who should be consulted whenever appropriate. It also observes that sentencing authorities may dispose of cases in the following ways:

(a) Verbal sanctions, such as admonition, reprimand and warning;

(b) Conditional discharge;

(c) Status penalties;

(d) Economic sanctions and monetary penalties, such as fines and day-fines;

(e) Confiscation or an expropriation order;

(f) Restitution to the victim or a compensation order;

(g) Suspended or deferred sentence;

(h) Probation and judicial supervision;

(i) A community service order;

(j) Referral to an attendance centre;

(k) House arrest;

(l) Any other mode of non-institutional treatment;

(m) Some combination of the measures listed above.

Rule 9 on Post-sentencing dispositions obligates that the competent authority shall have at its disposal a wide range of post-sentencing alternatives in order to avoid institutionalization and to assist offenders in their early reintegration into society. Such Post-sentencing dispositions may include:

(a) Furlough and half-way houses;

(b) Work or education release;

(c) Various forms of parole;

(d) Remission;

(e) Pardon.

The decision on post-sentencing dispositions, except in the case of pardon, shall be subject to review by a judicial or other competent

independent authority, upon application of the offender. And any form of release from an institution to a non-custodial programme shall be considered at the earliest possible stage.

On the implementation of non-custodial measures, Rule 10 provides for supervision to reduce reoffending and to assist the offender's integration into society in a way which minimizes the likelihood of a return to crime. It also provides for the duration, conditions, treatment process and discipline and breach of conditions.

Criminal law is said to adhere in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Punishment ought always to fit with the crime.[3]

The Supreme Court in *State (Delhi Admn.)* v. *Laxman Kumar* observed as under:

> "Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical power of a litigating individual or the might of the ruler nor even the opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to rule of law is the outcome of cool deliberation in the courtroom after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecutor is given an opportunity of supporting the charge and the accused is equally given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberations and the screening of the material by the informed mind of the Judge that leads to determination of the lis."[4]

[3] *Krishna Mochi* v. *State of Bihar*, (2002) 6 SCC 81, 115
[4] (1985) 4 SCC 476, 505, paragraph 50

As pointed out by Sarkaria J., in majority in *Bachan Singh*,[5] a savage sentence is anathema to the civilized jurisprudence of Article 21, especially after the decisions like *Maneka Gandhi*.[6] Just as reasonableness of restrictions under clauses (2) to (6) of Article 19 is for the courts to determine, so is it for the courts to decide whether the procedure prescribed by a law for depriving a person of his life or liberty is fair, just and reasonable.

In *Bhagwan Rama Shinde Gosai* v. *State of Gujarat*, it was held that when a convicted person is sentenced to a fixed period of sentence and when he files an appeal under any statutory right, suspension of sentence can be considered by the appellate court liberally unless there are exceptional circumstances. It may be a different matter if there is any statutory restriction against suspension of sentence or when the sentence is life imprisonment. If for any reason the sentence of a limited duration cannot be suspended, every endeavour should be made to dispose of the appeal on merits. Appellate courts can impose conditions when bail is granted.[7]

The Malimath Committee has made some substantial recommendations on offences, sentences, sentencing and compounding. Some of the recommendations that have a bearing on the topic under discussion are listed below with their corresponding recommendation numbers in the Report:

- **(100)** The Committee recommends that wherever fine is prescribed as one of the punishments, suitable amendments shall be made to increase the fine amount by fifty times.
- **(101)** In respect of offences for which death is a punishment, the sentence of "imprisonment for life without commutation or remission" be prescribed as an

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[5] (1980) 2 SCC 684, 730, paragraph 136. See also *Mithu* v. *State of Punjab*, (1983) 2 SCC 277

[6] *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597. Two instances by way of illustration were taken for the purpose of showing how the courts are not bound, and are indeed not free, to apply a fanciful procedure by a blind adherence to the letter of the law or to impose a savage sentence - a law providing that an accused shall not be allowed to lead evidence in self-defence will be hit by Articles 14 and 21. Similarly, if a law were to provide that the offence of theft will be punishable with the penalty of the cutting of hands, the law will be bad as violating Article 21

[7] (1999) 4 SCC 421, 421

alternative sentence. Suitable amendments shall be made to make it clear that when such punishment is imposed, the government is precluded from commuting or remitting the sentence.

(102) When a woman who is pregnant or has a child below 7 years is sentenced to any term of imprisonment, a provision shall be made to give effect to that sentence by directing that she shall remain under house arrest during that period. Similar provisions shall be made in respect of such women who are remanded to judicial custody.

(103) IPC empowers the court to prescribe the sentence of imprisonment when the accused commits default in payment of fine. The Committee recommends that a suitable provision should be made empowering the court to prescribe an alternative to default sentence, community service for a specified time.

(104) The Committee recommends that a statutory Committee be constituted to lay down sentencing guidelines to regulate the discretion of the court in imposing sentences for various offences under the IPC and Special Local Laws under the Chairmanship of a former Judge of the Supreme Court or a retired Chief Justice of a High Court who has experience in the Criminal Law, and with members representing the Police department, the legal profession, the Prosecution, women and a social activist.

(105) The Committee recommends review of the Indian Penal Code to consider enhancement, reduction or prescribing alternative modes of punishments, creating new offences in respect of new and emerging crimes and prescribing new forms of punishments wherever appropriate and including more offences in the category of compoundable offences and without leave of the court.

(106) The Committee recommends implementation of 142nd and 154th reports of the Law Commission of India in regard to settlement of cases without trial.

(120) The Committee is not in favour of prescribing death penalty for the offence of rape. Instead the Committee recommends sentence of imprisonment for life without commutation or remission.

(144) Sentences in economic offences should not run concurrently, but consecutively. Fines in these cases should be partly based on seriousness of offence, partly on the ability of the individual/corporation to pay, but ensuring that its deterrence is not lost.[8]

Pre Sentence Hearing

Sub-section (2) of Section 235 of the Code provides that if the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360,[9] hear the accused on the question of sentence and then pass sentence on him according to law.[10] The object of this provision is to acquaint the court with the social and personal data of the offender and thereby to enable the court to decide as to the proper sentence or the method of dealing with the offender after his conviction. The section shows that custodial measures are to be resorted to only when utmost necessary.

In *Muniappan* v. *State of T.N.*,[11] the Supreme Court held that the obligation to hear the accused on the question of sentence is not discharged by putting formal questions to him. The Judge must make a genuine effort to elicit from the accused all information which will eventually bear on the question of sentence. It was the duty of the Court to cast aside the formalities of the court scene and approach the question of sentence from a broad, sociological point of view.

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[8] In the context of sentencing for corporate crimes see Balakrishnan K., "Corporate Criminal Liability – An Enigma to Deal With", [1999] CULR 104

[9] The section provides for dealing with persons guilty for certain offences under the Probation of Offenders Act 1958

The corresponding section for Magistrates is in section 248 (2) of the Code

[11] AIR 1981 SC 1220: (1981) 3 SCC 11

It has been held that the non compliance of the requirements of section 235 (2) or of section 248 (2) amounts to bypassing an important stage of the trial and such a non compliance cannot be treated as a mere irregularity.[12]

In *Malkiat Singh* v. *State of Punjab*,[13] the Court went further and observed that hearing contemplated under Section 235(2) of the Code is not confined merely to oral hearing but is also intended to afford an opportunity to the prosecution as well as the accused to place facts and materials relating to various factors on the question of sentence and, if desired by either side, to have evidence adduced to show mitigating circumstances to impose a lesser sentence or aggravating grounds to impose death penalty. It was further observed that sufficient time must be given to the accused or the prosecution on the question of sentence, to show the grounds on which the prosecution may plead or the accused may show that the maximum sentence of death may be the appropriate sentence or the minimum sentence of life imprisonment may be awarded, as the case may be. It was further observed that the sentence awarded on the same day of finding guilt was not in accordance with law.

The Court, in neither of the two cases mentioned above, had taken note of the fact that by the Criminal Procedure Code Amendment Act, 1978, a proviso was added to sub-section (2) of Section 309 of the Code to the effect that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.

It did not make any significant difference, as evident from the decision of the Supreme Court in *State of Maharashtra* v. *Sukhdev Singh*,[14] where, while dealing with Section 309(2), third proviso and Section 235(2) of the Code and

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[12] *Allauddin Mian* v. *State of Bihar*, (1989) 3 SCC 5; *Suryamoorti* v. *Govindaswamy*, 1989 Cri.L.J. 1451; *Santa Singh* v. *State of Punjab*, (1976) 4 SCC 190; *Tarlok Singh* v. *State of Punjab*, (1977) 3 SCC 218

[13] (1991) 4 SCC 341. See also *Santa Singh* v. *State of Punjab*, (1976) 4 SCC 190

[14] AIR 1992 SC 2100: (1992) 3 SCC 700

after referring to its earlier decisions in *Allauddin Mian* v. *State of Bihar*[15] and *Balkiat Singh* v. *State of Punjab*[16] the Court held thus:

> "This proviso must be read in the context of the general policy of expeditious enquiry and trial manifested by the main part of the section. That section emphasises that an enquiry or trial once it has begun should proceed from day to day till the evidence of all the witnesses in attendance has been recorded so that they may not be unnecessarily vexed. The underlying object is to discourage frequent adjournments. But that does not mean that the proviso precludes the court from adjourning the matter even where the interest of justice so demands. The proviso may not entitle an accused to an adjournment but it does not prohibit or preclude the court from granting one in such serious cases of life and death to satisfy the requirement of justice as enshrined in Section 235(2) of the Code. Expeditious disposal of a criminal case is indeed the requirement of Article 21 of the Constitution; so also a fair opportunity to place all relevant material before the court is equally the requirement of the said article. Therefore, if the court feels that the interest of justice demands that the matter should be adjourned to enable both sides to place the relevant material touching on the question of sentence before the court, the above extracted proviso cannot preclude the court from doing so."[17]

The Court observed that the proviso to Section 309(2) does not entitle an accused get an adjournment, though it does not prohibit the court from granting such adjournment in serious cases.

Earlier in *Muniappan* v. *State of T.N.*,[18] the Supreme Court emphasised the need to make a genuine effort to elicit all relevant information from the

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[15] AIR 1989 SC 1456: (1989) 3 SCC 5
[16] *Supra* n. 13
[17] *Id.*, 748, para 56
[18] *Supra* n. 11

accused for considering the question whether the extreme penalty is to be awarded or not. In *Allauddin Mian* v. *State of Bihar*,[19] a two-Judge Bench and again in *Malkiat Singh* v. *State of Punjab*,[20] a three-Judge Bench of the Supreme Court have indicated the need to adjourn the case to a future date after pronouncing the verdict of conviction.

Ahmadi, J. (as he then was) in *State of Maharashtra* v. *Sukhdev Singh*,[21] after considering the proviso, observed for the Bench:

> "[I]f the court feels that the interest of justice demands that the matter should be adjourned to enable both sides to place the relevant material touching on the question of sentence before the court, the above extracted proviso cannot preclude the court from doing so."[22]

This was reiterated in *Ramdeo Chauhan* v. *State of Assam* where the Court held that there was no doubt in holding that despite the bar of third proviso to sub-section (2) of Section 309, the court, in appropriate cases, can grant adjournment for enabling the accused persons to show cause against the sentence proposed on them, particularly if such proposed sentence is a sentence of death. The Court also felt that in all cases where a conviction is recorded in cases triable by the Court of Session or by Special Courts, the court is enjoined upon to direct the accused convict to be immediately taken into custody, if he is on bail, and kept in jail till such time the question of sentence is decided.[23]

These provisions, therefore, bring our law in tune with the international norms that have been seeking individualisation of punishment.

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[19] *Supra* n. 15
[20] *Supra* n. 16
[21] *Supra* n. 14
[22] *Id.*, 748, para 56
[23] (2001) 5 SCC 714, 740. The Court also observed that after the sentence is awarded, the convict is to undergo such sentence unless the operation of the sentence awarded is stayed or suspended by a competent court of jurisdiction. Such a course is necessitated under the present circumstances prevalent in the country and is in consonance with the spirit of law. A person

Death Penalty

Death sentence has been prescribed as a punishment in the Indian Penal Code as well as some special enactments.[24] To quote the Supreme Court:

> "It must be realised that the question of constitutional validity of death penalty is not just a simple question of application of constitutional standards by adopting a mechanistic approach. It is a difficult problem of constitutional interpretation to which it is not possible to give an objectively correct legal answer. It is not a mere legalistic problem which can be answered definitively by the application of logical reasoning but it is a problem which raises profound social and moral issues and the answer must therefore necessarily depend on the judicial philosophy of the Judge.... But even so, in their effort to resolve such an issue of great constitutional significance, the Judges must take care to see that they are guided by "objective factors to the maximum possible extent". The culture and ethos of the nation as gathered from its history, its tradition and its literature would clearly be relevant factors in adjudging the constitutionality of death penalty and so would the ideals and values embodied in the Constitution which lays down the basic framework of the social and political structure of the country, and which sets out the objectives and goals to be pursued by the people in a common endeavour to secure happiness and welfare of every member of the society. So also standards or norms set by international organisations and bodies have relevance in determining the constitutional validity of death penalty...."[25]

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granted bail has no right to insist to remain at liberty on the basis of the orders passed in his favour prior to his conviction.

[24] Sections 120B, 121, 132, 194, 302, 305, 307 & 396 IPC. The one under section 307 IPC will have to be struck down in the light of *Maru Ram* v. *Union of India*, AIR 1980 SC 2147: (1981) 1 SCC 107

[25] Bhagwati J. in his minority opinion in *Bachan Singh* v. *State of Punjab*, (1982) 3 SCC 24, 47. Some countries have abolished death penalty for all offences: Australia, Brazil, Colombia, Costa Rica, Denmark, Dominican Republic, Ecuador, Fiji, Finland, Federal Republic of

Articles 3 and 5 of the Universal Declaration of Human Rights[26] provides:

> "....
> 3. Everyone has the right to life, liberty and security of person.
> .....
> 5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

During the drafting of the International Covenant on Civil and Political Rights[27] two main approaches to the issue of capital punishment were evident - one stressed the need for barring the death penalty and the second placed emphasis on restricting its application to certain cases. The proponents of the first position suggested either the total abolition of the death penalty or its abolition in time of peace or for political offences. This approach was however regarded as unfeasible, since many countries, including abolitionist ones, felt that the provision for an outright ban on the death penalty would prevent some States from ratifying the Covenant, but at the same time, it was insisted by many countries that the Covenant should not create the impression of supporting or perpetuating death penalty and hence a provision to this effect should be included. The result was that the second approach, stressing everyone's right to life and emphasising the need for restricting the application of capital punishment with a view to eventual abolition of the death penalty, won greater support.

Germany, Honduras, Iceland, Luxembourg, Norway, Portugal, Sweden, Uruguay and Venezuela, some like Canada, Italy, Malta, Netherlands, Panama, Peru, Spain and Switzerland have abolished death penalty in time of peace, but retained it for specific offences committed in time of war. Algeria, Belgium, Greece, Guyana, Ivory Coast, Seychelles, Upper Volta, Argentina, Bolivia, most of the Federal States of Mexico and Nicaragua have retained the death penalty on their statute-books but hardly employed them. In the United States of America there are several States which have abolished death penalty. In the United Kingdom, death penalty stands abolished from the year 1965 save and except for offences of treason and certain forms of piracy and offences committed by members of the armed forces during wartime. An attempt was made in the United Kingdom in December 1975 to reintroduce death penalty for terrorist offences involving murder but it was defeated in the House of Commons and once again in 1979. Israel, Turkey and Australia do not use the death penalty in practice.

[26] UN doc. A/811, 10 December 1948

[27] GA Res. 2200A (XXI), UN doc. A/6316 (1966) entered into force on 23 March 1976

Article 6 of the Covenant as finally adopted by the General Assembly provided as follows:

"(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 and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

(3) When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State party to the present covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the crime of Genocide.

(4) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

(5) Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

(6) Nothing in this article shall be invoked to delay or prevent the abolition of capital punishment by any State party to the present Covenant.

The Economic and Social Council, at its 35th Session, by its Resolution[28] urged member Governments, *inter alia*, to keep under review the efficacy of

[28] 934(XXXV) of April 9, 1963. By Resolution No. 1918(XVIII) of December 5, 1963, the General Assembly of the UN endorsed this action

capital punishment as a deterrent to crime in their countries and to conduct research into the subject and to remove this punishment from the criminal law concerning any crime to which it is, in fact, not applied or to which there is no intention to apply it.[29]

The General Assembly, by another Resolution clearly affirmed that:

> "In order to guarantee fully the right to life, provided for in Article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries."[30]

The Second Optional Protocol to the ICCPR exclusively deals with the abolition of death penalty.[31] Thus, the international bodies have taken a definite stand to work towards the total abolition of death penalty. This normative standard set by the world body must be taken into account in determining whether the death penalty should be retained in the statute books.

The Human Rights Committee in its first general comment[32] at paragraphs 6 and 7 while dealing with death penalty provision set out in Article 6(2) to (6) of ICCPR has made clear that State parties are not obliged to abolish death penalty totally, they are obliged to limit its use and to abolish it for other than "the most serious crimes". The general tone suggests that abolition is desirable. It emphasised that death penalty should only be resorted to as a quite exceptional measure and all procedural guarantees in the covenant including the right to a fair trial by an independent tribunal, the presumption of innocence, minimum guarantees for defence and the rights to review by a higher tribunal

[29] See also Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E.S.C. res. 1984/50, annex, 1984 U.N. ESCOR Supp. (No. 1) at 33, U.N. Doc. E/1984/84 (1984)
[30] 2857(XXVI) of December 20, 1971
[31] GA Res. 44/128, 15 December 1989, UN doc. A/44/49 (1989) in force from 11 July 1991
[32] First General Comment adopted by the Committee on 27 July 1982 at its Sixteenth Session GAOR 37th Session, Supplement Number 40 (A/37/40), Reports of HR Committee, pp. 93-4

must be observed. It has further stated that all these procedural safeguards must apply, *mutatis mutandis*, to the right to seek pardon or communication of sentence.[33]

It has, in the context of death penalty, drawn a connection between Article 6 and the due process requirement of Article 14.[34] It held that Article 14 paragraph 3(1)-

> 'in the determination of any criminal charge against him' everyone shall be entitled ... to be tried without under delay.'

and Article 14 paragraph 5 –

> 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law'

must be read together so that the right to review of conviction and sentence must be made available without undue delay.

The Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty,[35] provides:

> "1. In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.
>
> 2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
>
> 3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out

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See also *Mbenge* v. *Zaire*, (Comm. no. 16/1977 GAOR, 38th Session, Suppl. No. 40 A/38/40). Report of the Human Rights Committee p. 134, where it is required that both the substantive and the procedural law must be in accordance with the provision of the covenant

Earl Pratt and Ivan Morgan v. *Jamaica*, (Comm. Nos. 210/1986 and 225/1987 GAOR 44th Session Suppl. No. 40 (A/44/40), Report of the HR Committee p.222. See also P.R. Gandhi, "The Human Rights Committee and Article 6 of the International Covenant on Civil and Political Rights", 29 Ind. J. Intl. L. 326 (1989), 332

E.S.C. Res. 1984/50, Annex, 1984 U.N. ESCOR Supp. (No. 1) at 33, U.N. Doc. E/1984/84 (1984)

on pregnant women, or on new mothers, or on persons who have become insane.

4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.

5. Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.

7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.

8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.

9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering."

Similarly, as regards legal assistance in such matters, the Human Rights Committee observed that under Article 14, paragraph 3(d), everyone shall have 'legal assistance to him' in any case where the interests of justice so require. It imposed an obligation on the state party itself to make provision for effective representation by counsel in a case concerning capital offence as absence of counsel constituted an unfair trial.[36]

[36] *Frank Robinson* v. *Jamaica*, (Comm. No. 223/1987 GAOR 44th Session, Suppl. no. 40 (A 44/40), Report of the HR Committee p. 241. The HR Committee seemed to cast the onus of proving that the killing fill into an exempted category on the state once intention to kill was proved in its analysis in *Baboeram et. al.* v. *Surinam*, Comm. No.146/1983, GAOR - 40th Session, Suppl. No. 40 (A/40/40) Report of the HR Committee p.187. Gandhi *supra* n. 34, 333

The Constitutional Court of South Africa, by a striking judicial unanimity, constitutionally outlawed capital punishment[37] while the US was working out painful strategies for reservation.[38] As of 1993, 49 countries had totally abolished the death penalty and as many as 84 countries had abolished it for juveniles.[39]

The legislative history of the relevant provisions of the Indian Penal Code and the Code of Criminal Procedure, shows that there has been a gradual shift against the imposition of death penalty. Sub-section (5) of Section 367 of the Code of Criminal Procedure, 1898 as it stood prior to its amendment by Act 26 of 1955 provided:

> "If the accused is convicted of an offence punishable with death, and the court sentences to any punishment other than death, the court shall in its judgment state the reasons why sentence of death was not passed."

This provision laid down that if an accused was convicted of an offence punishable with death, the imposition of death sentence was the rule and the awarding of a lesser sentence was an exception and the court had to state the reasons for not passing the sentence of death. By the Amending Act 26 of 1955, which came into force with effect from January 1, 1956, this provision was deleted with the result that from and after that date, it was left to the discretion of the court on the facts of each case to pass a sentence of death or to award a lesser sentence. The courts could take note of extenuating circumstances to justify the passing of the lesser sentence and not impose the death penalty. Neither death penalty nor life sentence was the rule under the law as it stood after the abolition of sub-section (5) of Section 367 by the Amending Act 26 of 1955. The new Code of Criminal Procedure was enacted in 1973, where Section 354, sub-section (3) provided:

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[37] *The State* v. *Makwanyane and M.Mehunu*, 1995, cited in Upendra Baxi, "A Work in Progress?" The US Report to the United Nations Human Rights Committee", 36 Ind. J. Intl. L. 34 (1996), 39

[38] The US reserved the right to impose capital punishment on juveniles under any 'existing or future law'.

"When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term. of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence."

The courts are now required under this provision to state the reasons for the sentence awarded and in case of sentence of death, special reasons are required to be stated. It will thus be seen that life sentence is now the rule and it is only in exceptional cases, for special reasons, that death sentence can be imposed. The legislature has however not indicated what are the special reasons for which departure can be made from the normal rule and death penalty may be inflicted. The legislature has not given any guidance as to what are those exceptional cases in which, deviating from the normal rule, death sentence may be imposed. This is left entirely to the discretion of the court.

The Indian Penal Code (Amendment) Bill, 1972,[40] sought to narrow drastically the judicial discretion to impose death penalty and tried to formulate the guidelines which should control the exercise of judicial exercise in this punitive area. It suggested the idea of two degrees of murder – the general murders for which the maximum punishment would be life and higher degree murders where the maximum punishment would be death penalty.[41]

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[40] Baxi, *supra* n. 37, 39

[41] It was passed by the Rajya Sabha in 1978 and it was pending in the Lok Sabha when it ultimately lapsed with the dissolution of the House

[42] IPC (Amendment) Bill 1978, at clause 125. Higher degree was defined thus:

"(2) Whoever commits murder shall –

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of such murder he was such member or a public servant, as the case may be, or had ceased to be such member or public servant; or

The minority in *Bachan Singh* regarded death penalty as barbaric and cruel because of its nature and what it involves in terms of human anguish and suffering. It considered in the first place, that it was irrevocable, it cannot be recalled. It observed that death penalty extinguishes the flame of life for ever and is plainly destructive of the right to life, the most precious right of all, a right without which enjoyment of no other rights is possible. The minority was worried that in case even if any mistake is subsequently discovered, it will be too late. It also considered death penalty to be disproportionate and so arbitrary and irrational, for it would not pass the test of reason and would be contrary to the rule of law and void under Articles 14, 19 and 21.[42]

Krishna Iyer, J. in *Rajendra Prasad case* observed thus:

> "The values of a nation and ethos of a generation mould concepts of crime and punishment. So viewed, the lodestar of penal policy today, shining through the finer culture of former centuries, strengthens the plea against death penalty. . . . The Indian cultural current also counts and so does our spiritual chemistry, based on divinity in everyone, catalysed by the Buddha-Gandhi compassion. . . . Many humane movements and sublime souls have cultured the higher consciousness of mankind."[43]

He emphasised the reformatory potential in every man. He said:

(d) if the murder is of a person who had acted in the lawful discharge of his duty under section 43 of the Code of Criminal Procedure, 1973 or had rendered assistance to a Magistrate or Police Officer demanding his aid or requiring his assistance under section 37 or section 129 of the said Code, or

(e) if the murder has been committed by him, while undergoing sentence of imprisonment of life, and such sentence has become final."

[42] *Bachan Singh* v. *State of Punjab*, (1982) 3 SCC 24, 74 – 76. The Minority, on the question of proportionality, referred to the decisions of the United States Supreme Court in *Gregg* v. *Georgia*, 428 US 153: 49 L. Ed. 2d. 859 (1976); *Coker* v. *Georgia*, 433 US 584: 53 L. Ed. 2d. 982 (1877) and *Lockett* v. *Ohio*, 438 US 586: 57 L. Ed. 2d. 973 (1878), which had banked on the Eighth Amendment to the US Constitution as well as *Rex* v. *Miller and Cockriell*, 70 DLR (3d) 324 of the Canadian Supreme Court

[43] *Rajendra Prasad* v. *State of U.P.*, AIR 1979 SC 916: (1979) 3 SCC 646, 665, paragraph 43

"In this land of Buddha and Gandhi, where from times immemorial, since over 5000 years ago, every human being is regarded as embodiment of *Brahma* and where it is a firm conviction based not only on faith but also an experience that "every saint has a past and every sinner a future", the standards of human decency set by our ancient culture and nourished by our constitutional values and spiritual norms frown upon imposition of death penalty for the offence of murder. It is indisputable that the Constitution of a nation reflects its culture and ethos and gives expression to its sense of moral and ethical values. It affords the surest indication of the standards of human decency cherished by the people and sets out the socio-cultural objectives and goals towards which the nation aspires to move. There can be no better index of the ideals and aspirations of a nation than its Constitution. When we turn to our Constitution, we find that it is a humane document which respects the dignity of the individual and the worth of the human person and directs every organ of the State to strive for the fullest development of the personality of every individual. Undoubtedly, as already pointed out above, our Constitution does contemplate death penalty, and at the time when the Constitution came to be enacted, death penalty for the offence of murder was on the statute-book, but the entire thrust of the Constitution is in the direction of development of the full potential of every citizen and the right to life along with basic human dignity is highly prized and cherished and torture and cruel or inhuman treatment or punishment which would be degrading and destructive of human dignity are constitutionally forbidden. Moreover, apart from the humanistic quintessence of the Constitution, the thoughts, deeds and words of the great men of this country provide the clearest indication of the prevailing standards of human decency. They represent the conscience of the nation and are: the most authentic spokesmen of its culture and ethos."[44]

But then, sentencing discretion is inherent in our legal system, and, in fact, it is desirable, because no two cases or criminals are identical and if no discretion is left to the court and sentencing is to be done according to a rigid pre-determined formula leaving no room for judicial discretion it would be unjust. But at the same time, the sentencing discretion conferred upon the court cannot be altogether uncontrolled or unfettered. The stratagem which is therefore followed by the legislatures while creating and defining offences is to

[44] *Bachan Singh*, *Supra* n. 42, 77, paragraph 39. See also *Ediga Anamma* v. *State of AP*, (1974) 4 SCC 443. For a study of decisions prior to and after *Ediga Anamma* see Prof. Blackshield, "Capital Punishment in India", 21 JILI 123 (1980)

prescribe the maximum punishment and in some cases, even the minimum and leave it to the discretion of the court to decide upon the actual term of imprisonment. This cannot be regarded as arbitrary or unreasonable since the discretion that is left to the court is to choose an appropriate term of punishment between the limits laid down by the legislature, having regard to the distinctive features and the peculiar facts and circumstances of the case. It is a basic requirement of the equality clause contained in Article 14 that the exercise of discretion must always be guided by standards or norms so that it does not degenerate into arbitrariness and operate unequally on persons similarly situate.

The following propositions are said to emerge from the Constitution Bench judgment in majority in *Bachan Singh*:[45]

(*i*) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(*ii*) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(*iii*) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(*iv*) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised." [46]

[45] (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898

[46] *Id.* paragraph 38

The Court thereafter observed that in order to apply these guidelines the following questions may be answered:

"(*a*) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(*b*) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"[47]

The Court went on to place the burden on the courts thus:

"It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."[48]

The Constitution Bench, however, did not agree with the approach adopted by a three-Judge Bench in *Rajendra Prasad* v. *State of U.P.* that focus of special reasons has shifted from the crime to the criminal. It said:

"As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of 'special reasons' in that context, the court must pay due regard *both* to the crime and the criminal.

[47] *Id*. paragraph 39
[48] *Id*., paragraph 209

What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case."[49]

The Constitution Bench observed that aspects like the age of the accused, if the accused is young or old the sentence of death should be avoided); the probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society; and that the accused acted under duress or domination of another person may be considered are undoubtedly relevant mitigating circumstances and must be given great weight in the determination of sentence.[50]

In the case of *Machhi Singh* v. *State of Punjab*,[51] a three Judge Bench of the Supreme Court, following the decision in *Bachan Singh*, observed that death penalty may be imposed in rarest of rare cases when the collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. It clarified that the community may entertain such a sentiment in the following circumstances:

I. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance, when the house of the victim is set aflame with the end in view to roast him alive in the house; when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death; and when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. When the murder is committed for a motive which evinces total depravity and meanness. For instance when a hired assassin commits murder for the sake of money or reward or a cold-blooded murder is committed with

[49] *Id.*, 748, paragraph 201
[50] *Id.*, 750, paragraph 207
[51] (1983) 3 SCC 470 : 1983 SCC (Cri) 681

a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-à-vis whom the murderer is in a dominating position or in a position of trust, or a murder is committed in the course for betrayal of the motherland.

III. When murder of a member of a Scheduled Caste or minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorise such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance. In cases of 'bride burning' and what are known as 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V. When the victim of murder is (*a*) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (*b*) a helpless woman or a person rendered helpless by old age or infirmity (*c*) when the victim is a person vis-à-vis whom the murderer is in a position of domination or trust (*d*) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.[52]

It may be pertinent to point out that, unfortunately, in spite of the attempts of the Courts, the categorisation of rarest of rare cases has been a troublesome

[52] *Id.*, 488 - 89, paragraphs 33-37

me. To quote an example, in *State (Delhi Admn)* v. *Laxman Kumar*, [53] dowry death was classified as the rarest of rare category. Bride burning was considered as grave in *Kailash Kaur* v. *State of Punjab*.[54] In *Lichhamadevi* v. *State of Rajasthan*,[55] it was observed that bride burning is an offence generally deserving death penalty. It was felt that the growing incidence justify deterrent punishment. Though, in spite of recognising it so the Court declined to impose death.[56]

In *Allauddin Mian* v. *State of Bihar*, Justice Ahmadi observed thus:

> "Where the incidence of a certain crime is rapidly growing and is assuming menacing proportions, for example, acid pouring or bride burning, it may be necessary for the courts to award exemplary punishments to protect the community and to deter others from committing such crimes."[57]

Interestingly though, in *Ravindra Trimbak Chouthmal* v. *State of Maharashtra*,[58] the Supreme Court considered and described dowry death as murder most foul and still did not place in the rarest of rare category. In the opinion of the Court due to increase in dowry deaths, it could not be treated as the rarest of the rare category.[59]

In *Deena* v. *Union of India*, the Supreme Court refused to reopen the question of the validity of the death sentence for the offence of murder having been upheld by this Court after a careful and prolonged discussion in *Bachan*

(1985) 4 SCC 476
(1987) 2 SCC 631
(1988) 4 SCC 456
See also *Surinder Kumar* v. *State (Delhi Admn)*, (1987) 1 SCC 467: AIR 1987 SC 692, where too the Court did not impose death penalty though it considered the offence to be grave
(1989) 3 SCC 5, 19
(1996) 4 SCC 148 at para 9
Prof. B. B. Pande, "Murder Most Foul, Though Not Rarest of Rare", (1996) 5 SCC (J) 1

Singh. It observed that the question must be treated as concluded and not any longer open to argument:

> "There has to be finality to litigation, criminal as much as civil, if law is not to lose its credibility. No one of course can question that law is a dynamic science, the social utility of which consists in its ability to keep abreast of the emerging trends in social and scientific advance and its willingness to readjust its postulates in order to accommodate those trends. Life is not static. The purpose of law is to serve the needs of life. Therefore law cannot be static. But, that is not to say that judgments rendered by this Court after a full debate should be reconsidered every now and then and their authority doubted or diluted. That would be doing disservice to law since certainty over a reasonably foreseeable period is the hallmark of law."[60]

It noted that though all major arguments have been specifically considered under separate heads, the argument mentioned relating to the execution of death sentence has not been considered under a separate head. The question raised was considered important not only from the legal and constitutional point of view but also from the sociological point of view.[61] It was argued that even if it may be lawful to impose the death sentence in an exceptional class of cases, it is impermissible to execute that sentence even in those cases, since it is inhuman and cruel to take human life under any circumstances, even under a decree of a court and, secondly that the method prescribed by Section 354(5) of the Code for executing the death sentence is inhuman, barbarous and degrading and therefore that method cannot be employed for executing the death sentence. It said that the burden is upon the State to show that the procedure prescribed is constitutional. The Court

[60] (1983) 4 SCC 645, 653. See also *Krishna Mochi* v. *State of Bihar*, (2002) 6 SCC 81; *Devender Pal Singh* v. *State of NCT of Delhi*, (2002) 5 SCC 234; *State* v. *Nalini*, (1999) 5 SCC 253

[61] *Deena* v. *Union of India*, (1983) 4 SCC 645, 656

observed that the burden does *not* lie on the petitioners to prove that the procedure prescribed by the aforesaid provision for taking life is unjust, unfair or unreasonable. The impugned statute, on the face of it, provides for a procedure for extinguishing life. Therefore, not even the initial obligation to show the fact of deprivation of life or liberty rests on the petitioners. The State must establish that the procedure prescribed by Section 354(5) of the Code for executing the death sentence is just, fair and reasonable. That burden includes the obligation to prove that the said procedure is not harsh, cruel or degrading.[62]

The Court referred to the 35th Report of the Law Commission,[63] and the other reports mentioned therein[64] and concluded that the recommendation of the Commission was that death sentence should be executed by the method of hanging prescribed in Section 354(5) of the Criminal Procedure Code, since there were no circumstances justifying its substitution by any other method and since, no other method was shown to be more satisfactory. It concluded that the State has discharged the heavy burden which lay upon it to prove that the method of hanging prescribed by Section 354(5) of the Code of Criminal Procedure does not violate the guarantee contained in Article 21 of the Constitution.[65] It observed that the system is consistent with the obligation of the State to ensure that the process of execution is conducted with decency and decorum without involving degradation or brutality of any kind.

Deterrence

On the question of deterrence, Sir James Fitzjames Stephen said –

> "No other punishment deters man so effectually from committing crimes as the punishment of death. This is one of those propositions which it is

[62] *Id.*, 668
[63] 35th Report of the Law Commission of India on Capital Punishment, dated September 30, 1967
[64] Report of the Royal Commission of England and the Report of the Canadian Committee

difficult to prove, simply because they are in themselves more obvious than any proof can make them. It is possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction. The threat of instant death is the one to which resort has always been made when there was an absolute necessity for producing some result.... No one goes to certain inevitable death except by compulsion. Put the matter other way. Was there ever yet a criminal, who when sentences to death and brought out to die, would refuse the offer of a commutation of his sentence for the severest secondary punishment? Surely not. Why is this? It can only be because 'All that a man has he will give for his life.' In any secondary punishment, however terrible, there is hope; but death is death; its terrors cannot be described more forcibly."[66]

ıe Law Commission of India in its 35th Report opined that:

"Experience of other countries would not be conclusive for India. Need for the deterrent control provided by capital punishment is greater in various classes of society. There is greater danger in India of increase in violent crimes if capital punishment is abandoned, particularly in respect of professional criminals?"[67]

In *Ram Deo Chauhan* v. *State of Assam* the Supreme Court observed that ough it is time that in a civilised society a tooth for a tooth, and a nail for a nail ·death for death is not the rule, but it is equally true that when a man becomes beast and menace to the society, he can be deprived of his life according to the ·ocedure established by law, as the Constitution itself has recognised the death

Supra n. 61, 687

Stephen "Capital Punishment", Fraser's Magazine, Vol. LXIX, 1864 at p. 753 cited in Royal ommission Report on Capital Punishment, p. 9 para 57

Capital Punishment, 1967, Government of India, Ministry of Law, Vol. I, p. 54

sentence as a permissible punishment for which sufficient constitutional provisions for an appeal, reprieve and the like have been provided under the law. The Supreme Court in *Mahesh* v. *State of M.P.*, observed thus:

> "It will be a mockery of justice to permit these appellants to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the appellants would be to render the justicing system of this country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon." [68]

A Full bench in *Triveniben* v. *State of Gujarat*,[69] recognised the deterrent value but accepted that it has not been empirically proved. The Supreme Court in *Sevaka Perumal* v. *State of Tamil Nadu*,[70] observed thus –

> "... law as a cornerstone of the edifice of order should meet the challenges confronting the society. In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation of sentencing process be stern where it should be, or be tampered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of crime, the manner in which it was planned and committed, the motive for the commission of the crime, the conduct of the accused and all other attending circumstances are relevant facts which would enter into the area of consideration. For instance a murder committed due to deep seated personal rivalry may not call for penalty of death. But an organised crime or mass murders of innocent people would call for imposition of death sentence as a deterrence."

In *Shashi Nayar* v. *Union of India*,[71] it was observed that death sentence has a deterrent effect and serves as a social purpose. The Court was of the opinion that in view of deteriorating and fast worsening law and order situation

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[68] (1987) 3 SCC 80, 82. Deterrent value was stressed in *Jagmohan Singh* v. *State of UP*, (1973) 1 SCC 20; *Paras Ram* v. *State of Punjab*, (1981) 2 SCC 508: See also *Ashrafi Lal* v. *State of UP*, (1987) 3 SCC 224

[69] (1989) 1 SCC 678

[70] (1991) 3 SCC 471, 480 para 9

[71] (1992) 1 SCC 96, 99

in the country, about which judicial notice can be taken, it is most inopportune time to reconsider the law on the subject and to take the risk of abolishing death sentence.

The view was reiterated in *Ravji* v. *State of Rajasthan*–

> "It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against individual victims but also against the society to which the criminal and the victim belongs. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal.' If for such heinous crimes the most deterrent punishment for wanton and brutal murders is not given, the case of deterrent punishment will lose its relevance."[72]

As observed by the Report of the Ceylon Commission of Inquiry on Capital Punishment –

> "Developing psychological knowledge gave no support to the assumption that a potential murderer calculated (before killing), the ultimate consequences, and pointed out that in an impulsive action, which, as in Ceylon, frequently led to murder, it was unlikely that there was any intellectual consideration at all prior to the killing, let alone a reflection of possible remote penalties. Further, in its opinion, difficulties of detection, apprehension and conviction and the discretionary exercise of reprieve,

[72] (1996) 2 SCC 175, 187

militated against death penalty being the unique deterrent which it was claimed to be."[73]

It felt that prompt detection and proper conviction are more conducive to the reduction of crime than the severity of punishment.

Accordingly, the gravity of the sentence of death and the necessity to be utmost sure while imposing the same was recognised as important factors in *Kehar Singh* v. *Union of India.*[74] Chief Justice Pathak, for a Constitution Bench, while dealing with power of the President under Article 72, made the following observations –

"To any civilized society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position given by the courts to Article 21 of the Constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order, and consequently, the Legislature, the Executive, and the Judiciary are more sensitive to them than to the other attributes of daily existence. The deprivation of personal liberty and the threat of the deprivation of life by the action of the State is in most civilized societies regarded seriously and, recourse, either under express constitutional provision or through legislative enactment is proved to the judicial organ. But, the fallibility of human judgment being undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority to scrutinize the validity of the

[73] Sessional Paper XIV – 1959 cited in 35th Report of the Law Commission of India p. 117 para 330; See also Blackshield: "Capital Punishment in India", 21 JILI 123 (1980)
[74] (1989) 1 SCC 204

threatened denial of life or the threatened or continued denial of personal liberty."[75]

In *Mithu* v. *State of Punjab*,[76] the Supreme Court held that the majority in *Bachan Singh* concluded that Section 302 of the Penal Code is valid for three main reasons: firstly, that the death sentence provided for by Section 302 is an alternative to the sentence of life imprisonment; secondly, that special reasons have to be stated if the normal rule is departed from and the death sentence has to be imposed; and, thirdly, because the accused is entitled, under Section 235(2) of the Code of Criminal Procedure, to be heard on the question of sentence. The last of these three reasons becomes relevant, only because of the first of these reasons. In other words, it is because the court has an option to impose either of the two alternative sentences, subject to the rule that the normal punishment for murder is life imprisonment, that it is important to hear the accused on the question of sentence. If the law provides a mandatory sentence of death as Section 303 of the Penal Code does, neither Section 235(2) nor Section 354(3) of the Code of Criminal Procedure can possibly come into play. If the court has no option save to impose the sentence of death, it is meaningless to hear the accused on the question of sentence and it becomes superfluous to state the reasons for imposing the sentence of death. The blatant reason for imposing the sentence of death in such a case is that the law compels the court to impose that sentence. The ratio of *Bachan Singh,* therefore, is that, death sentence is Constitutional if it is prescribed as an alternative sentence for the offence of murder *and* if the normal sentence prescribed by law for murder is imprisonment for life. In the light of this, section 303 of the IPC was held unconstitutional as it left no option for the judges mandating death penalty for the offence of murder by a life convict.

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[75] *Id.*, 210-11, paragraph 7
[76] (1983) 2 SCC 277

Those facing death may approach the Supreme Court on questions of death penalty only under Article 134(1), where right of appeal is provided for in certain circumstances; or under Article 136(1), which is discretionary power; or under Section 2 of the Supreme Court (Enlargements of Criminal Appellate Jurisdiction) Act 1970. The powers under the Constitution were narrowed down in the context where death was the norm and the alternative an exception. The Constituent Assembly Debates show that the reason for restricting appeals to the Supreme Court was the presumption that the Court would be flooded with such appeals.[77] This is claimed to have lost ground especially after *Bachan Singh*[78] and Section 354 (3) in the new Code of Criminal Procedure. There is an argument to make appeals in the matter of death sentences a right since only a few numbers of such cases would exist. The same is argued to be the case of life imprisonment cases also especially after the passing of the section 433 A of the Code of Criminal Procedure which has made it more burdensome.[79]

Remedy - Compensation

Compensation is recognised for accusation without reasonable cause in a case triable by a Magistrate, for person groundlessly arrested, for wrongful arrest, to innocent purchaser of stolen property out of money found on person of accused and it may also be ordered to be paid by convicted person to the victim or the dependants of the deceased victim. The last of the above to be done under section 357 of the Cr.P.C.

[77] CAD Vol III p.599-601 & 843
[78] AIR 1980 SC 898
[79] K. Prakash, "Criminal Appeal Jurisdiction of the Supreme Court – With Particular Reference to Death Sentence and Life Imprisonment Cases", (2003) 2 SCC (J) 17

Lately, courts have been granting compensation in deserving cases wherever they come across violation of the fundamental human rights. Compensation has been awarded mainly in cases of police atrocities and unlawful detention. Sovereign immunity as a principle against State liability has eroded right after the *Kasturi Lal Ralia Ram* v. *State of UP.*[80] The concept of public accountability was for the first time recognised in the infamous Bhagalpur Blinding case, *Khatri (II)* v. *State of Bihar.*[81] In *Khatri (IV)* v. *State of Bihar*, it was observed that if compensation was not granted, Article 21 would be reduced to a nullity 'a mere rope of sand'.[82] Though it was said that the court is not helpless to grant relief in a case of violation of the right to life and personal liberty, and it should be prepared 'to forge new tools and devise new remedies' for the purpose of vindicating these precious fundamental rights, in neither of these cases was compensation actually granted.[83]

It was in *Rudul Sah* v. *State of Bihar*[84] that compensation was granted for illegal detention for the first time. Chandrachud, CJ., for the Apex Court observed thus:

> "It is true that Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes of courts, civil and criminal. A money claim has therefore to be agitated in and adjudicated upon in a suit instituted in a court of lowest grade competent to try it. But the important question for our consideration is whether in the exercise of its jurisdiction under Article 32, this Court can pass an order for the payment of money if such an order is in the nature of compensation consequential upon the deprivation of a fundamental right. The instant case is illustrative of such cases .....

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[80] AIR 1965 SC 1039
[81] (1981) 1 SCC 627
[82] (1981) 2 SCC 493 at 504
[83] This was continued to be left open in *Veena Sethi* v. *State of Bihar*, (1982) 2 SCC 583 and *Sunil Bir* v. *State of Bihar*, (1982) 3 SCC 131. On developing new tools see further *Union Carbide Corpn.* v. *Union of India*, where Misra, CJ. stated that "we have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future ... there is no reason why we should hesitate to evolve such principle of liability ...''.
[84] (1983) 4 SCC 141

.... The petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial, in the sense that a civil court may or may not have upheld his claim. But we have no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed in that suit, though it is not possible to predicate, in the absence of evidence, the precise amount which would be decreed in his favour. In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders to release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilisation is not to perish in this country as it has perished in some others too well known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers."[85]

The Supreme Court allowed compensation of Rs. 1 lakh each in matter of two persons going missing in *Sebastian M. Hongray* v. *Union of India*.[86] In *Bhim Singh* v. *State of Jammu and Kashmir*,[87] which was a case of malafide arrest and non production of the arrested person in the Court, an amount of Rs. fifty thousand was awarded as compensation. However, in none of the above mentioned decisions was any principle laid down for deciding the quantum of compensation to be paid in each case.

[85] *Id.*, 147-48, paragraphs 9 and 10
[86] (1984) 3 SCC 82
[87] (1985) 4 SCC 677

Later, in *Peoples Union for Democratic Rights* v. *State of Bihar*,[88] while the Court was entertaining a matter of ruthless and unwanted police firing resulting in the death of 21 persons, including children, the Supreme Court, for the first time quantified the amount as Rs. 20 thousand for each death and Rs. 5 thousand for the injured. But, the quanta of these compensations were felt to be negligible to stand as any guiding principle.[89] Compensation was also allowed by the High Courts in the case of maltreatment, though in lawful detention, in *Rajasthan Kisan Sangathan* v. *State*[90] and for loss of life of an undertrial prisoner due to failure or neglect of duties of officers in *C. Ramkonda Reddy* v. *State*.[91]

In *Saheli* v. *Commissioner of Police, Delhi*,[92] the Court, while dealing with assault and beating by police resulting in the death of a 9 year old child, ordered a compensation of Rs. 75 thousand. In *State of Maharashtra* v. *Ravikant S. Patil*,[93] an undertrial prisoner was handcuffed and paraded through the streets in a procession which the Apex Court found abhorrent and awarded a compensation of Rs. 10 thousand.[94]

The Court, *Nilabati Behera* v. *State of Orissa*,[95] attempted to spell out clearly the principle on which the liability of the State arises in such cases for payment of compensation and the distinction between this liability and the liability in private law for payment of compensation in an action on tort. It observed that award of compensation in a proceeding under Article 32 by the Supreme Court or by the High Court under Article 226 of the Constitution is a

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[88] (1987) 1 SCC 265
[89] Prakash, *supra* n. 79
[90] AIR 1989 Raj. 10
[91] AIR 1989 A.P. 235
[92] (1990) 1 SCC 422
[93] (1991) 2 SCC 373
[94] See also *TV Vatheeswaran* v. *State of TN*, (1983) 2 SCC 68; *Sunil Gupta* v. *State of Madhya Pradesh*, (1990) 3 SCC 119; *Delhi Judicial Service Association, Tis Hazari Court* v. *State of Gujarat*, (1991) 4 SCC 406; *President, Citizens for Democracy* v. *State of Assam*, (1995) 3 SCC 743; *MP Dwivedi In re*, (1996) 4 SCC 152. See also Paramjit S. Jaswal and N. Jaswal, "Right to Personal Liberty and Handcuffing: Some Observations", 33 JILI 246 (1991)
[95] (1993) 2 SCC 746

remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort.[96] The Court held that *Kasturilal's* upholding the State's plea of sovereign immunity for tortious acts of its servants is confined to the sphere of liability in tort, which is distinct from the State's liability for contravention of fundamental rights to which the doctrine of sovereign immunity has no application in the constitutional scheme, and is no defence to the constitutional remedy under Articles 32 and 226 of the Constitution which enables award of compensation for contravention of fundamental rights, when the only practicable mode of enforcement of the fundamental rights can be the award of compensation.[97] The Court referred to the decision of Privy Council in *Maharaj* v. *Attorney-General of Trinidad and Tobago (No. 2)*, where it was considering whether section 6 of the Constitution of Trinidad and Tobago 1962, in the chapter pertaining to human rights and fundamental freedoms, which provided for an application to the High Court for redress, permitted an order for monetary compensation also. It was held, that an order for payment of compensation, when a right protected had been contravened, is clearly a form of 'redress' which a person is entitled to claim under Section 6, and may well be 'the only practicable form of redress'. Lord Diplock further observed that claim is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone.[98] On the strength of this the Supreme Court held that 'a claim in public law for

[96] *Nilabati Behera* v. *State of Orissa*, (1993) 2 SCC 746, 759. See also *Dalip Singh* v. *State of Haryana*, 1993 Supp (3) SCC 336; *Bhuwaneshwar Singh* v. *Union of India*, (1993) 4 SCC 327; *S Nagendra Rao & Co.* v. *State of Andhra Pradesh*, (1994) 6 SCC 205; *Pratul Kumar Sinha* v. *State of Bihar*, 1994 Supp (3) SCC 100; *R.S. Sodhi* v. *State of UP*, 1994 Supp (1) SCC 142

[97] *Kasturilal* which related to value of goods seized and not returned to the owner due to the fault of Government servants and the claim being of damages for the tort of conversion under the ordinary process, and not a claim for compensation for violation of fundamental rights was held to be inapplicable in this context and distinguishable, *Kasturi Lal Ralia Ram* v. *State of UP*, AIR 1965 SC 1039

[98] *Id.*, 762

compensation' for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is 'distinct from, and in addition to, the remedy in private law for damages for the tort' resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution.[99]

The Court observed that the wide powers given to it by Article 32, which itself is a fundamental right, imposes a constitutional obligation on it to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution, which enable the award of monetary compensation in appropriate cases, where that is the only mode of redress available. It considered the power available to the Court under Article 142 as also an enabling provision in this behalf. The contrary view, it said, would not merely render the court powerless and the constitutional guarantee a mirage, but may, in certain situations, be an incentive to extinguish life, if for the extreme contravention the court is powerless to grant any relief against the State, except by punishment of the wrongdoer for the resulting offence, and recovery of damages under private law, by the ordinary process. If the guarantee that deprivation of life and personal liberty cannot be made except in accordance with law, is to be real, the enforcement of the right in case of

[99] *Id.*, 763

every contravention must also be possible in the constitutional scheme, the mode of redress being that which is appropriate in the facts of each case. It correctly recognised that this remedy in public law has to be more readily available when invoked by the have-nots, who are not possessed of the wherewithal for enforcement of their rights in private law but it did caution that its exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies, where more appropriate.[100] Reference was made to Article 9(5) of the International Covenant on Civil and Political Rights, 1966 to indicate that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right.

Dr Anand, J. while concurring, observed that the purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. He felt that the compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty.

He observed further that law is in the process of development and the process necessitates developing separate public law procedures as also public law principles. It may be necessary to identify the situations to which separate proceedings and principles apply and the courts have to act firmly but with certain amount of circumspection and self-restraint, lest proceedings under Article 32 or 226 are misused as a disguised substitute for civil action in private law.[101]

The Court directed the respondent State of Orissa to pay the sum of Rs 1,50,000 to the petitioner for custodial death of her son and a further sum of Rs 10,000 as costs to be paid to the Supreme Court Legal Aid Committee. It also clarified that the award of this compensation, apart from the direction for

[100] *Id.*, 764
[101] *Id.*, 767

adjustment of the amount as indicated, will not affect any other liability of the respondents or any other person flowing from the custodial death.[102]

Though not as serious a violation as above, in *Inder Singh* v. *State of Punjab*,[103] which related to abduction and detention of persons, Rs. 1.5 lakhs were ordered to be paid as compensation to each of the victims. Similarly, where an army officer died under mysterious circumstances in *Charanjit Kaur* v. *Union of India*,[104] an amount of Rs. 6 lakhs was ordered as compensation.

Compensation to victims of crime, especially in rape cases, also have been allowed as in *Delhi Domestic Working Women's Forum* v. *Union of India*.[105] The Supreme Court in *D.G. & I.G. of Police* v. *Prem Sagar*,[106] approved the decision of the lower courts, which after coming to the conclusion that one Bhav Sagar was illegally detained for a period of one month, awarded a compensation to the tune of Rs 20,000.

It observed that there were sufficient materials before the learned Sessions Judge who conducted the enquiry and the High Court in coming to the conclusion that the detention was wholly illegal and on such conclusion, compensation having been awarded, there was no necessity of any interference.

Where a detenu disappeared from custody of security forces Rs. 1 Lakh was ordered to be paid in *Union of India* v. *Luithukla*.[107] In *Aheibam Ongbi Leihao Devi* v. *State of Manipur*[108] a person was killed by indiscriminate firing and Rs. 1.5 lakhs was asked to be paid as compensation to the relatives of the victim. In *Arvinder Singh Bagga* v. *State of UP*[109] a married woman was subjected to physical, mental and psychological torture for her to abandon her

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[102] *Id.*, 765
[103] (1995) 3 SCC 702
[104] (1994) 2 SCC 1
[105] (1995) 1 SCC 14 and *Bodhisattwa Gautam* v. *Subhra Chakraborty*, (1996) 1 SCC 490
[106] (1999) 5 SCC 700, 701
[107] (1999) 9 SCC 273
[108] AIR 1999 Gau. 9
[109] (1994) 6 SCC 505

legal marriage by the police. Her husband and his family were also subjected to torture and the Apex Court ordered the State to pay her compensation.

Ajab Singh v. *State of UP*[110] involved the death of a person in judicial custody for which a compensation of Rs. 5 lakhs were ordered. However, where a person had to undergo long imprisonment on a wrong conviction due to inadequate legal representation no compensation was granted.[111]

The award of Rs. Twenty thousand as compensation by the High Court in a case of custodial death was enhanced to Rs. Seventy thousand by the Supreme Court in *Amitadyuti Kumar* v. *State of West Bengal*.[112] In *State of Punjab* v. *Vinod Kumar*,[113] three persons disappeared due to police atrocities and Rs. 2 lakhs each were granted as compensation.

Where a lunatic under-trial was in jail for over 30 years he was ordered to be accommodated with Missionaries of Charity and they were to be ordered to be paid Rs. 2 lakhs in *RD Upadhyay* v. *State of AP*.[114]

In this context, it may also be noted that, the Supreme Court in *D.K. Basu* v. *State of W.B.*, reiterated the principle of *ubi jus, ibi remedium* – there is no wrong without a remedy in the context of punitive measures.[115] It observed that the law wills that in every case where a man is wronged and 'endamaged' he must have a remedy. A mere declaration of invalidity of an action or finding of custodial violence or death in lock-up, does not by itself provide any meaningful remedy to a person whose fundamental right to life has been infringed. Much more needs to be done.

After pointing out some of the provisions in the Indian Penal Code[116] which could be applicable to such situations, it observed that these statutory

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(2000) 3 SCC 521

Hussain v. *State of Kerala*, (2000) 8 SCC 139

(2000) 9 SCC 404

(2000)9 SCC 742

(2001) 1 SCC 437 and 439. See also *Punjab & Haryana High Court Bar Assn.* v. *State of Punjab*, (1996) 4 SCC 742

(1997) 1 SCC 416, 437

Section 220 provides for punishment to an officer or authority who detains or keeps a person in confinement with a corrupt or malicious motive. Sections 330 and 331 provide for

provisions are, however, inadequate to repair the wrong done to the citizen. Prosecution of the offender is an obligation of the State in case of every crime but the victim of crime needs to be compensated monetarily also. The Court, where the infringement of the fundamental right is established, therefore, cannot stop by giving a mere declaration. It must proceed further and give compensatory relief, not by way of damages as in a civil action but by way of compensation under the public law jurisdiction for the wrong done, due to breach of public duty by the State of not protecting the fundamental right to life of the citizen. To repair the wrong done and give judicial redress for legal injury is a compulsion of judicial conscience.

After doing the groundwork, the Court referred to Article 9(5) of the International Covenant on Civil and Political Rights, 1966. It recognised that the Government of India, at the time of its ratification (of ICCPR) in 1979, made a specific reservation to the effect that the Indian legal system does not recognise a right to compensation for victims of unlawful arrest or detention and thus did not become a party to the Covenant. Interestingly, the Court said that the relevant reservation has now lost its relevance in view of the law laid down by the Supreme Court in a number of cases awarding compensation for the infringement of the fundamental right to life of a citizen. It was observed that though there is no express provision in the Constitution of India for grant of compensation for violation of a fundamental right to life, nonetheless, the Court has judicially evolved a right to compensation in cases of established unconstitutional deprivation of personal liberty or life.[117]

The Court went on to further observe that the courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are

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punishment of those who inflict injury or grievous hurt on a person to extort confession or information in regard to commission of an offence. Illustrations (*a*) and (*b*) to Section 330 make a police officer guilty of torturing a person in order to induce him to confess the commission of a crime or to induce him to point out places where stolen property is deposited. Section 330, therefore, directly makes torture during interrogation and investigation punishable under the Indian Penal Code

[117] Reference was made to *Nilabati Behra*

for the people and expected to respond to their aspirations. A court of law cannot close its consciousness and aliveness to stark realities. Mere punishment of the offender cannot give much solace to the family of the victim and a civil action for damages is a long drawn and a cumbersome judicial process. Monetary compensation for redressal by the court finding the infringement of the indefeasible right to life of the citizen is, therefore, useful and at time perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim, who may have been the breadwinner of the family.[118] As far as the quantum of compensation was concerned it said that it will depend upon the peculiar facts of each case and no strait-jacket formula can be evolved in that behalf and this may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit.[119]

In *Chairman, Railway Board* v. *Chandrima Das*,[120] it was contended that the victim of rape in the railway precincts, Smt Hanuffa Khatoon, was a foreign national and, therefore, no relief under public law could be granted to her as there was no violation of the fundamental rights available under the Constitution, since the fundamental rights in Part III of the Constitution are available only to citizens of this country. This argument was turned down for two reasons: first,

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[118] The Court refers to a similar approach of redressing the wrong by award of monetary compensation against the State for its failure to protect the fundamental rights of the citizen that has been adopted by the Courts of Ireland, which has a written constitution, guaranteeing fundamental rights, but which also like the Indian Constitution contains no provision of remedy for the infringement of those rights - in *State (At the Prosecution of Quinn)* v. *Ryan*, 1965 IR 70, 122 and *Byrne* v. *Ireland*, 1972 IR 241. It also referred to *Simpson* v. *Attorney General (Baigent case)*, 1994 NZLR 667 of the Court of Appeal in New Zealand which had, in turn, referred to *Nilabati Behera*.

[119] On the question of distinction between public law and private law see with benefit *Common Cause, A Regd. Society* v. *Union of India*, AIR 1999 SC 2979, paragraphs 39-40; *Arvinder Singh Bagga* v. *State of U.P.*, (1994) 6 SCC 505; *P. Rathinam* v. *Union of India*, 1989 Supp (2) SCC 716; *Death of Sawinder Singh Grower In re*, 1995 Supp (4) SCC 450; *State of M.P.* v. *Shyamsunder Trivedi*, (1995) 4 SCC 262; *People's Union for Civil Liberties* v. *Union of India*, AIR 1997 SC 1203; and *Kaushalya* v. *State of Punjab*, (1999) 6 SCC 754; *Supreme Court Legal Aid Committee* v. *State of Bihar*, (1991) 3 SCC 482; *Jacob George (Dr)* v. *State of Kerala*, (1994) 3 SCC 430; *Paschim Banga Khet Mazdoor Samity* v. *State of W.B.*, AIR 1996 SC 2426; and *Manju Bhatia* v. *New Delhi Municipal Council*, AIR 1998 SC 223

[120] (2000) 2 SCC 465, 480

on the ground of domestic jurisprudence based on constitutional provisions and secondly, on the ground of human rights jurisprudence based on the Universal Declaration of Human Rights, 1948, which, according to the Court, has the international recognition as the "Moral Code of Conduct" having been adopted by the General Assembly of the United Nations.

It discussed the principles and objects behind the Universal Declaration of Human Rights, 1948, as adopted and proclaimed by the United Nations General Assembly Resolution of 10.12.1948. It quoted the relevant portion of the Preamble, and the Declaration to the effect that:

> "Everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, NATIONAL OR SOCIAL ORIGIN, PROPERTY, BIRTH OR OTHER STATUS.
>
> Furthermore, 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, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."[121] (emphasis original)

It also quoted the General Assembly resolution dated 20.12.1993 adopting the Declaration on the Elimination of Violence against Women and went on to hold 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 words in those Declarations and Covenants have to be such as would help in effective implementation of those rights. The applicability of the Universal Declaration of Human Rights and the principles thereof may have to be read, if need be, into the domestic jurisprudence.

[121] *Id.*, 481

Rights of prisoners

The Standard Minimum Rules for the Treatment of Prisoners, 1955[122] is a comprehensive guideline laid down for the purpose of bringing the law in tune with the human rights requirements. It contains provisions stipulating, inter alia, about accommodation, personal hygiene, clothing and bedding, food, exercise and sport, medical services, discipline and punishment, instruments of restraint, information to and complaints by prisoners, contact with the outside world, books, religion and removal of prisoners. The Rules deal specifically with Institutional personnel and rules applicable to special categories
It classifies the prisoner on the following criteria:

A. Prisoners under sentence with guiding principles for their treatment, classification and individualization, social relations and after-care

B. Insane and mentally abnormal prisoners

C. Prisoners under arrest or awaiting trial

D. Civil prisoners

E. Persons arrested or detained without charge

Additionally the General Assembly has also come out with the Basic Principles for the Treatment of Prisoners.[123]

The significance and sweep of Article 21 make the deprivation of liberty a matter of grave concern and permissible only when the law authorising it is reasonable, even-handed and geared to the goals of community good and State necessity spelt out in Article 19.[124] "Life" in Article 21 was explained in

[122] Adopted on August 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977)

[123] G.A. res. 45/111, annex, 45 U.N. GAOR Supp. (No. 49A) at 200, U.N. Doc. A/45/49 (1990)

[124] *Gudikanti Narasimhulu* v. *Public Prosecutor, High Court of A.P.*, (1978) 1 SCC 240, 244

Kharak Singh case,[125] where Subba Rao, J. quoted Field, J. in *Munn* v. *Illinois*[126] to emphasise the quality of life covered by Article 21:

> "Something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world."

While dealing with the conditions in prison the Supreme Court in *Sunil Batra* v. *Delhi Admn.*,[127] identified three inter-related problems in the matter: (*i*) a jurisdictional dilemma between 'hands off prisons' and 'take over jail administration', (*ii*) a constitutional conflict between detentional security and inmate liberties and (*iii*) the rule of processual and substantive reasonableness in stopping brutal jail conditions. The Court observed that in such basic situations, pragmatic sensitivity, belighted by the preamble to the Constitution and balancing the vulnerability of 'caged' humans to state torment and the prospect of escape or internal disorder, should be the course for the court to navigate.

The "hands-off" doctrine is said to be based the observation in *Ruffin* v. *Commonwealth*:[128]

> "He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being, the slave of the State."

In the words of Krishna Iyer J., it was obligatory for the courts to respond because:

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[125] *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295
[126] 94 US 113, 142
[127] (1978) 4 SCC 494, 502
[128] 62 Va (21 Gratt) 790, 796 (1871) quoted *Ibid.*

"... in our constitutional order it is axiomatic that the prison laws do not swallow up the fundamental rights of the legally unfree, and, as sentinels on the *qui-vive,* courts will guard freedom behind bars, tempered, of course, by environmental realism but intolerant of torture by executive echelons. The policy of the law and the paramountcy of the Constitution are beyond purchase by authoritarians glibly invoking 'dangerousness' of inmates and peace in prisons."

In *Mohammad Giasuddin* v. *State of A.P.*,[129] the Supreme Court strongly endorsed the importance of the hospital setting and the therapeutic goal of imprisonment in the following words:

"Progressive criminologists across the world will agree that the Gandhian diagnosis of offenders as patients and his conception of prisons as hospitals, mental and moral, is the key to the pathology of delinquency and the therapeutic role of 'punishment'. The whole man is a healthy man and every man is born good. Criminality is a curable deviance.... Our prisons should be correctional houses, not cruel iron aching the soul.... This nation cannot, and, if it remembers its incarcerated leaders and freedom fighters, will not but revolutionize the conditions inside that grim little world. We make these persistent observations only to drive home the imperative of Freedom, that its deprivation, by the State, is validated only by a plan to make the sentences more worthy of that birthright. There is a spiritual dimension to the first page of our Constitution which projects into penology... A rehabilitation purpose is or ought to be implicit in every sentence of an offender unless ordered otherwise by the sentencing court."[130]

It was observed in the context of sending a prisoner to solitary confinement that though our Constitution has no 'due process' clause or the

[129] (1977) 3 SCC 287

VIII Amendment similar to the US, after *RC Cooper* v. *Union of India*[131] and *Maneka Gandhi* v. *Union of India*,[132] the consequence is the same:

> "For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counter-productive, is unarguably unreasonable and arbitrary and is shot down by Articles 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21. Part III of the Constitution does not part company with the prisoner at the gates, and judicial oversight protects the prisoner's shrunken fundamental rights, if flouted, frowned upon or frozen by the prison authority.... Judges, even within a prison setting, are the real, though restricted, ombudsmen empowered to proscribe and prescribe, humanize and civilize the life-style within the *concerns*. The operation of Articles 14, 19 and 21 may be pared down for a prisoner but not puffed out altogether."[133]

It observed that inflictions may take many various forms, apart from physical assaults. Pushing the prisoner into a solitary cell, denial of a necessary amenity, and, more dreadful sometimes, transfer to a distant prison where visits or society of friends or relations may be snapped, allotment of degrading labour, assigning him to a desperate or tough gang and the like, may be punitive in effect. Every such affliction or abridgment is an infraction of liberty or life in its wider sense and cannot be sustained unless Article 21 is satisfied. There must be a corrective legal procedure, fair and reasonable and effective. Such infraction will be arbitrary, under Article 14 if it is dependent on unguided discretion, unreasonable, under Article 19 if it is irremediable and unappealable, and unfair, under Article 21 if it violates natural justice.[134]

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[130] This was reiterated in *Sunil Batra* v. *Delhi Admn.*, (1978) 4 SCC 494, 509
[131] (1970) 1 SCC 248: (1970) 3 SCR 531
[132] (1978) 1 SCC 248
[133] *Sunil Batra (II)* v. *Delhi Admn.*, (1980) 3 SCC 488
[134] *Id.*, 509

It has been held that there must be special reasons of an extraordinary or urgent character when fetters are fastened on an unconvicted prisoner and those substantial reasons must be recorded and its copy furnished to the prisoner.[135]

In *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi*,[136] it was observed that any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with procedure prescribed by law, but no law which authorises and no procedure which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness, it would plainly be unconstitutional and void as being violative of Articles 14 and 21. It would thus be seen that there is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the International Covenant on Civil and Political Rights. This right to live, which is comprehended within the broad connotation of the right to life, can concededly be abridged according to procedure established by law and therefore when a person is lawfully imprisoned, this right to live is bound to suffer attenuation to the extent to which it is incapable of enjoyment by reason of incarceration. The prisoner or detenu obviously cannot move about freely by going outside the prison walls nor can he socialise at his free-will with persons outside the jail. But, as part of the right to live with human dignity and, therefore, as a necessary component of the right to life, he would be entitled to have interviews with the members of his family and friends and no prison regulation or procedure laid down by prison regulation regulating the right to have interviews with the members of the family and friends can be upheld as constitutionally valid under Articles 14 and 21, unless it is reasonable, fair and just. It also felt that 'personal liberty' under Article 21 would include

[135] *Supra* n. 130, 553
[136] (1981) 1 SCC 608, 619 – 620

the right to socialise with members of the family and friends subject, of course, to any valid prison regulations.

The Supreme Court has upheld the right of a prisoner to have his work published if it does not violate prison discipline in *State of Maharashtra* v. *Prabhakar Pandurang*,[137] as also the right to prisoners to interview in *Prabha Dutt* v. *Union of India*.[138]

His security while in prison is the responsibility of the State. Failure to ensure his security may entail payment of compensation. For example, in *Kewal Pati* v. *State of U.P.*,[139] it was held that even though the deceased was a convict and was serving his sentence yet the authorities were not absolved of their responsibility to ensure his life and safety in the jail. A prisoner does not cease to have his constitutional right except to the extent he has been deprived of it in accordance with law.[140] He was entitled to protection. Since the killing took place when he was in jail, it resulted in deprivation of his life contrary to law. Since it had taken place while he was serving his sentence due to failure of the authorities to protect him, the Court was of the opinion that his family is entitled to be compensated.

Parole

Parole is granted under the relevant Jail Rules by the executive.

In *Poonam Lata* v. *ML Wadhawa*,[141] the Supreme Court observed that release on parole is a wing of reformative process and is expected to provide opportunity to the prisoner to transform himself to a useful citizen

[137] AIR 1966 SC 424
[138] AIR 1982 SC 6: (1982) 1 SCC 1
[139] (1995) 3 SCC 600, 600
[140] Reference was made to *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi*, (1981) 1 SCC 608 : AIR 1981 SC 746 and *A.K. Roy* v. *Union of India*, (1982) 1 SCC 271: AIR 1982 SC 710
[141] 1987 Cri.L.J. 1130

In *Inder Singh* v. *State*,[142] Krishna Iyer J., for the Court, formulated another strategy, that of a guarded parole, when he said:

> "If the behaviour of these two prisoners shows responsibility and trustworthiness, liberal, though cautious, parole will be allowed to them so that their family ties may be maintained and his inner tensions may not further build up. After every period of one year, they should be enlarged on parole of two months ...."

Pardon

Pardoning power, in the US, is not considered as a personal act of grace by the President but as power belonging to the people reposed on the highest dignitary of the State. The reasons that impelled the system to confer this power on the executive head was explained by Chief Justice Taft thus:

> "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or the enforcement of the law. The administration of justice by the courts is not necessarily always wise or certainly considerate of the circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments as well as in monarchies to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments ...."[143]

Prior to the enactment of the Constitution, the remission and commutation system was prevalent in our country as part of the statutory scheme.[144] There was also a delegated clemency power with the Governor General in Council.[145] By the Constitution, this clemency power of the erstwhile monarch has been

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[142] AIR 1978 SC 1091, 1092
[143] *Ex parte Phillip Crossman*, 267 US 87 (1924)
[144] Sections 401 and 426, Cr.P.C. 1898
[145] Section 295 of the Government of India Act 1935

conferred on the President and the Governors.[146] Dealing with the pardoning power vis-à-vis section 433A of the Cr.P.C., which laid down that convicts whose death penalty has been commuted to life imprisonment and those who have been awarded life for an offence for which death penalty is one of the punishments should necessarily serve 14 years of actual imprisonment before release, in *Maru Ram* v. *Union of India*,[147] the Supreme Court declared that if a person was released in exercise of the constitutional power under Article 72 or 161, the rule in section 433A would not be applicable in such cases. It went on further, however, to hold that the exercise of such powers could be subjected to judicial review since these powers are to be exercised on the advice of the government.[148]

Non custodial measures

The United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) are the international norms in this area.[149] Among the non custodial measures, probation stands out since we do not have other options yet recognised.

Probation means the conditional suspension of imposition of a sentence by the court, in select cases, especially of young offenders, who are not sent to prisons but released on probation, on agreeing to abide by certain conditions.

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[146] Though there was a proposal to confine it to the President, it was shelved on the ground that the Governor would be better placed to exercise this power in relation to an offence committed in the State and the Home Minister of the State would be advising him. Constituent Assembly Debates, Book No. 2, Vol. No. VII, pp. 1118 – 1120

[147] AIR 1980 SC 2147; See also *K. M. Nanavati* v. *State of Bombay*, AIR 1961 SC 112; *Shamsher Singh* v. *State of UP*, AIR 1974 SC 2192; *Kuljit Singh* v. *Lt. Governor*, AIR 1982 SC 774; *Swaran Singh* v. *State of UP*, (1998) 4 SCC 75; *Satpal* v. *State of Haryana*, (2000) 5 SCC 170

[148] For a critical analysis of the judgment and the power see K.N. Chandrasekharan Pillai and Balakrishnan K., "Pardoning Power – Need for a Fresh Look", 24 Ac.L.R. 225 (2000)

[149] G.A. res. 45/110, annex, 45 U.N. GAOR Supp. (No. 49A) at 197, U.N. Doc. A/45/49 (1990). The other measures have been mentioned under the section dealing with sentencing *supra*.

The probationer is subject to supervision by a public or private organisation or by individuals.

The attempt by probation is to reform and rehabilitate the offender as a useful and self reliant member of the society without subjecting him to the negative effect of jail life.[150] However, the Law Commission has pointed out that there are occasions when the offender is so anti social that his immediate and prolonged confinement is the best assurance of society's protection.[151]

Probation was recognised in India for the first time in section 562 of the Code of Criminal Procedure 1898. Here its application was confined to offences of theft, dishonest misappropriation, cheating and any other offence in the Penal Code punishable with not more than two year's imprisonment. The scope of probation was extended by the Amendment of 1923 to the Code of Criminal Procedure and the period of release on probation was also increased from one year to three years.[152]

A comprehensive enactment was passed by the Probation of Offenders Act 1958 and it was also included under section 360 of the Code of Criminal Procedure.

The Supreme Court has emphasised, in *Ramji Misar* v. *State of Bihar*,[153] that the Act is meant to reform and rehabilitate the offender, the method adopted being an attempt to possible reformation. It held that the beneficial provisions should receive wide interpretation and should not be read in restrictive sense. This view was reiterated in *Ratan Lala* v. *State*.[154]

In *Ishwardass* v. *State of Punjab*,[155] the Supreme Court said that before deciding to apply the beneficial provisions of the Probation of Offenders Act, the object of the Act (and the intention of the legislature) under which the offences

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[150] Statement of Object and Reasons to the Probations of Offenders Bill 1957.
[151] 47th Report on The Trial and Punishment of Social and Economic Offences, para 10.3, p. 85
[152] See for a comparative position on probation, Dr. D.C. Pande and V. Bagga, "Probation – The Law and Practice in India", 15 JILI 57 (1974)
[153] AIR 1963 SC 1088
[154] AIR 1965 SC 444
[155] AIR 1972 SC 1295

is committed ought to be taken into consideration. In the instant case, which was for an offence under the Prevention of Food Adulteration Act under which a minimum sentence of six months were prescribed, the Court said that the provisions should not be lightly resorted to, where the person is above 21 years of age.[156] For those under 21, the beneficial provisions may still be applied as was the case here. It went on to hold that the object of the Probation of Offenders Act is to avoid imprisonment of the persons covered by the provisions and the said object cannot be set at naught by imposing a sentence of fine which would necessarily entail imprisonment in case there is a default in payment of fine.

In *PK Tejani* v. *MR Dange*,[157] the Supreme Court observed in the context of offences under the Prevention of Food Adulteration Act that the observations of the Law Commission in its 47th Report must be kept in mind and in some occasions the kindly application of the probation principle is negatived by the imperatives of social defence and the improbabilities of moral proselytisation. It said that the police powers of the state must reach out to protect the unsuspecting community. The legislature having prescribed a minimum sentence under the Act, in the context of the proposition that generally food offences must be dealt with deterrently, it refused to extend the benefit under the Probation of Offenders Act. It observed that if offenders could get away by payment of trivial fines, it would bring the law into contempt and its enforcement a mockery.[158] But, in fit cases, the Supreme Court has extended the benefit of the Act to Prevention of Food Adulteration cases also.[159]

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[156] The age became relevant since under the Probation of Offenders Act, in section 6, there is a restriction on imprisonment of offenders under 21 years of age, except in cases where life imprisonment can be imposed

[157] 1974 Cri.L.J. 313, 322

[158] See also *Prem Ballab* v. *State (Delhi Admn.)*, AIR 1977 SC 56; *Jai Narain* v. *Municipal Corp. of Delhi*, AIR 1972 SC 2607

[159] *R M Nayak* v. *State of Maharashtra*, AIR 1981 SC 1776

In *Jugal Kishore* v. *State of Bihar*,[160] the Supreme Court observed that the object of the Probation of Offenders Act is to prevent the conversion of youthful offenders into obdurate criminals as a result of their association with hardened criminals of mature age in case they are sentenced to undergo imprisonment in jail. The appellant in this case was charged with offence under section 326 read with section 149, which, he contended that, is punishable not only with imprisonment for life but also imprisonment which may extend to 10 years and so, the benefit of section 6 of the Probation of Offenders Act should be invoked. The Court refused to accept this view and dismissed the appeal.[161]

In *State of Haryana* v. *Prem Chand*,[162] the Supreme Court gave the benefit of probation under section 360 Cr.P.C. to a person convicted for attempt to commit rape by taking the punishment of attempt to commit rape as 10 years, by taking life imprisonment to be RI for 20 years as per section 57 IPC and then by virtue of section 511, taking its half, i.e. 10 years as the punishment for the offence.

It may be pertinent to point out that the Courts are to use their discretion judicially and having regard to the age, character of antecedents of the offender, and to the circumstances in which the offence was committed.[163] It has been held in *Budhram* v. *State of Rajasthan*,[164] that mere prescription of a minimum sentence is not a bar to the applicability of the provisions of sections 360 and 361 of Cr.P.C. The courts have been consistent to extend the benefit to those under 21 years of age.[165]

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[160] (1972) 2 SCC 633

[161] See also *Som Nath Puri* v. *State of Rajasthan*, AIR 1972 SC 1490 where the question was the benefit of section 4 in a similar situation

[162] (1997) 7 SCC 756

[163] See observations in *Dilbag Singh* v. *State of Punjab*, (1979) 2 SCC 103; *Hari Singh* v. *Sukbir Singh*, (1988) 4 SCC 551

[164] AIR 1996 Raj. 52. See also *State* v. *Ratan Lal Arora*, (2004) 4 SCC 590

[165] *Abdul Cavus* v. *State of Bihar*, AIR 1972 SC 214; *Satya Bhan Kishore* v. *State of Bihar*, AIR 1972 SC 1554

In *Arvind Mohan Sinha* v. *Amulya Kumar Biswas*,[166] the question was whether the Act can apply to offences under the Customs Act 1962. The Supreme Court held that the words of section 4 (1) of the Probation of Offenders Act are wide enough and would include offences under the Customs Act also. But, in *State of Maharashtra* v. *Kapur Chand Kesari Mal Jain*,[167] the benefit of the Act granted by the High Court was disallowed by the Supreme Court on the ground that under section 4, nature of the offence is one of the criteria for determining award of benefit, so would be the age and the circumstances in which the offence is committed. The court decided as it did since none of these factors favoured the accused.

In *Bishnu Deo Shaw* v. *State of West Bengal*,[168] the Supreme Court after holding that sections 360 and 361 are mandatory in nature, expressed the opinion that the special measures contained in section 361 must be such as to compel the court to hold that it is impossible to reform and rehabilitate the offender after examining the matter with due regard to the age, character and antecedents of the offender and the circumstances in which the offence was committed.[169]

Justice to Victims

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[170] defines victims as persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within a

[166] 1974 Cri.L.J. 885
[167] AIR 1981 SC 927
[168] (1979) 3 SCC 714
[169] See for a discussion of application of section 361 and its problems, RV Kelkar's Criminal Procedure, Revised by Dr. K.N. Chandrasekharan Pillai, 4th ed., Eastern Book Co., Lucknow, 2001
[170] G.A. 40/34, annex, 40 U.N. GAOR Supp. (No. 53) at 214, U.N. Doc. A/40/53 (1985). See generally *International Faces of Victimology*, Sarah Ben David and Gerd F. Kirchoff Eds., WSV Publishing, Monchengladbach, FRG, 1992 for the Papers and Essays at the VIth International Symposium on Victimology in Jerusalem, 1988

country, including those laws proscribing criminal abuse of power. The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

It prescribes that victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered. It specifically prescribes that the offender should restitute the victim and where it is not possible for the victim to get it from him, the State should be obligated to compensate for the sufferings of the victim. It has envisaged the establishment of national funds for this purpose.

The Malimath Committee has recommended a series of rights to the victim including the right to prefer an appeal against any adverse order passed by the court acquitting the accused, convicting for a lesser offence, imposing inadequate sentence, or granting inadequate compensation and legal services to victims in select crimes may be extended to include psychiatric and medical help, interim compensation and protection against secondary victimization.

It observes that victim compensation is a State obligation in all serious crimes, whether the offender is apprehended or not, convicted or acquitted. This is to be organized in a separate legislation by Parliament. Consideration and the creation of the Victim Compensation Fund to be administered possibility by the Legal Services Authority. These are encouraging recommendations.

The recommendations of the Malimath Committee takes care of all the aspirations of the international community in this area. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power also projects rights based to approach to it.[171] So does the Resolution of the United Nations Human Rights Commission on the rights to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental

[171] UN Doc A/40/53 (1985)

freedoms[172] as well as the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides that the views and concerns of victims of crime should be presented and considered at appropriate stages in the proceedings, that victims should be provided proper assistance throughout the process, that they should suffer only minimal inconvenience, in particular with regard to their privacy, and that unnecessary delays should be avoided in the proceedings.[173] It also states that victims of crime should obtain prompt redress through expeditious, fair, inexpensive and accessible procedures.[174] Offenders should make fair restitution to victims, their families or dependants and governments should consider restitution as an available sentencing option.[175] When compensation is not fully available from the offender or other sources, the State should provide monetary compensation.[176] Victims of human rights violations have a right to adequate compensation, proportionate to the gravity of the violation and the harm suffered.[177] But, ensuring a just dessert is as important as getting compensation. Victims of human rights violations have a right to an efficient remedy as provided for in Article 2 (3) of the ICCPR, which implies that the victim of the violation should have access to a remedy which can lead to the punishment of those responsible.[178]

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[172] Commission on Human Rights Resolution 2003/04

[173] Principle 6; see also Principle 10 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law

[174] Principle 5

[175] Principles 8

[176] Principles 12 and 13

[177] Concluding Observations of the Human Rights Committee: Brazil, 24 July 1996, CCPR/C/79/add.66, paras 20; *Papamichalopoulos* v *Greece*, ECtHR, (Article 50), Series A No 330-B, para 34

[178] Human Rights Committee, General Comment 6, Article 6, para 3; General Comment No 20, Article 7, UN Doc. HRI\GEN\1\Rev.1 at 14 (1994), para 13, 15; *Nydia Erika Bautista* v. *Colombia*, CCPR/C/55/D/563/1993, 13 November 1995, para 8.6; *José Vicente y Amado Villafañe Chaparro, Luis Naploleón Torres Crespo, Ángel María Torres Arrozo y Antonio Hugues Chaparro Torres* v. *Colombia*, CCPR/C/60/D/612/1995, 20 July 1997, para 8.8. Concluding Observations of the Human Rights Committee – Brazil, 24 July 1996,

Conclusion

It could be said that the study so far gone through suggests that the country's system is on the right track towards the implementation of international norms. There has been direct and indirect effect on the formulation of the system. There are areas for improvement especially, in the recognition of non custodial measures and institutionalisation of payment of compensation. It is expected that the process being a continuous one, it may not be long before things fall in line in accordance with the international norms.

CCPR/C/79/add.66, para 8.]. Although personal immunity may be legitimate for some cases, and although immunity for magistrates should even be the norm as it is a safeguard to preserve their independence and impartiality [Principle 16 of the Basic Principles on the Independence of the Judiciary, UN Doc A/CONF.121/22/Rev.1 (1985)], it is not, in general compatible with the right of the victim to an effective remedy for grave human rights violations. See with benefit the ICJ Position Paper

CHAPTER VII

CONCLUSIONS AND SUGGESTIONS

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

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

Characteristically, the States either refused to recognise the possibility of a world order or stuck to the theory of dualism on the strength of the concept of sovereignty. Hardly any State adhered to the principle of monism, and if at all they did, as in the case of United States when it formulated its Constitution, was due to historical necessities. Of course, in those days world order was not even worth the name and, therefore, it could easily be accommodated for their nationalist gains. Dualism or monism, it is a fact that cannot be ignored that there is an international community and there is an earnest effort to set up a world order. The concept of sovereignty has become diffuse from the times democracy took over as the form of government in many States. As a necessary corollary, the standing of an individual within the international community has

also undergone a sea change. Earlier, when the concept of sovereignty was reigning supreme, only a State and its sovereign were considered as subjects proper of the international relations. One might even say that it is these individual rights that have got predominance now and the recognition of States is relatable to protection of such rights.

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

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

In the recent past, human rights norms have been generated at a brisk pace. This is one area that affects sovereignty to the core. It imposes positive obligations on the States to protect individuals and negative obligation by prohibiting violation of human rights by the State organs.

We have seen that the creation of norms is not confined to treaties. Treaties, of course, are the major mode of such creation, since they impose direct contractual obligation. If it is a multilateral treaty, the obligations are undertaken by acceding to the treaty and its ratification. Norms created otherwise than by a treaty are the first steps towards the formal acceptance of the same by the world community, possibly at a later date. However, merely because the form or the source of norms is not the traditionally recognised one does not mean that such norms do not have sanctity. In fact, many States, as we learnt, prefer to show ready adherence to this soft law since its obligations are not burdensome as that of treaties and it facilitates a smooth transition from the existing to the expected standards.

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

When it comes to implementation, probably because of the diverse points of view prevalent among States, the international community has not yet been able to evolve any specific procedure for the same. The problem of varying characteristics of the norms, as mentioned earlier, is the major hindrance to any such attempt. Wisely for now, the community has left it to the States to decide the question till a pan world acceptable procedure can be agreed upon. In a sense, this has pushed back the theory to that supremacy of sovereign. But, of course, as mentioned earlier, the sovereign, whichever form it be, is considerably influenced by the developments around it. The approaches of individual countries had to be deciphered from the system prevalent in each State.

To begin with, as we understood the common law position as followed in the United Kingdom and most of its erstwhile colonies are that sovereign is supreme and it is left to decide the question of implementation of obligations at the international level. When the question comes to the courts, it developed the principle that the sovereign is presumed not to intend to violate such obligations. Thereby the courts take the freedom to choose an interpretation of domestic law provision that is in consonance with such international obligations. But, if the sovereign has categorically refused to comply with the same, the courts have held that there must necessarily be adherence only to domestic law. In the United Kingdom itself, however, the passing of the Human Rights Act 1998 has ensured that the legislature ensures compliance with the standards set by the European Convention on Human Rights. By virtue of the Act, though it is only the superior courts that have been conferred with the power to declare incompatibility of a given provision with a Convention right, interpretations have given a larger role to lower courts also in implementation.

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

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

Unlike others, countries with written constitutions have something to refer to initially. Their approach is to be understood by looking at the constitutional provisions and the sanctity they attach to international obligations.

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

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

countries with lower share of contribution to the budget of these international bodies to make constructive criticism of the powerful.

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

Be it India or elsewhere, the law in action can be understood only by the judgment of the courts. The courts in the United States have swung between different views on recognition of international norms depending upon the mood of the administration of the day. While in the initial days of the Constitution, it gave interpretations taking note of the international developments through its constitutional provisions, lately it has also been giving undue credence to the reservations attached to by the executive or the legislature. It has managed adherence to such standards to a large extent by interpreting the provisions of the Constitution, and more particularly the amendments thereto, which have conferred similar rights upon the people. As we have seen, there is also an allegation that the US Supreme Court is harsh when it comes to federal interference in state matters whereas while the same is done at the instance of an international obligation, they are unduly lenient in recognising its constitutionality, which is a cause of worry for those favouring strong states.

The constitution makers of South Africa recently considered it more appropriate to leave certain matters to the courts while charting out the rights under their constitution. They went to the extent of getting the approval of courts to the document before adopting the same. As a special mention on criminal justice administration, it left the important question of the abolition of death penalty for the courts to decide and immediately the highest court of the land did declare death penalty to be unconstitutional.

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

In India, the courts followed the British policy of incorporation and interpretation favouring adherence to international norms where not specifically denunciated. Lately, however, the Supreme Court has been vibrant in accepting that international norms can be recognised on their own standing in tune with the protection envisaged under the Constitution. Earlier, due to the fact that our Constitution drafters were working in the light of international developments culminating in the Universal Declaration of Human Rights of 1948, the courts felt that, for us, the constitutional provisions takes care of what is sought to be protected by the international norms. It being true, as seen from the debates in

the Constituent Assembly. It shows us as to how we understood the various provisions, especially the fundamental rights, as adopted by our Constitution. Later, however the courts have been more forthright in drawing inspiration and strength from the international norms directly rather than looking at them through the glasses of the various articles in the Constitution. This has been magnanimously done in the context of recognition of violation of human rights in the post *Maneka* scenario. The major chunk of them has been in the area of criminal justice administration to which the study is confined.

In the light of the international norms, the courts in India have held that the human rights are available to all people. The initial rub for an individual alleged to have violated the criminal law comes at the stage of arrest and detention. This is one area that has caught the attention of the courts due to the instances of flagrant violations by the law enforcement authorities. Irrespective of the culpability of the persons or availability of evidence, it was customary for such authorities to pick up a person in the name of interrogation. The definite purposes for which arrest could be made have been repeatedly reiterated by the Supreme Court lately. It was necessitated for the reason that custodial violence reached its peak. The worsening situation of the law and order problem in the country had ensured that public opinion against such excesses by authorities was muted in the name of security and safety of citizens. The problem of terrorism and the damage they caused had to a certain extent justified the actions of the law enforcement authorities at least in areas infested with such violators of law. However, experience has shown that, along with the so called dreaded terrorists, the innocent were also at times at the receiving end. This has prompted the courts to step in and ensure that sense prevails in dealing with such situations. It is interesting to note that the international norms laid for the protection of those facing detention have been totally accepted and reinforced by the Supreme Court in the area. Almost all the rights protected under the international norms have been referred to by the Apex Court as forming part of Article 21 of the Constitution of India. The fact that preventive detention ought to be resorted to

for the specific cases covered under the provisions and the protection extended under the Constitution and the statutes have been required to be scrupulously guarded. Though specific legislation to deal with some of the grave offences affecting the public like terrorism have made some deviations from the normal course expected, the courts have for now considered them to be a necessary power. However, it may be safely noted that as and when the situation would so require the courts would come to the rescue of those oppressed by such laws. Probably, the other organs of the state being more privy to the requirements of the situation, the courts have for now refused to strike down some of the provisions on the ground that a mere possibility of abuse cannot be taken as a justification for striking down of such provisions. In the process, we have also seen that, within the legislative framework, the courts have been requiring safety measures to ensure that the grasp of law does not violate the human rights of persons. It ought to be said that the courts have been trying to strike a delicate balance between the rights of the individual and the collective rights of the citizens as protected by the State.

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

law enforcement agencies and where a violation is seen exemplary punishment is ensured after a proper investigation and fixing of responsibility.

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

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

On the matters like search, bail and handcuffing, being resorted in the pre trial stage, the courts, especially the Supreme Court has been very harsh on coming down upon the authorities. It has laid down guidelines to be followed which are more in tune with the international norms. Right to counsel has been read into Article 21 prompting even an amendment to declare it as a constitutional right. The right to counsel would have to be made meaningful and complete by ensuring it in all cases including grave offences, even at the expense of the State, for the standards of international norms to be achieved. This is one

area that should not be allowed to be compromised with since, on it hinges the basic rights of a human being.

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

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

On the principles of *ex post facto* laws and double jeopardy, being recognised as constitutional protection, we are on the right side of international norms. Our experiments with juvenile justice administration have borne fruit. It is encouraging to find that the process of refinement continues. Similarly, speedy trial, after being recognised as a facet of Article 21, has also attained an important status. We need to consolidate on the same and take necessary procedural corrections to ensure that they become meaningful. The relaxation of concept of *locus standi* in criminal justice administration has to a large extent ensured that the voices of the poor and downtrodden have been taken to the highest courts of the land.

We are similarly on track with the international norms on another facet of proper administration of criminal justice with the idea of witness protection gaining attention. As seen, even the Law Commission has come out with a consultation paper as a first step towards the integration of the same to the law of the land. The objections raised hitherto of the administrative hindrances would soon lose their relevance if the matter is pursued in right earnest as is being done now. We are sure that we would be in a position to strike a balance between the interests to be protected here with that of the interest of the accused. The trial stage has by and large ensured that the present position is largely in consonance with the requirements with the international norms.

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

There is, however, a lot to be done in the area of developing non custodial measure that are recognised by the international community as alternatives to conventional punishment favouring a smooth reintegration of a deviant to the society. Though some of them were attempted the last time a comprehensive re-

enactment of the Penal Code was attempted, it requires a fresh look now in the light of the recommendations in the international norms.

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

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

At the international level -

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

- The courts, both supranational and municipal, should be recognised as major centres for implementation of such norms as they are concerned with the law in action;
- The international norms should be considered at par, if not superior, and must be given direct effect without waiting for any legislation by the municipal legislature;
- The complaint procedure, at the international level, ought to be recognised to ensure that the States comply with these norms;
- A comprehensive review should be had of the existing structures.

At the national level –

- The country should have a policy evidencing its attitude towards the international norms;
- The fact as to whether the country has accepted most of the norms either directly or indirectly in its constitution, which should be clarified in such a policy;
- The participation of the country in such international bodies for the purpose of norms creation should be prefaced with necessary consultations at the national and regional levels;
- Rather than leaving it for the courts to go for piecemeal implementation of the norms on a case by case basis, there must be comprehensive attempt to delineate the rights and protections recognised by us;
- The authorities must be educated about the values of human rights norms and their importance for the State;
- In the light of the decisions of the courts, it must be considered as to whether legislation would be required in such areas to specifically codify the rights that have been identified;

- The rules and regulations to be followed by the law enforcement agencies ought to be codified and any violations should be dealt with seriously by prescribing severe penalties for the same;
- Rules of practice should be formulated by the State for the authorities to refer to and follow;
- The inherent laches in the system should be adequately addressed by remedial measures;
- A policy of witness protection ought to be formulated and it must be ensured that the law is concerned about proper criminal justice administration from the other side of the spectrum lest the society should lose its faith in the system;
- A thorough overhauling of the codes in the area of criminal law ought to be made to reflect the changing position as far as accused's rights and the rights of others involved in the process are concerned;
- A sentencing policy and the guidelines for the same ought to be formulated with just desserts reflecting the gravity of the crime;
- Non custodial measures ought to be given due importance and statutorily recognised as a measure of reformation and rehabilitation of offenders;
- There must be a policy on compensation as a remedy, as recognised by the courts rather than leave it for piecemeal considerations; it should reflect various aspects including the gravity of the offence, the position of the accused, the state of the victim or his/her family and the failure of the State in protecting his/her rights;
- As suggested already, a fund should be created to take care of the needs of the victims so that it does not depend upon the paying capacity of the convict;
- All in all a thorough reconsideration of the legal position would have to be made to ensure compliance with the international norms.

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