IMPLEMENTATION OF TREATISE AND THE ROLE OF JUDICIARY

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*The world has grown from a war stricken era to an era of cooperation and collaboration. Thus with the dawn of globalization no country can progress in isolation leading to a need for mutual respect and faith amongst different countries. India too after the advent of the liberalization, globalization and privatization post 1991 has also been drawn into this web of globalization.**[1]** This has resulted in signing of a number of treaties with different countries. While earlier it was more in nature of bilateral treaties with more emphasis on the foreign affairs and boundary determination, presently it has transgressed these contours and digressed into the areas of human rights,economic affairs, environment affairs,energy, patents and such other diverse fields.*

Through this article we proceed to study the impact treatise and conventions have played in the evolution of the Indian jurisprudence. The most important contribution has been by the judiciary through its various pronouncements. In this article we analyze through the study of various judgments how courts have incorporated the treatise. The policy of the judiciary has been changing over the years and critical study is undertaken to understand this changing attitude of the courts.

Introduction

The term treaty denotes an agreement entered into by two sovereigns. There are a number of ways in which the process can begin. After negotiation the representative of each government signs a treaty. A signed treaty is not binding on the international law. But the customary principle of *Pacta sund servanda* is now formally recognized under international law.[2] Ratification is a process whereby the country indicates that it accepts a treaty as binding on international law. Upon ratifying a treaty, a country is bound by the treaty at international law.[3]

Treaties are of two kinds, first category treaties are those which become binding as a result of signatures affixed at the completion of the negotiations. Then there are treaties which require a further step to be taken after the text has been established by signature before the treaty will take effect, whether by way of ratification or by legislation, as the case may be. Generally there are some countries which operate according to a ***monist model*** (for example, in the United States, once Congress ratifies a treaty it is, in principle, enforceable in U.S. law) and there are some which operates according to a ***dualist model***: a treaty that has been signed and ratified by the executive still requires incorporation through domestic law to be enforceable at the national level.[4]

India follows a dualist model. The treaty making has been invested with union under Article 246 and Entries 13 and 14 of List I. While Article 253[5] empowers the Parliament 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." However since no legislation with regard to treaty making has been made under Article 73 it lies with the executive. Thus a perusal of the constitutional provision shows that the power of treaty making lies within the authority of the executive and the power of making the law with the legislature. The judiciary thus has not been granted any power with regard to the implementation of the treaty, but the courts have played a significant role when it comes to the incorporation of the treaty within the domestic laws. And we can understand this through the study of various judicial pronouncements. For convenience the judgments have been grouped into various phases the first being the phase of judicial restraint.

In the early phase of judicial interpretation the courts were clear and held that a treaty entered into by India cannot become the law of the land and it cannot be implemented unless the Parliament passes a law as required under Article 253 of the Constitution.[6] The judiciary was confronted with the predicament with parliament making no law. This can be seen in *Jolly Verghese* v. *Bank of Cochin*[7],on the question whether when personal freedom of the judgment-debtors can be held to ransom until repayment of the debt. It was challenged that this violates the provision of Article 11 of the International Covenant on Civil and Political. Justice V.R. Krishna Iyer J speaking for the court held: *"India is now a signatory to this Covenant and Art. 51(c) of the Constitution obligates the States to "foster respect for international law and treaty obligations in the dealings of organized peoples with one another".* Even so, until the municipal law is changed to accommodate the Government what binds the court is the former, not

the latter. From the national point of view the national rules alone count……with regard to interpretation, however, it is a principle generally recognized in national legal systems that, in the event of doubt, the national rule is to be interpreted in accordance with the State's international obligations. According to these decisions, the treaties entered into by the Union of India do not become enforceable at the hands of our courts and they do not become part of our domestic law.

Thus the court here was reluctant in applying the international principles into the municipal laws. But this started shifting in the later decision of the courts,[8]here the courts came up with the reasoning that if the law is unclear or unambiguous then the international treaty obligation can be considered to understand the meaning of the legislature. The doctrine of incorporation recognizes 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. Thereby the court slowly started accepting international law even without any specific domestic legislation incorporating the law.

Thus the role of judiciary has been minimal and restricted when it came into the interpretation of treaty which has not been incorporated into the Indian Law. However this restraint was slowly loosening in the phase of judicial activism. The period of public interests litigation and judicial activism saw a change in the judiciary this is reflected in various decisions during this period. In *Nilabati Behera vs. State of Orissa**[9]***, a provision in the International Covenant on Civil and Political Rights, 1966 was referred for the enforcement of a guaranteed right as a public law remedy under Article 32. The court held that, *"There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity.*" Thus the court incorporated the right to compensation within Article 32 which was a revolutionary move. Here the court found legal justification from the provision under the ICCPR.

In *C MasilamaniMudaliar and others v. Idol of Sri SwaminathaswamiThirukoil and others**[10]***, the Supreme Court while deciding on the property rights of widow readily accepted the incorporation of international obligation into the Indian legal system. The Court held that as India is a party to Convention on the Elimination of All Forms of Discrimination Against Women 1979 ,the rights guaranteed by the Convention can be availed to the petitioner. The Court observed that existence of Protection of Human Rights Act 1993 means that the principles in CEDAW are enforceable in India. In *MadhuKishwar and others v. State of Bihar and others*[11], even though India has reserved some provisions of CEDAW the Court held that international conventions would apply. The Court observed "these conventions add urgency and teeth for immediate implementation. It is therefore imperative for the state to eliminate obstacles, prohibit all gender based discrimination as mandated by Article 14 and 15 of the Constitution of India. By operation of Article 2(f) and other related articles of CEDAW the state should by appropriate measures including legislation modify law and abolish gender based discrimination in existing laws, regulations, customs and practices which constitute discrimination against women."

These decisions indicate not only recognition of an International Covenant ratified by India but also a readiness to ignore the reservations appended by our country while ratifying the Convention. The phase saw its pinnacle in *Vishaka* v *State of Rajasthan**[12]***,where the court ruled that international conventions signed by the Government of India that are consistent with the spirit of the fundamental rights, even though not exactly in terms of letters of the Constitution, can be read into fundamental rights, although the union and state legislatures may not have passed an implementing legislation to that effect. The Supreme Court laid down guidelines and norms to be observed to prevent sexual harassment of working women. The Court observed *"Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right. The common minimum requirement of this right has received global acceptance. The International Conventions and norms are, therefore, of great significance in the formulation of the guidelines to achieve this purpose*."

In *D.K Basu v. State of West Bengal*[13] the Government of India had acceded to and ratified the International Convention on Civil and Political Rights, 1966. Article 9(5) of the said Convention declares that "anyone who has been the victim of unlawful arrest or detention shall have enforceable right to compensation". The Government of India had, however, made a reservation to this clause while ratifying the said Convention saying that Indian law does not recognize any such right. The Supreme Court however opined that *"That reservation, however, has now lost its relevance in view of the law laid down by this Court in a number of cases awarding*

compensation for the infringement of the fundamental right of a citizen. [14] The court thus slowly moved towards interpreting international laws for the purpose of upholding the rights of the citizens. In *Entertainment Network (India) Ltd. v Super Cassette Industries Ltd**[15]*** the matter was with relation to copyrights. The court while deciding the matter held that, "*applicability of the International Conventions and Covenants, as also the resolutions, etc. for the purpose of interpreting domestic statute will depend upon the acceptability of the Conventions in question. If the country is a signatory thereto subject of course to the provisions of the domestic law, the International Covenants can be utilized. Those Conventions to which India may not be a signatory but have been followed by way of enactment of new Parliamentary statute or amendment to the existing enactment, recourse to International Convention is permissible. Furthermore, as regards the question where the protection of human rights, environment, ecology and other second-generation or third-generation rights is involved, the courts should not be loathe to refer to the International Conventions."*

This in short outlines the judicial attitude towards international Conventions. From the restricted approach in the *Jolly Varghese Case,* the courts has adopted a more liberal and have radically used the conventions in various spheres of law. However it has also resulted in the erosion of separation of power. This has lead to recent phase of Judicial rethinking.

The Court subjected itself to certain restriction and the liberal interpretation of the courts in applying international principles were reconsidered by the courts themselves. In *State of West Bengal v. Kesoram Industries Limited &Ors*[16] the Constitution Bench was concerned with questions of constitutional significance with regarding taxing provisions as also the extent and purport of the residuary power of the legislation vested in the Union of India. The Constitution Bench held that a treaty entered into by India cannot become the law of the land and it cannot be implemented unless the Parliament passes a law as required under Article 253 of the Constitution. In *Selvi v. State of Karnataka*[17], a three-Judge Bench of the Hon'ble Supreme Court has observed that even though India is a signatory to a particular Convention, so long as it has not been ratified by Parliament in the manner provided under Article 253of the Constitution and so long as we do not have a national legislation, which has provisions analogous to those of the Convention, its automatic enforcement does not arise. It is, however, further held that the Convention has significant persuasive value since it represents an evolving international consensus on the nature and specific contents of human rights norms. Another recent decision of the court in*Gulf Goans Hotels Co. Ltd. vs Union Of India &Ors*[18] the court were again reluctant to apply the international treaty into the municipal laws. In *P Geetha v. The Kerala Livestock Development Board Ltd.**[19]***,* High Court of Kerala observed "In the face a particular legislative field having been occupied by an extant domestic enactment, the International Law conventions and treaty obligations cannot be enforced through Municipal Courts, though they have considerable persuasive value in interpreting the Municipal Law."

Thus there has been a more cautious approach taken by the court in these cases. The Court has acknowledged that making the treatise the law of the land lies within the powers of the Legislature. Hence an unbridled application of treatise and convention through judicial pronouncement would result in the violation of separation of power. In the earlier times the court took a restrictive stand that treaty cannot be enforced directly into the Indian legal system. Later when confronted with human rights matters, courts adopted a liberalized stand. Courts accepted the principles laid down in international conventions. The courts have to ensure that the people receive justice; to guarantee this they have successfully incorporated treaty provision. As seen these convention were successfully incorporated in ensuring free and fair justice. However this should not be used without caution. The constitution has clearly demarcated the powers of the various organs of the state. Such practices by the court would violate this separation of power.

Recently though courts have been more cautious in its approach. As seen in many recent judgments they have acknowledged that for a treaty to be the law of land it must be enacted by the legislature. Nevertheless in matters such as human rights and environment the court may refer to these conventions if it is imperative. However it must be an exception and not the rule.

[1] National Commission to Review the Working of the Constitution : A Consultation Paper on Treaty Making Power under our Constitution http://lawmin.nic.in/ncrwc/finalreport/v2b2-3.htm

[2] Shaw, Malcolm N.. *International Law*. 6th ed. Cambridge: Cambridge University Press, 2008.

[3]Anil R Nair , *Treaty Making Power:A comparative perspective* , 26 C.U.L.R 2002

[4] Supra note 2

[5]Article 253 is one of those set of Articles, which provide certain exceptional situations in which the Parliament can legislate with respect to matters in the State List.

[6]*MaganbhaiIshwarbhaivsUnion of India* 1970 3 SCC 400, *Xavier v. Canara Bank Limited* 1969 KLJ 927

[7] 1980 SC 470 AIR where the appellants were the judgment-debtors while the respondent-bank was the decree-holder. In execution of the decree a warrant for arrest and detention in civil prison was issued to the appellants judgment-debtors and in consequence all their immovable properties had been attached for the purpose of sale in discharge of the decree- debts.
[8]*M/s. V/O. Tractoroexport Moscow v. M/s. Tarapore& Co., Madras &Anr* AIR 1971 SC 1, *Gramophone Company of India Limited v. BirendraBahadurPandey&Ors*AIR 1984 SC 667
[9]1993 (2) SCC 746
[10]AIR 1996 SC 1697
[11]AIR 1996 SC 1864, In *People's Union for Civil Liberty v. Union of India* 1997 (3) SCC 433 the court took the same view.
[12]1997 (6) SCC 241
[13]1997 (1) SCC 416
[14] See *Rudal Shah v. State of Bihar*, *Sebastian M. Hongray v. Union of India*, *Bhim Singh v. State of J &K, NilabatiBehera v. State, S Jagannath v. Union Of India* 1997 (2) SCC 87
[15](2008)13SCC30
[16]2004 10 SCC 201,*Karan DileepNevatia v. Union of India* 2010 (1) BomCR 588
[17](2010) 7 SCC 263
[18] Civil Appeal No.3434-3435 OF 2001 decided of Sept 22,2014
[19] Decided on 06/01/2015 by Kerala High Court