

## CHAPTER – V

### THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW WITH BRIEF ACCOUNT OF STATE PRACTICES (OTHER THAN INDIA) IN THIS REGARD

#### 5.1 Introduction:

Since the focus of the study is on ‘Domestic Application of International Human Rights Law in India, nothing is more essential to a proper grasp of the subject than a clear understanding of the Relationship between International Law and Municipal Law. It clarifies the nature, scope and extent of application/enforcement of International Human Rights Law in the domain of municipal sphere.

Where a State is a Party to an International Treaty (such as human rights treaty) which has entered into force, the question arises whether and how the provisions of that treaty can become part of the State’s own domestic law, viz., whether and how the obligations undertaken by the State on the international plane, which in substance for the benefit of the individuals within its domestic jurisdiction, can become transformed into obligations owed directly to those individuals within its own domestic legal system. That question involves the relationship between international law and domestic law, which has been the subject of a longstanding debate between two schools of thought among academic writers, who call themselves as ‘dualists’ and ‘monists’ respectively.

#### 5.2 Theories as to Relationship Between International Law and Municipal Law- Dualism & Monism:

*Dualists* see International Law and Municipal Law as distinct and separate – arising from different sources, governing different areas and relationships, and different in substance. According to Dualists, international law is inferior to and weaker than, domestic law. If international law ever becomes part of domestic law, that can only be because domestic law, has chosen to incorporate it.

*Monists* on the other hand contend that there is only one system of law, of which international and domestic laws are no more than two aspects. They justify this by claiming that both of them govern sets of individuals (States being seen for this as

collection of individuals) both are binding, and both are manifestations of a single concept of law. Hence international law is superior and stronger, as it represents the system's highest rules – jurisdiction on a domestic level being only delegated to states, which cannot avoid being bound to apply international law at the domestic level. So, if domestic law anywhere conflicts with international law that is the State's fault, and will not excuse the State's obligations.<sup>1</sup>

Viewed on the international plane, the dispute between these two schools of thought is indeed academic. “Formally international and domestic law as systems can never come into conflict. What may occur is something strictly different, namely a conflict of obligations or an inability for a state on the domestic plane to act in the manner required by international law”. It is well settled that international law will apply to a state regardless of its domestic law and that a state can not in the international forum plead its own domestic law, or even its domestic constitution, as an excuse for breaches of its international obligations.<sup>2</sup>

Viewed on the domestic plane, however, the dispute is not merely an academic one, for the two schools of thought lead to very different results. Whether international law forms part of domestic law is a question, which in practice, is decided either by the Constitution or a Statute or by the domestic Courts of each State.

*Monists* say that it will always form such a part; dualists, that it will form part only if the domestic law has expressly as impliedly incorporated it. In fact, many States expressly accept international law as part of their domestic law, leaving academicians to debate whether the acceptance was necessary or superfluous. But others do not.<sup>3</sup>

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<sup>1</sup> S.B. Sinha J., “A Contextualised Look at the Application of International Law – the Indian Approach”, *AIR Jour*, 2004, p.33. M. Sivaraman, “Role of Indian Judiciary in Harmonising Municipal Law with International Law”, *AIR, Jour.*, 2003, at 211-12.

<sup>2</sup> Advisory Opinion on Exchange of Greek and Turkish Populations PCDJ, series B, No. 10, 20. Advisory opinion on the Treatment of Polish Nationals and other persons of Polish Origin or Speech in the Danzing Territory, PCIJ, series A/B, No. 44, 24; Free Zones of Upper Savoy and District of Gex case, PCIJ, Series A/B No. 46, 167. See also Alabama Claims Arbitration, Moore 1 Int. Arb. 445 at 456; and the International Draft Declaration on Rights and Duties of States 1949, (YB ICC 1949, 246:288), Article 13: Every state has a duty to carry out in good faith its obligations arising from treaties and other sources of international law, and may not invoke provisions in its own constitution or its laws as an excuse for failure to perform this duty’. This formulation was later commended by the U.N. to its Members in U.N.G.A. Resolution 375 (iv).

<sup>3</sup> Paul Seighart “The International Law of Human Rights”, Clarendon Press, Oxford, 1983, Pp. 40 – 41.

Where international law becomes incorporated in a State's domestic law without the need for specific legislation, those parts of it, which are sufficiently explicit to be enforceable by the domestic courts, are known as 'self executing'.<sup>4</sup>

Some States provide by their Constitutions that certain provisions of international law shall be self-executing. For example, the Constitution of the U.S.A., provides that international treaties are part of the law of the land.<sup>5</sup> Other countries have gone even further by not only making international law self executing, but assigning to it a rank in the domestic hierarchy superior to all prior and subsequent legislation. Examples of this are France and Germany.<sup>6</sup> But there are other States that do not accept any international law as self-executing, or so accept it in part. For example United Kingdom (U.K.).

Where International Law and Domestic Law coincide, there is of course no problem. But if they differ – either because international law imposes an obligation on a State which is not reflected in its domestic law, or because obligations imposed by international law and domestic law respectively conflict with each other in a particular case – a domestic court will generally have to apply the following rules.<sup>7</sup>

(1) Where the domestic legal system is founded on a dualists view, and the obligation under international law has not become self-executing under a standing provision of the domestic law or been expressly re-enacted in that law, the court must follow the domestic law and ignore the international law. (In U.K. where the legal system is entirely dualist and there are no provision for self-execution), U. K. courts are not entitled to take into account provision of international treaties if the legislature has not expressly enabled them as part of domestic law though U.K. is bound by treaty provision.

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<sup>4</sup> Robertson would prefer the phrase 'directly enforceable' see Human Rights in Europe, 29 cited in Paul Seighart, *Supra note 3*.

<sup>5</sup> Article VI Section 2: This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

<sup>6</sup> Article 55 – Constitution of France, 1958, says, "Treaties or agreements duly ratified or approved shall, upon their publication have an authority superior to that of laws, subject for each agreement or treaty, to its application by the other party. Germany – Basic Law of 8 May 1949, as amended on 1<sup>st</sup> Jan. 1966, Art. 25; "The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory".

<sup>7</sup> Paul Seighart, *Supra note 3*, Pp. 41–42.

(2) In any other case, the court must have regard both to international law and to domestic law. If there proves to be a conflict between them, the court must follow any rules of domestic law that prescribe which of them is to prevail.<sup>8</sup>

(3) If there are no such rules, it will probably be because the domestic legal system is founded on the monistic view, and so international law will prevail.<sup>9</sup>

Unfortunately, however, existing legal theories concerning such application of international rights tend to belittle both the judicial agency and the desirability of judicial participation in implementing even relatively uncontroversial international rights at domestic levels.

The existing pattern of marginalization of domestic enforcement of International Human Rights Law is deeply rooted in a naïve exploration of the theory of relationship between domestic law and international law. The monists theory rightly contemplates International Law and Domestic Law as just two manifestations of one singular concept, “Law”. As such the judiciary in a monist country is ideally in a position to directly apply international human rights norms. By contrast, unincorporated international human rights treaties are considered as only having ‘persuasive’ and not ‘binding’ authority for judiciaries of dualist tradition, although as regards customary international law most dualist court follow, if more theoretically than practically, a notionally monist tradition of recognizing customary international human rights as directly applicable part of national laws.<sup>10</sup>

The traditional divide between ‘binding’ and ‘persuasive authority’ of international human rights norms simply holds the possibility that a judge may if he/she so wishes, draw on those norms to inform his/her decisional reasoning. The approach does not focus on the obligations that a state assumes by becoming a party to an international convention, or under higher, general international principle; nor does it articulate to refer, at the minimum, to those international legal sources of state obligations. In short the existing dualist model, in its uncritical applied mood,

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<sup>8</sup> For example France and Germany.

<sup>9</sup> Paul Seighart, *Supra note 3*, Pp. 41 – 42.

<sup>10</sup> This 18<sup>th</sup> Century English Common Law proposition is often (in fact automatic incorporation) that consider customary international as directly applicable without parliamentary intervention as apposed to the ‘theory of transformation’ that does not consider customary rights as part of domestic law unless they are formally adopted in statute or case law. (emphasis supplied).

addresses the issues of rights implementation rather inadequately and tends to weaken both the normative and ethical regime of international human rights law as a whole.<sup>11</sup>

Thus, the dualist model seems to epitomize the limits of legal positivism. But, if one concedes to the view that, apart from state obligations, there are also values and ethical force in international human rights, one would be able to pursue a more effective approach to the dualism. Mayo Moran aptly questioned the dominance of the “world of legal judgment” by the traditional “binding sources” model of international rules.<sup>12</sup>

While supporting the persuasive stance regarding non-binding international law, they critique that the courts current approach does not properly distinguish between ‘binding’ and ‘persuasive’ authorities of international rights law and urge for judicial obligations to interpret binding international law (e.g. customary) more actively. Moran describes the approach of courts in this regard (treating International Law as persuasive) as one of ‘Judicial quasi-obligation’. It appears that dualist model courts treat International Human Rights Law as not ‘rights generating’ but only helps in articulating rights based on domestic regime of law. Such an approach is suicidal one considering the legal foundation upon which International Human Rights Law exists.<sup>13</sup>

### **5.3 Judicial Discourse on Relationship Between International Law and Municipal Law:**

In **State of West Bengal v Kesoram Industries Ltd. & others.**<sup>14</sup> a five judge Constitutional Bench of Supreme Court observed:

“It is true that the doctrine of Monism as prevailing in the European Countries does not prevail in India. The Doctrine of Dualism is applicable. But, where the municipal law does not limit the extent of the statute, even if India is not a signatory to the relevant International Treaty or covenant, the Supreme Court in a large number of cases Interpreted the Statutes keeping in view the same”.

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<sup>11</sup>M. Moran, ‘Authority, Influence and Persuasion; Baker, Charter Values and the Puzzle of the Method’ in D. Dyzenhuas (ed), *The Unity of Public Law*, Hart Publishing, Oxford, 2004, pp 389-430.

<sup>12</sup>Ibid.

<sup>13</sup>Ibid.

<sup>14</sup>A.I.R. 2005 SC 46 at para 494.

In **Civil Rights Vigilance Committee S.L.R.C. College of Law Bangalore v. Union of India and others**,<sup>15</sup> the High Court of Karnataka while dealing with power of Courts to enforce India's International Treaty obligations observed that;

“To understand international law it is necessary to appreciate its close relationship to the internal law of states, or as lawyers say, the municipal law of states; for it is increasingly penetrating that sphere..... There are, broadly two different methods by which precepts of international law are applied in the domestic Courts of a State. By the *first method* it is accepted that international law is per se a part of the law of the land and that the domestic court therefore, in an appropriate case, applied international law directly. According to the *second method* a domestic court can only apply and enforce its own internal law, and the international law rule is binding only on the State itself, which must by legislation transform the precept in to one of domestic law.....”

*Defining the relationship between International Law and the Municipal Law of Sovereign states presents novel legal questions.* It is due to the increasing relevance of International law on the global and local scenario that several queries are starting to be raised regarding the relationship between Municipal Law and International Law. Strictly speaking, Municipal Law & International Law are founded on different forms and source can make the systems simply incompatible.<sup>16</sup>

#### **5.4 Theories as to Application of International Law within Municipal Sphere:**

The discussion on theories as to the Relationship between Monism and Dualism would be incomplete without referring to certain theories concerning the Application of International Law within the Municipal sphere.

##### **5.4.1 Specific Adoption, Specific Incorporation or Transformation Theory:**

The Dualist have put forward the view that the rules of International Law cannot directly and ex proprio vigore be applied within the municipal sphere by State Courts or otherwise. In order to be so applied such rules must undergo a process of specific

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<sup>15</sup> AIR 1983 Kar. 85 at para 13. Emphasis supplied.

<sup>16</sup> Joseph Bruce Alonso, 'International Law and the United States Constitution in Conflict : A case study on the Second Amendment', Houston Journal of International Law, Vol. 26, No. 1, 2003, at 26. Emphasis supplied.

adoption by or specific incorporation into municipal law. According to Dualist Theory International Law and Municipal Law cannot impinge upon state law unless Municipal Law allows its constitutional machinery to be used for that purpose because they are two separate and structurally different systems. Dualists argue that, in the case of treaty rules, there must be transformation of the treaty into state law.<sup>17</sup> They further claim that such transformation of treaty into state law should not merely a formal but a substantive requirement, and that alone validates the extension to individuals of the rules laid down in treaties.<sup>18</sup>

These theories rest on the supposed consensual character of International Law as contrasted with the non-consensual nature of state law. The transformation theory is largely based on the one hand and state laws or regulations on the other. According to this theory, there is a difference between Treaties which are of the nature of **promises**, and Municipal statutes which are of the nature of **commands** and that the transformation of International Treaties to the Municipal sphere is formally and substantively indispensable. However, this argument is criticised by saying that the distinction between promise and command is relevant to form and procedure but not to the true legal character of these instruments.<sup>19</sup>

#### **5.4.2 Delegation Theory:**

The 'Delegation Theory' which is put forward by the critics of the transformation theory maintain that the Constitution Rules of International Law delegated to each state Constitution, the right to determine when the provisions of a treaty or a convention are to come into force and the manner in which they are to be embodied in State law. Further, the protagonists of Delegation theory contend that the procedure and methods to be adopted for this purpose by the state are a continuation of the process begun with the conclusion of the treaty or convention. They argue that, there is no transformation, no fresh creation of rules of municipal law, but merely a prolongation of one single act of creation and the constitutional requirements of state law are thus merely part of a unitary mechanism for the creation of law.<sup>20</sup>

While the monist/dualist debate continues to shape academic discourse and judicial decisions, it is unsatisfactory in many respects. The debate focuses on the

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<sup>17</sup> Ibid.

<sup>18</sup> For example, by legislation approving the treaty or implementing its provisions.

<sup>19</sup> I. A. Shearer (ed.) 'Starkes' International Law' 11<sup>th</sup> ed. Butterworths, Kent, 1994, p 66.

<sup>20</sup> Ibid at 66 – 67. Emphasis supplied.

source or pedigree of norms, and ignores the substance of the norms at issue. By creating a dichotomy between norms on the basis of their sources, we risk being blinded from assessing the merits of the contents of the norms at issue. International law and national law have traditionally addressed relatively different issues: the former concentrating on the relationships among States, and the latter on relationships among persons within national jurisdictions. In recent times, however, there is gradual convergence of interest, and the ultimate goal of both systems is to secure the well-being of individuals. This common goal manifests itself in human rights law, environmental law, and commercial law i.e., areas where there is increasing interaction between national and international law making individuals as subject of international law. Thus international law and national law have lot in common, and any attempt to compartmentalize or isolate them will be analytically flawed and practically inapposite at present.<sup>21</sup>

The theoretical problems with the monist/dualist paradigm aside, the relationship between international law and national law has important practical implications for both systems and their subjects. The relationship determines the extent to which individuals can rely on international law for the vindication of their rights within the national legal system, and has implications for the effectiveness of international law, which generally lacks effective enforcement mechanisms.<sup>22</sup>

Further, States do not base the application of International Law in their territories as per these theories whether monism or dualism. What matters is the actual practice or operation of International Law in each Municipal sphere is to be looked into, which in turn necessitates the study of Status of International Law under the Constitution of a State. Because Constitution being the Supreme and Basic Law of a State and its philosophy as far as scope of Application of International Law in its territory assumes lot of importance. This in fact is the real test for understanding nature, scope and extent of the Domestic Application of International (Human Rights) Law.

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<sup>21</sup> Francois-Xavier Bangamwabo, "The Implementation of International and Regional Human Rights Instruments in the Namibian Legal Framework", paper available on <http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/bangamwabo.pdf> Visited on 26-09-2012 at 6.38 pm.

<sup>22</sup> Ibid.



## **5.5 State Practice on the Domestic Application of International Law:**

Domestic use of international human rights treaties has been a subject of debate in almost all countries. This is mainly because of the effect of common law that had great bearing on the jurisprudence of several countries since they were once colonies of British Empire and even after liberation, common law still continue to influence the jurisprudence of these countries. However, in recent years there is a sharp departure from dualist approach and most national courts are tending towards monist view on the subject. A brief overview of domestic application of international human rights law in states other than India will offer comparative analysis of domestic use of international human rights treaties. Further it will also help understand the prevailing trend and interpretative techniques that are adopted to incorporate international human rights laws in to the domestic jurisprudence.

### **5.5.1 United States of America (U.S.A.):**

#### **5.5.1(i) Application of International Treaty Rules in U.S.A:**

Unlike India, the treaty making power and the status of international law in U.S. is clearly provided under the U.S. Constitution. Article II Section 2 of the Constitution of U.S.A. provides that; “the President shall have power, by and with the advise and consent of the Senate, to make treaties, provided two-thirds of senators present concur....” The President initiates and conducts negotiations of the treaties and after signing them, places them before Senate for its “Advice and Consent”.<sup>23</sup>

A distinction is made in the U.S.A. between treaties and agreements. Treaties are required by the Constitution to be submitted before the Senate for approval/ratification. Whereas the agreements (known as executive agreements), are entered into and signed by the President in exercise of his executive power. The types of agreements so contemplated are those relating to foreign relations and military matters that do not affect the rights and obligations of the citizens. However, in the

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<sup>23</sup> The two famous instances in which Senate refused to ratify or approve the treaty signed by the President are (a) the Treaty of Versailles concluded at the end of the World War I and (b) Comprehensive Test Ban Treaty on nuclear test. President Wilson, who was indeed the moving spirit behind the Versailles treaty, signed the treaty together with allied nations but when it was presented to the Senate, it rejected the same – effectively withdrawing U.S.A. from European affairs until the developments in Germany under Hitler brought it back into it. Even the Comprehensive Test Ban on nuclear (CTBT) was the handiwork of the President Clinton and his predecessors. In view of this constitutional position, a practice has developed in U.S. according to which, the Senators are associated with treaty making from the very beginning so that it may be easier for the President to get the treaty ratified later by the Senate.

case of trade agreements, such agreements are subject to ratification by both Houses but only by a simple majority.<sup>24</sup>

### **5.5.1(i)(a) Supremacy Clause:**

Article VI of the Constitution of U.S.A. provides that;

“This constitution and the Laws of the United States which shall be made in pursuance thereof; all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”<sup>25</sup>

At first glance, one might conclude treaties are equal in weight to the Constitution because they are both the “Supreme Law of the Land”. The U.S. Supreme Court in **Reid v. Covert**,<sup>26</sup> held that a treaty cannot change the Constitution or be held as valid if it be in violation the Constitution. The Court recognized the supremacy of the Constitution over a treaty by pointing out that the language used in Article VI does not suggest that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. The Court further said that it would be manifestly contrary to the objectives of those who created the Constitution, as well as who were responsible for the Bill of Rights to construe Article VI as permitting the U.S. to exercise power under an international agreement without observing constitutional prohibitions.

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<sup>24</sup> This is because the Congress has the constitutional authority to regulate commerce with foreign nations under Article 1 of the Constitution.

<sup>25</sup> In the words of Chief Justice Taft, relating to Article VI, in his opinion and Award of 1923 in an Arbitration between Great Britain and Costa Rica: “...the Constitution of the United States makes the constitution, laws passed in pursuance thereof, and treaties of the United States the Supreme Law of the Land. Under that provision, a treaty may repeal a statute and a statute may repeal a treaty.” Cited in McNair, “The Law of Treaties”, Clarendon Press, Oxford, 1986, p.79.

<sup>26</sup> 354 U.S.1,77 S.Ct.1222(1957). In this case Mrs Covert and Mrs Smith killed their husbands, who were then performing military service in England and Japan, respectively. They were each tried by courts-martial convened under Article 2 (11) of the Uniform Code of Military Justice, which authorize trial by a court-martial of dependants of armed forces for capital offences, even if committed abroad. After conviction by court martial, each woman sought release on a writ of habeas corpus, which granted in the case of Mrs. Covert and was denied in the case of Mrs Smith. On direct appeal the Court affirmed Mrs Covert’s case and reversed Mrs Smith’s holding that civilian dependants of members of the armed forces overseas could not constitutionally be tried by a court-martial in time of peace for capital offences, even if committed abroad.

### 5.5.1(i)(b) Evolution of Distinction Between “Self-Executing and Non-Self Executing” Treaties:

Article VI is regarded as supremacy clause of the U.S. Constitution as it speaks quite generally of all treaties describing them as the ‘Supreme Law of the Land’. However, the courts began to suggest that this did not necessarily mean that all treaties could be relied upon in the courts as a rule of decision, saying some treaties require legislative action before they can receive effect in American Courts. The distinction involved made its first appearance in 1829, in **Foster & Elam v. Neilson**,<sup>27</sup> wherein Chief Justice Marshall said:

“Our constitution declares a treaty to be law of the land. It is, consequently, to be regarded in Courts of Justice as equivalent to an act of legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract – when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule of for the Court”.

Thus those treaties, which do not require any legislation to make them operative, are referred to as “self executing” and those, which require legislation to make them enforceable, are called as “non-self executing”.<sup>28</sup>

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<sup>27</sup> 27 U.S. (2 Pet.) 253, (1829) at 314, In this case the validity of a title to land based on a grant from the king of Spain was involved. It was argued that the grant was confirmed in the Treaty of 1819 by which the United States acquired Florida and settled various land disputes left over from the time of the Louisiana Purchase. The Supreme Court relying on the English text of the Treaty held that the Treaty of 1819 is not part of U.S. law and that the legislation is required to give effect to it. However, a few years later, in **U.S. v. Percheman**, 32 U.S. 51(1833), involving similar set of facts (a land grant through the king of Spain), an equally authentic Spanish text of the Treaty of 1819 was drawn to the attention of the Supreme Court and the Court came to the opposite conclusion, holding that the Treaty itself is sufficient to hold validity of the grant.

<sup>28</sup> This distinction made by Chief Justice Marshall in **Foster** case became known as the distinction between self-executing and non-self executing treaties. An international treaty of U.S. is “non-self executing” (a) if the treaty manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, (b) if the Senate in giving consent to a treaty, or Congress by resolution requires implementing legislation, or (c) if implementing legislation is constitutionally required. See Section 111 of the Restatement (Third), Foreign Relations Law of the United States (1987). Cited in Henry J. Steiner and Philip Alston, ‘International Human Rights in Conflict’, Oxford University Press, Oxford, 2000, p.1025.

The Charter of the United Nations affords a good illustration of the kind of treaty, which requires for its performance the collaboration of the executive, the legislature and the judiciary. Thus in **Fujii v. State of California**,<sup>29</sup> an alien Japanese ineligible for citizenship under American Law invoked Articles 55 and 56 of the Charter<sup>30</sup> relating to human rights and fundamental freedoms for all without distinction as to race, sex, language or religion and to action by the member states for the achievement of these objects, for the purpose of avoiding the escheat to the state of land purchased by him which he was ineligible by statute to hold. The Supreme Court of California rejected this plea on the ground that Article 55 and 56 were not self-executing and did not create rights and duties for individuals until implemented by legislation. However, the Court invalidated the Californian Statute on the ground that it violated the equal protection clause of the Fourteenth Amendment of the Constitution of the United States, the question of conflict of the Californian Statute with that of Charter of the United Nations was a separate point in that case.

Further, subsequent decisions throughout the United States have followed *Fujii* in holding that the U.N. Charter's Human Rights provisions are non self-executing and therefore are not directly incorporated into U.S. law.<sup>31</sup>

Although extradition treaties and treaties limiting the scope of extraterritorial jurisdiction over criminal offences have been found to be self-executing, courts have consistently held that the Universal Declaration on Human Rights instrument to be non-self executing.<sup>32</sup>

In **Roper v. Simons**,<sup>33</sup> it was argued that the execution of juvenile offenders (those who commit capital offences while under the age of 18 years) violates Article

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<sup>29</sup> 38 Cal 2d 718 (1952) (Cal Sup Ct).

<sup>30</sup> Article 55 (c) emphasizes that U.N.O. must promote universal respect for and observance of human rights and fundamental freedoms and under Article 56 member States pledge themselves to act jointly and separately for the achievement of the purposes set out in Article 55.

<sup>31</sup> **Hitai v. Immigration and Naturalisation** sev. 343 F. 2d 466, 468 (2d Cir. 1965); **Vlissidis v. Anadell**, 262 F. 2d 398, 400 (7<sup>th</sup> Cir. 1959); **Puerto Rico v. Muskie**, 507 F. Supp. 1035, 1064 (DPR), vacated, 668 F. 2d 611 (1981); **Davis v. Immigration and Naturalisation Serv.** 481 F Supp. 1178, 1183n. 7 (D.D.C. 1979); **Camacho v. Rodger**, 199 F. Supp. 155, 158 (S.D.N.Y. 1961); **Rice v. Sionx City Memorial Park Cemetery**, 245 Iowa 147, 157-58, 60 N.W. 2d 110, 116-17 (1953), aff'd, 348 US, 880 (1954), vacated, 349 U.S. 70 (1955). Cited in Louis Henkin & John Lawrence Hargrove (ed), 'Human Rights An Agenda for the Next Century', ASIC, Washington D.C. 1994, p. 482.

<sup>32</sup> **Committee of US Citizens Living in Nicaragua v. Regan**, 859 F 2d 929, 937-38, (D.C. Cir, 1988); **Handel v. Artukousic**, 601 F. Supp. 1421 (D. Cal. 1985) cited in Louis Henkin & John Lawrence Hargrove (ed), *Supra*, note 31, p. 482

<sup>33</sup> 543 US 551 (2005).

37 of Convention on the Rights of Child, 1989,<sup>34</sup> to which United States has signed but not ratified. It was also argued that under Article 18 of the Vienna Convention on the Law of Treaties, 1969, United States is obliged to refrain from acts which would defeat the objects and purpose of the treaty.<sup>35</sup> The U.S. Supreme Court held that the execution of juvenile offenders constitutes cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution. Although the Court did not rely on the U.S. signature of the Convention on the Rights of the Child, it did note that every nation in the world except United States and Somalia had ratified the Convention.<sup>36</sup>

### **5.5.1(i)(c) Presidential Order of 1998 on the Policy & Practice of International Human Rights Law in U.S.:**

In 1998, the President of U.S. issued an Executive Order stating the policy and practice of international human rights law in U.S., which reads as; “By the authority vested in me as President...it is hereby ordered as follows:

#### Section 1. Implementation of Human Rights Obligations.

- a) It shall be the policy of and practice of the Government of the United States,...fully to respect and implement its obligations under the international human rights treaties to which it is a part, including the ICCPR, the CAT, and the CEAD....

#### Section 2. Responsibility of Executive Departments and Agencies.

- a) All Executive Departments and Agencies...shall maintain a current awareness of United States international human rights obligations that are relevant to their functions and shall perform such functions so as to respect and implement those obligations fully...

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<sup>34</sup> Article 37 (a) reads as: **States Parties shall ensure that:** (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;”

<sup>35</sup> Art. 18 reads as “A state is Obligated to refrain from arts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed

<sup>36</sup> Curtis A. Bradely, ‘Unratified Treaties Domestic Politics and the U.S. Constitution’, Harvard International Law Journal, Vol. 48, 2007, p. 315

### Section 3. Human Rights Inquiries and Complaints.

- a) Each Agency shall take lead responsibility, in coordination with other appropriate Agencies, for responding to inquiries, requests for information, and complaints about violations of human rights obligations that fall within its areas of responsibility....

### Section 6. Judicial Review, Scope, and Administration.

- a) Nothing in this Order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.
- b) This Order does not supersede Federal statutes and does not impose any justiciable obligations on the Executive branch.
- c) The term “treaty obligations” shall mean treaty obligations as approved by the senate pursuant to Article II, section 2, and clause 2 of the United States Constitution.
- d) To the maximum extent practicable and subject to the availability of appropriations, Agencies shall carry out the provisions of this Order.<sup>37</sup>

#### **5.5.1(i)(d) The “LaGranda Brothers” Cases:**

The recent LaGranda Brothers cases have opened new debate in U.S. as to the application of international human rights conventions and their status in U.S. courts. The Karl and Walter brothers (German Nationals) were arrested in 1982 for murder of a bank manager during a robbery in Arizona and were sentenced to death.<sup>38</sup> The LaGranda brothers were not told of their right to contact their consulate. In 1998 for the first time in a habeas corpus petition (after their conviction) they raised their right to access to consular assistance and alleged that they were not notified of this right as per Article 36<sup>39</sup> of Vienna Convention on Consular Relations, 1961(VCCR) to which U.S. and Germany are parties. Admittedly U.S. did not notify the brothers of their

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<sup>37</sup> Henry J. Steiner and Philip Alston, *Supra note 28*, p.1020.

<sup>38</sup> **State v. Karl LaGranda**, 733, P.2d 1066, 1067 (Ariz.1987); **State v. Walter LaGranda**, 734 P.2d 563 (Ariz. 1987).

<sup>39</sup> Art. 36(1) reads as “If the detainee so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district a national of that State is arrested or committed to prison or to custody pending trial or is detained in other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph”.

right to access to consul. However their claim was not entertained for not having raised in earlier proceedings and the writ of habeas corpus was denied.<sup>40</sup>

Germany approached I.C.J. against U.S.A. in 1999 and obtained injunction order against U.S.A. as to not execute LaGranda brothers until the case is fully decided.<sup>41</sup> Germany immediately petitioned the U.S. Supreme Court to enforce I.C.J.'s interim order, but the Supreme Court refused to do so because of the lethargic attitude and delay on the part of Germany noting that Germany was aware of LaGranda brothers issue way back in 1992 itself.<sup>42</sup> Unfortunately both the brothers were executed despite of injunction order of I.C.J. Karl LaGrand was executed on 24<sup>th</sup> February 1999 and Walter LaGrand was executed on 3<sup>rd</sup> March 1999.

The case was decided on 27/06/2001.<sup>43</sup> In a unanimous (14 votes to 1) decision the I.C.J. held that;

1. Article 36 of VCCR creates specific rights for individual foreign nationals under international law.
2. Procedural default may not be applied to prevent the judicial consideration of the treaty violation in such cases.
3. No prejudice need be demonstrated in such cases.
4. The U.S.A. must provide review and reconsideration of convictions and sentences where Article was violated.

Further, by 13 votes to 2 the I.C.J. held that its provisional orders are binding. The I.C.J. determined in clear terms that U.S.A. violated Article 36 of VCCR and also its provisional orders. As the I.C.J was interpreting the provisions of a multilateral treaty with over 160 nations party to the convention, therefore, the ruling establishes the authoritative interpretation of the rights conferred under Article 36 of VCCR for all nationalities and nations.

#### **5.5.1(i)(e) Impact of the ICJ's LaGranda Decision on U.S. Courts:**

Despite the binding and authoritative nature of the ICJ's judgment and its obvious domestic implications, the U.S. Government has not issued a formal

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<sup>40</sup> **LaGranda(Karl&Walter) v. Stewart**, 133 F, 3d 1253, 1261 (9<sup>th</sup> Cir. 1998).

<sup>41</sup> Order dated 03/03/1999; see full text at [www.icj-cij.org/icjwww/idocket/igus/igusframe.htm](http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm).

<sup>42</sup> **Federal Republic of Germany v. United States**, 526 U.S. 111, 112(1999). There the U.S. Supreme Court failed to find fault with Arizona State that knew about nationality of LaGranda brothers in 1983 itself but did not notify the brothers of their right to access to their consul.

<sup>43</sup> **Federal Republic of Germany v. United States**. (Order dated 27/06/2001) see full text at [www.icj-cij.org/icjwww/idocket/igus/igusframe.htm](http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm).

comment on the ruling and has not yet announced any measures that it will take to comply with it.

There has been conflict of decisions over VCCR claims in U.S courts after the ICJ's LaGranda decision. In some cases Courts have bypassed the "individual rights" question, holding that the VCCR does not provide the remedy sought by the defendant.<sup>44</sup> Other Courts have held that VCCR does create individually enforceable rights, however held that defendants failed to show that they were "prejudiced" by the violation of those rights.<sup>45</sup>

In **U.S. ex rel. Madej v. Schomig**,<sup>46</sup> petitioner argued that after ICJ's LaGranda decision, States in U.S.A. couldn't rely on procedural defaults in denying VCCR claims. The district court agreed with the petitioner, in holding that pursuant to the ICJ decision in LaGranda, a State could no longer strictly rely on a procedural rule as a basis for denial of relief of defendant's VCCR claims. The court said "The interpretations of the Vienna Convention by the I.C.J. are binding as to the terms of the treaty. To disregard one of the I.C.J.'s most significant decisions interpreting the Vienna Convention would be a decidedly imprudent course. After LaGranda ... no court can credibly hold that Vienna Convention does not individually enforceable rights."<sup>47</sup>

However, Courts in U.S.A. continue to deny VCCR claims either on procedural default or absence of prejudice. In **State v. Navarro**,<sup>48</sup> the Wisconsin Court of Appeal went a step ahead stating that an individual cannot assert VCCR rights in domestic courts on his own behalf suggesting that only national State of the detained person can bring an action for VCCR claims before ICJ. This interpretation of the ICJ's LaGranda decision by the Wisconsin Court of Appeals is narrow and goes against the very spirit of the authoritative decision of the ICJ in which case U.S.

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<sup>44</sup> **United States v. Contreras-Cortez**, No. 01-8030, 2002 WL 734772 (10<sup>th</sup> Cir. Apr. 26, 2002); **United States v. Minjares-Alvarez**, 264 F.3d 980 (10<sup>th</sup> Cir. 2001); **State v. Issa**, 752 N.E. 2d 904 (Ohio 2001); **State v. Tuck** 766 N.E., 2d 1065 (Ohio Ct. App. 2001). Cited in Sarah M. Ray 'Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular Relations', *California Law Review*, Vol. 91 (2003), 1729 at 1753.

<sup>45</sup> **United States v. Cazares**, No. 01-2180, 2003 W.L. 894064 (10<sup>th</sup> Cir. 2001 Mar. 7, 2003); **United States v. Duarte-Acero**, 296 F. 3d 1277(11<sup>th</sup> Cir. 2002); **State v. Lopez**, 633 N.W.2d 774(Iowa 2001). Cited in Sarah M. Ray, *Supra note 44*.

<sup>46</sup> 223 F. Supp. 2d at 978. Cited in Sarah M. Ray, *Supra note 44*.

<sup>47</sup> *Ibid.*

<sup>48</sup> 659 N.W. 2d 487 (Wis. Ct. App.) 2003. To reach this conclusion the Court relied on customary practices and the position of State Department.



participated. The U.S. state department has not yet issued any official note on the outcome of ICJ's LaGranda decision and it appears that only U.S. Supreme Court can resolve this ambiguity over VCCR claims.

### **5.5.1(ii) Application of Customary Rules of International Law in U.S.A.:**

The most celebrated case law on the status of customary international law in U.S. is that of **Paquete Habana and the Lola**.<sup>49</sup> The court held that the Government had acted illegally under international law in seizing certain Cuban fishing boats during the Spanish-American War.<sup>50</sup> The court 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; and evidence of these, to the works of jurists and commentators, who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be but for the trustworthy evidence of what the law really is”.

After considering evidentiary material such as that mentioned in the extract, a majority of the Supreme Court held that the fishermen were entitled to damages for the seizure and sale of their property. The Court's general proposition about the role of international law as the U.S. law, which is not founded on any express language in the Constitution, must be a recognition of a kind of federal common law, derived from the federal government's general foreign affairs powers and inherent powers acquired along with independence from Great Britain. The British Courts, indeed, have a

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<sup>49</sup> 175 U.S. 677, 708 (1900).

<sup>50</sup> Most jurists viewed this case as a human rights case, involving basic property right that went to the heart of the livelihood of the Cuban fishermen.

similar principle that international customary law is part of the English common law, at least to the extent it does not clash with an Act of Parliament.<sup>51</sup>

In **Filartiga v. Pena Irala**,<sup>52</sup> the Paraguayan survivors of a Paraguayan national who had been tortured to death in Paraguay found the Paraguayan torturer in New York. They served process on the torturer and brought suit in federal district court under section 1350 of the United States Code (USC),<sup>53</sup> alleging a tortious violation of the law of nations. The U.S. Court of Appeals for the Second Circuit relying in part on Justice Gray's famous statement in **Paquete Habana** case, that "International law is part our of our law", Judge Irving Kaufman held for a unanimous panel of the Second Circuit that the basis for subject matter jurisdiction was "the law of nations", which has always been part of the federal common law. On merits, the Court held that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.<sup>54</sup>

The judgment in **Filartiga** case is significant one on two counts; firstly, it solved the problem of subject matter of jurisdiction, viz., if customary international law is federal common law, a suit to enforce a right under that law is a suit "arising

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<sup>51</sup> Roger S. Clark, "How International Human Rights Law Affects Domestic Law", edited by Adamantia Pollis, "Human Rights New Perspectives, New Realities", Peter Schwab Viva Books Pvt. Ltd., New Delhi, 2002, p.189.

<sup>52</sup> 630 F.2d 876 (2D Cir 1980). The Filártiga family contended that on 29 March 1976, their seventeen-year-old son Joelito Filártiga was kidnapped and tortured to death by Américo Norberto Peña Irala. All parties were living in Paraguay at the time, and Peña was the Inspector General of Police in Asunción. Later that same day, police brought Dolly Filártiga (Joelito's sister) to see the body, which evidenced marks of severe torture. The Filártigas claimed that Joelito was tortured in retaliation for the political activities and beliefs of his father, Dr. Joel Filártiga. Dr. Filártiga brought murder charges against Peña and the police in Paraguay, but the case went nowhere. Subsequently, the Filártigas' attorney was arrested, imprisoned, and threatened with death. He was later allegedly disbarred without just cause. In 1978, Dolly Filártiga and (separately) Américo Peña came to the United States. Dolly applied for political asylum, while Peña stayed under a visitor's visa. Dolly learned of Peña's presence in the United States and reported it to the Immigration and Naturalization Service, who arrested and deported Peña for staying well past the expiration of his visa.

<sup>53</sup> Section 1350 (28 USC) of Alien Torts Claims Act- part of the Judiciary Act of 1789- reads as: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

<sup>54</sup> 630 F.2d 876 (2D Cir. 1980) at 885. The Court awarded roughly \$10.4 million. Torture was clearly a violation of the law of nations, and the U.S. did have jurisdiction over the case since the claim was lodged when both parties were inside the United States. Additionally, Peña had sought to dismiss the case based on forum non convenienc (saying that Paraguay was a more convenient location for the trial), but did not succeed. See also William A. Fletcher, "International Human Rights in American Courts", Virginia Law Review, Vol. 93:651, p.653 at 657.

under” federal law within the meaning of Article III of the Constitution.<sup>55</sup> Secondly, it instructed American courts that, established norms of international human rights under customary international law were binding on all American courts as federal common law including the state courts under Supremacy Clause.

Thus **Filartiga** case was beginning of a consistent line of cases in which the lower federal courts held that established norms of international human rights based on customary international law are part of the “law of nations” and are part of the federal common law.

In summary, in U.S., international human rights treaties are considered as part of the law of the land and could be enforced directly without the aid of domestic law provided they are “self executing”. Further, customary international human rights law is considered as part of the federal law and could be enforced without any limitations, however subject to provisions of U.S. Constitution and Statutes. It is because of this reason that the United States has ratified only a few of the international human rights treaties considering the supremacy status that it’s Constitution has provided to international treaties. The fact that U.S. Constitution treats international law as part of the law of land affords greater opportunity to augment the cause of human rights based upon international human rights law in U.S.

### **5.5.2 England:**

The domestic application of international law in England draws a distinction between i) customary rules of international law; ii) treaty rules.

#### **5.5.2(i) Customary Rules of International Law:**

According to the 18<sup>th</sup> Century “Blackstonian” Doctrine, generally known as incorporation doctrine, customary international law was deemed automatically to be part of the common law.<sup>56</sup> Two important qualifications emerged because of the evolution of doctrine of ‘precedents’ and doctrine of ‘parliamentary sovereignty’ in England. Thus Lord Atkin declared in **Chung Chi Chung v. R.**<sup>57</sup>

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<sup>55</sup> Article III Section 2, cl. 1 reads as “ The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority.....”

<sup>56</sup> I.A. Sheirer, “Starke’s International Law”, 11<sup>th</sup> ed., Butterworths, London, 1994, p.68.

<sup>57</sup> (1939) AC 160 at 168.

“The Courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is and having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.’

Ever since Lord Atkin’s declaration, the practice in England pertaining to customary rules of international law is that, the courts in England will apply customary rules subject to two important qualifications;

a) that such rules are not inconsistent with British Statutes, whether the statute be earlier or later in date than the particular customary rule concerned.

b) that once the scope of such customary rules has been determined by British Courts of final authority, all British Courts are thereafter bound by that determination, even though a divergent customary rule of International Law later develops.<sup>58</sup>

Apart from the above two qualifications, there are two important exceptions to the automatic applicability of customary rules of international law by municipal courts;

1) Act of State by the executive, for example a declaration of war, or an annexation of territory, may not be questioned by British Municipal Courts notwithstanding that a breach of international law may have been involved.

2) British Municipal Courts regard themselves as bound by a certificate or authoritative statement on behalf of the executive (crown) in regard to certain matters falling peculiarly within the crown’s prerogative powers, such as the *dejure* or *defacto* recognition of states, the sovereign nature of governments and the diplomatic privilege, although such certificate or statement may be difficult to reconcile with existing rules of international law.<sup>59</sup>

### **5.5.2(ii) Treaty Rules:**

The application of treaty rules in England is primarily conditioned by the constitutional principles governing the relations between the executive (crown) and Parliament. The negotiation, signature and ratification of treaties are matters

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<sup>58</sup> I.A. Sheirer, *supra note* 56, p.68

<sup>59</sup> Ibid.

belonging to the prerogative powers of the crown. Lord Atkin in **Attorney – General of Canada v. Attorney – General of Ontario & others**<sup>60</sup> observed;

“It will be essential to keep in mind the distinction between (1) the formation, (2) the performance of the obligations constituted by a treaty.....Within the British Empire there is a well established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, require legislative action. Unlike some other countries the stipulations of a treaty duly ratified do not within the empire, by virtue of the treaty alone, have the force of law. If the national executive, the Government of the day, decide to incur the obligations of a treaty, which involve alteration of law, they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification, seek to obtain from Parliament an expression of approval. But it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament or any subsequent Parliament from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament has a constitutional control over the executive; the creation of the obligations undertaken in treaties and the assent to their form and quality are the functions of the executive alone. Once they are created, while they bind the state as against the other contracting parties, Parliament may refuse to perform them and so leave the state in default. In a unitary state whose legislative possess unlimited powers the problem is simple. Parliament either fulfills or not treaty obligations imposed upon the state by its executive. The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses. But in a state where the Legislature does not possess absolute authority; in a

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<sup>60</sup> AIR 1937 PC 82 at 86. In this case The Governor-General in Council of the Dominion of Canada referred a question to the Court as to whether the Weekly Rest in Industrial Undertakings Act, 1935, the Minimum Wages Act, 1935, and the Limitation of Hours of Work Act, 1935, or any of the provisions thereof and in what particular or particulars or to what extent, were ultra vires of the Parliament of Canada. The Statutes in question were passed by the Dominion Parliament in accordance with Conventions adopted by the International Labour Organization.

Federal State where legislative authority is limited by constitutional document; or is divided up between different Legislatures in accordance with the class of the subject matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several legislations; and the executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible but possibly of several Parliaments to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive; but how is the obligation to be performed and that depends upon the authority of the competent legislature or legislatures.”

The House of Lords in **J. H. Rayner Limited v. Dept. of Trade and Industry**,<sup>61</sup> affirmed the ratio of the above decision where in it was observed that;

“The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty. Parliament may alter the laws of the United Kingdom. The courts must enforce those laws; judges have no power to grant specific performance of a treaty or to award damages against a sovereign state for breach of a treaty or to invent laws or misconstrue legislation in order to enforce a treaty.”

Thus it has become established in England that the following categories of Treaties must receive Parliamentary assent through an enabling Act of Parliament and if necessary, any legislation to effect the requisite changes in the law must be passed:

- 1) Treaties, which affect the private rights of British subjects.
- 2) Treaties which involve any modification of the common or statute law by virtue of their provisions or otherwise
- 3) Treaties which require the vesting of additional powers in the crown
- 4) Treaties, which impose additional financial obligations, dissect or contingent upon the government.

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<sup>61</sup> 1990 (2) AC 418.

The classic authority for this statement is the judgment of Sir Robert Phillimore, Judge of the Admiralty Court in **The Parliament Blege**<sup>62</sup> in 1879. There he held that a certain article in the Anglo – Belgian ‘Convention regulating Communications by Post’, signed and ratified in 1876, purporting to confer upon Belgian Government mail-steamers the immunities of foreign warships (a result which in his opinion would be at variance with the law of England) could not be applied by an English Court so as to protect the Belgian Steamer against an action for damages for collision and thus deprive a British subject of his remedy against the steamer. The relevant passage of his judgment is as follows. “If the crown had power without the authority of Parliament by this treaty to order that the *Parliament Belge* should be entitled to all the privileges of a ship of war, then the warrant, which is prayed for against her as a wrong – doer on account of the collision, cannot issue, and the right of the subject, but for this order unquestionable, to recover damages for the injuries done to him by her is extinguished. The law of this country has indeed incorporated these portions of international law which give immunity and privileges to foreign ships of war and foreign ambassadors; but I don’t think it has therefore given the crown authority to clothe with this immunity foreign vessels, which are really not vessels of war, or foreign persons, who are not really ambassadors.”

Though his judgment was reversed by the court of Appeal on other point, namely, his ruling that the *Parliament Belge* did not *ipso facto* and without invoking the provisions of the Convention of 1876, belong to the category of public vessels exempt from process of law. But his decision on the effect which English Court must give to a treaty purporting to modify the law, when no modification by statute has taken place, remained and remains unchallenged.

The necessity to obtain statutory sanction for execution and application of a treaty, for acts which at common law the executive has no power to do, is well illustrated in the case of **Waker v. Baird**.<sup>63</sup> There the crown had entered into an agreement with the Republic of France, of the nature of a *modus vivendi*, for regulating the lobster fisheries on and off the coast of Newfoundland. One of the terms of this agreement was that on a certain part of the coast no new lobster factory should be established after 1 July 1889, without the joint consent of the commanders

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<sup>62</sup> 4 P.D. 129. Cited in McNair, ‘The Law of Treaties’, Clarendon Press, Oxford, 1986, p.83.

<sup>63</sup> (1892) AC 491.

of the British and French naval stations respectively. The defendant the captain of a British fishery patrol vessel, was authorized by the Lords Commissioners of the Admiralty, by command of Her Majesty, to superintend the execution of this agreement and in the course of his duty he entered and took possession of the lobster factory of the plaintiff, a British subject, on the ground that, having been established after 1 July 1889 without such consent, it contravened the agreement. It was held by Privy Council, affirming the decision of the Supreme Court of Newfoundland in an action for trespass, that the defendant's plea of 'act of state', based upon alleged right in the Crown to take steps for the execution of the treaty, was bad.<sup>64</sup>

The position as to whether individuals can rely upon the provisions in treaties concluded by England as the basis for a claim in England Court was explained by Lord Oliver in **Maclaine Waston v. Dept. of Trade**;<sup>65</sup>

"...as a matter of the constitutional law of the United Kingdom, the royal prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated in to the law by legislation. So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant."

Similarly in **R. v. Secretary of State for the Home Department Ex.P Brind**,<sup>66</sup> the House of Lords rejected the appellant's argument that the direction issued under section 29(3) of Broadcasting Act, 1981 and Clause 13(4) of the 1981 License and Agreement between the Home Secretary and the British Broadcasting

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<sup>64</sup> Another instance of a treaty requiring legislation for its application in the United Kingdom is the decision in **The Republic of Italy v. Hambros Bank Ltd. and Gregory** (custodian of enemy property. (1950) Ch. 314.)

<sup>65</sup> (1990) 2 A.C. 418 at 500, H.L.

<sup>66</sup> (1991) 1 A.C. 696, H.L.



Corporation (B.B.C.), by Home Secretary to the Independent Broadcasting Authority (I.B.A.) and B.B.C. not to broadcast in television or radio ‘words spoken’ by any person representing or purporting to represent certain organizations proscribed under Prevention of Terrorism (Temporary Provisions) Act, 1984, violative of Article 10 of the European Convention on Human Rights, 1950 (ECHR)<sup>67</sup> which guarantees freedom of speech and expression. Lord Bridge<sup>68</sup> observed that;

“...when Parliament has been content for so long to leave those who complain that their Convention rights have been infringed to seek their remedy in Strasbourg, it would be surprising suddenly to find that judiciary had, without Parliament’s aid, the means to incorporate the Convention in to such an important area of domestic law and I can not escape the conclusion that this would be a judicial usurpation of the legislative function...”

In **Derbyshire County Council v. Times News Paper Ltd.**,<sup>69</sup> the Court of Appeal held that whether or not a statutory authority could pursue a suit in defamation for attacks made on its reputation was not clearly settled in the common law, and looked to the Convention for guidance in holding that no such right should exist, having regard to the principle of freedom of speech as applied to public authorities. The House of Lords on appeal held that the common law, unambiguously excluded such a right of action at the suit of public authorities; thus it was unnecessary to consider the Convention. It is submitted that even if Convention right to privacy is applied, would have led to the same result.<sup>70</sup>

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<sup>67</sup> Article 10 of ECHR reads as: **Freedom of expression.**- 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

<sup>68</sup> Lord Ackner, Templemen, Roskill and Lowry delivered concurrent speeches.

<sup>69</sup> (1992) QB 770, CA; (1993) AC 534, H.L.

<sup>70</sup> I.A. Sheirer, *Supra note* 56, p.72

### 5.5.2(iii) European Convention on Human Rights, 1950 (ECHR),<sup>71</sup> and England:

England is a party to ECHR that require state parties to guarantee the rights recognized under the Convention. It also provides for direct complaints to by individuals against violation of Convention rights by state parties to the Committee on Human Rights and then to the European Human Rights Court at Strasbourg and strict compliance with the judgment of the Court.

ECHR has not been incorporated in to English law till date. (The Human Rights Act, 1998 is not a law incorporating ECHR in to English law) The status of ECHR in England is that of any other treaties and that under common law, unless specifically adopted by domestic legislation, treaties do not form part of the law of land.

The non-incorporation of ECHR in to English law has led to the increase in filing applications before the Human Rights Court (HRC) at Strasbourg alleging violation of Convention rights by England. The judgment of HRC is binding and state parties cannot escape from being given effect to it. Thus the growing number of successful applications against England in HRC at Strasbourg and its binding effect on England and the embarrassment of receiving lessons on human rights from Strasbourg, the realization of the need to bring the government and public authority under an obligation to comply with ECHR, influenced England to enact Human Rights Act, 1998.

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<sup>71</sup> The European Convention on Human Rights (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950) is an international treaty to protect human rights and fundamental freedoms in Europe. Drafted in 1950 on the model of United Nation's Universal Human Rights Declaration of 1948, by the then newly formed Council of Europe, the Convention entered into force on 3 September 1953. All Council of Europe member states are party to the Convention (currently 27 state are parties- for list of member countries see [http://europa.eu/about-eu/member-countries/index\\_en.htm](http://europa.eu/about-eu/member-countries/index_en.htm)). The Convention established the European Court of Human Rights at Strasbourg. Any person who feels his or her rights have been violated under the Convention by a state party can take a case to the Court. Judgments finding violations are binding on the States concerned and they are obliged to execute them. The Committee of Ministers of the Council of Europe monitors the execution of judgments, particularly to ensure payment of the amounts awarded by the Court to the applicants in compensation for the damage they have sustained. *The establishment of a Court to protect individuals from human rights violations is an innovative feature for an international convention on human rights, as it gives the individual an active role on the international arena (traditionally, only states are considered actors in international law). The European Convention is still the only international human rights agreement providing such a high degree of individual protection.* State parties can also take cases against other state parties to the Court, although this power is rarely used. The Convention has several Protocols. For example, Protocol 13 prohibits the death penalty. The protocols accepted vary from State Party to State Party, though it is understood that state parties should be party to as many protocols as possible. (emphasis supplied)

### **5.5.2(iv) Human Rights Act, 1998:**

The Human Rights Act, 1998 (HRA, 1998, hereinafter) is not a law incorporating ECHR in to the domain of English law. The HRA, 1998 sensitizes and compels all the organs of government and public authorities for better compliance with ECHR. According to Dominic McGoldrick, it works by a kind of osmosis and puts the Convention rights in to the heart of judicial system.<sup>72</sup>

Section 3 provides that so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way, which is compatible with the Convention rights. Courts do not have power to invalidate statutes. However, section 4 empowers the appellate courts to make a Declaration of Incompatibility upon primary legislations if they are satisfied that they are inconsistent with Convention rights. This triggers fast track legislative procedure contemplated under section 10, wherein a Minister may make an order to amend legislation to remove the incompatibility. Further, section 6 is crucial which says that ‘it is unlawful for a public authority to act in a way which is incompatible with a Convention right. The mandatory character of section 6 and the comprehensive definition of public authority makes it abundantly clear that the provision is intended to import principle of proportionality either to supplement or substitute Wednesbury rule of rationality.<sup>73</sup>

HRA, 1998 is seen as a conduit pipe for bringing the Strasbourg jurisprudence to the British soil, expecting it to be effective in incorporating the principles of interrelationship among Convention rights. The passing of HRA, 1998, was preceded and followed by wide scale public debate on the issues of erosion of parliamentary sovereignty, inherent capacity of common law to be a source of human rights, and propriety and extent of judicial review on administrative action impinging human rights.<sup>74</sup> The HRA is seen as a significant development in legal and political culture, having imaginative and radical dimension as it exposed the entire English legal system to a fundamental process of review.<sup>75</sup>

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<sup>72</sup> Dominic McGoldrick, “The United Kingdom’s Human Rights Act, 1998, in Theory and Practice”, 50, *ICLQ*, 2001, p.905, cited in P.Ishwar Bhat, “Fundamental Rights”, Eastern Law House, New Delhi, 2004, p.598.

<sup>73</sup> P.Ishwar Bhat, *Supra*, note 72, p.598.

<sup>74</sup> Lord Irvin, “The Development of Human Rights in Britain under an Incorporated Convention on Human Rights”, (1998) *Public Law* (summer) 221, cited in P.Ishwar Bhat, *Supra*, note 72, p.597.

<sup>75</sup> Dominic McGoldrick, *Supra*, note 72, p.901, cited in P.Ishwar Bhat, *Supra*, note 72, p.597.

### **5.5.2(v) Current Practice:**

The modern practice in England is of submitting treaties of Parliament for ratification. This is because of a statement made on 1<sup>st</sup> April 1924 by Mr. Ponsonby the Under Secretary of State for Foreign affairs in Parliament of the intention of the new Government to lay on the table of both House of Parliament every treaty, when signed, for a period of twenty one days, after which the treaty will be ratified and published and circulated in the Treaty Series.

The object of this practice is to secure publicity for treaties and to afford opportunity for their discussion in Parliament if desired. It apparently does not apply to those kinds of treaties, usually of minor or technical importance, which do not require ratification. It appears that practice only applies to treaties that are made subject to ratification.

Thus, domestic application of international human rights law in England reflects dualist approach in the sense that international human rights treaties do not form part of the *corpus juris* of England unless Parliament enacts a law incorporating the treaty provisions in to the English law. That means all Multilateral Treaties including human rights are non-self executing treaties and in that context English practice of domestic application of international treaties is completely different from U.S. where treaties are regarded as supreme law of the land. However customary international law is regarded as part and parcel of the law of land in both England and U.S. The recent HRA 1998, applies only to European Convention on Human Rights, 1950 and not to other international human rights treaties to which England is a party which is unacceptable as it leads to double standards in applying human rights norms to Europeans and non-Europeans.

### **5.5.3 Australia:**

The Australian Constitution Act, 1900, provides for distribution of powers between the Federal Government and the States. Under Section 61 of the Constitution, the power to enter into treaties is an Executive power. Even so, the Prime Minister of Australia announced in the Parliament in the year 1961 that henceforward the Government will lay on the table of both Houses texts of the treaties signed for Australia, whether or not ratification is required, as well the texts of these treaties to which the Government is contemplating accession. It was stated that the

Government would not, as a general rule, proceed to ratify or accede to a treaty until it has been laid on the table of both Houses for at least 12 sitting days. Be that as it may, a practice has developed in Australia wherein Australia would not ratify a treaty or accept an obligation under the treaty until appropriate domestic legislation is in place in respect of treaties where legislation is necessary to give effect to the treaty obligations. Several proposals have been made by groups of parliamentarians to provide for greater overview by Parliament of the treaty-making power and also to identify and consult the groups, which may be affected by the treaty. All of them are strongly critical of the lack of transparency in the treaty-making process. One of the NGOs in that country, namely, National Farmers Federation has suggested that not only the treaties should be laid on the table of the House before they are finalized but the text of the treaty should be accompanied by a statement clearly setting out the important treaty obligations being undertaken by the country there under, what effect the treaty will have on the Australian national interest including economic, social and environmental and the extent of consultation already held by affected groups and so on – impact assessment statement, if one can call it, for short.<sup>76</sup>

In May 1996, the Foreign Minister made a statement to the House of Representatives outlining a new treaty-making process. According to this, the treaties will be tabled at least for 15 sitting days, after signature but before they are ratified, to allow for parliamentary scrutiny. This arrangement was to apply to both bilateral and multi-lateral treaties and to their amendments. Where however urgent action has to be taken, a special procedure was devised under which the Agreements will be tabled in the House as soon as possible with an explanation of reasons for urgent action. Further, the States will be consulted before entering into treaties and any particular information about the treaties will be placed before the Premiers and Chief Minister's Department. The Government has also agreed in principle to append a statement indicating the impact of the proposed treaty to the papers laid before the House. A joint Standing Committee on treaties was established comprising Members of both Houses and consisting of Federal and State Officers who shall meet twice every year and consider and report upon the treaties tabled before the House.<sup>77</sup>

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<sup>76</sup> P.M. Bakshi, "Treaty Making Power under our Constitution", A Consultation Paper presented to the National Commission to Review the Working of the Constitution-January 8, 2001. Full paper available at [www.lawmin.nic.in/ncrwc/finalreport/v2b2-3.htm](http://www.lawmin.nic.in/ncrwc/finalreport/v2b2-3.htm) visited on 28-06-2011 at 2.15 p.m.

<sup>77</sup> P.M. Bakshi, *Supra note 76*.

The most celebrated case on the issue of domestic application of international human rights law in Australia is **Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh**.<sup>78</sup> In this case Mr. Teoh, a Malaysian citizen, entered Australia in May 1988 on a temporary permit. In July 1988 he married an Australian citizen who had been the *de facto* spouse of his deceased brother. In November 1990 he was convicted on charges of heroin importation and possession and sentenced to six years imprisonment. The offences were clearly related to Mrs Teoh's heroin addiction. In 1991 Teoh was ordered to be deported on the grounds that he had committed a serious crime. At that time Mrs Teoh had six children living with her, all under ten years old, and three of them had been fathered by Teoh. The deportation order was appealed to the Federal court, which upheld the appeal partly on the grounds that the requirement in the Convention on the Rights of Child (CRC), that the child's best interests be considered in such matters, had not been taken in to account.<sup>79</sup> The Minister of State for Immigration and Ethnic Affairs filed an appeal in the High Court against the Order of the Federal Court. The High Court examined the issue of enforceability of the Convention by the national courts. Mason, C.J. speaking for himself and Dean, J. stated the position in the following words:

“It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated in to our municipal law by statute.... But the fact that the Convention has not been incorporated in to Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the court's should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry in to, or ratification of, the relevant international instrument. That is because Parliament, *prima facie*,

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<sup>78</sup> 1995 183 CLR 273 = (1995) 69, Australian Law Journal, 423. Full text of the judgment available at [http://www.austlii.edu.au/au/cases/cth/high\\_ct/1995/20.html](http://www.austlii.edu.au/au/cases/cth/high_ct/1995/20.html) visited on 28-06-2011 at 6.45 p.m. (Mason CJ, Deane, Toohey, Gaudron and Mchugh were the Judges)

<sup>79</sup> Article 3(1) of CRC provides that “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies the best interest of the child shall be a primary consideration.

intends to give effect to Australia's obligations under international law. Apart from influencing the construction of a statute or subordinate legislation, an international convention may play a part in the development by the courts of common law. The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law. But the courts should act in this fashion with due some circumspection when the Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law. Judicial development of the common law must not be seen as a back door means of importing an unincorporated convention into Australian law. A cautious approach to the development of the common law by reference to international conventions would be consistent with the approach, which the courts have hitherto adopted to the development of the common law by reference to statutory policy and statutory materials. Much will depend upon the nature of relevant provision, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing principles of our domestic law."

Thus, Mason CJ rejected the direct enforcement of International Conventions by the national courts saying that, in most countries ratification is done by the executive acting alone and that the prerogative of making the law is that of Parliament alone and unless the Parliament legislates, no law can come into existence. *However, Mason C.J. went on to add the following that spark widespread debate in Australia;*

"Ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the

Convention. The positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interest of the children as ‘a primary consideration’...To regard a legitimate expectation as requiring the decision-maker to act in a particular way is tantamount to treating it as a rule of law. It incorporates the provisions of the unincorporated convention into our municipal law by the back door....*But if a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course.*”<sup>80</sup>

The High Court upheld the Order of Federal Court on the point that the Minister has failed in his duty to take into account the CRC obligations while passing an order of deportation. The High Court denied that it was giving the provisions of a treaty the domestic legal status of a rule of law, as it was not compelling a decision maker to act in accordance with the treaty. Rather, the effect of the judgment was that a procedural legitimate expectation had been generated by the ratification: i.e., if a decision maker proposed to make a decision that was inconsistent with the expectation, procedural fairness required that the persons affected be given notice and an adequate opportunity of presenting a case against that course of action.<sup>81</sup>

The decision in *Teoh*, enunciated two propositions:

- 1) that under the Australian constitutional system, a treaty entered into by the Federal Government does not become a part of domestic law and is not

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<sup>80</sup> 1995 183 CLR 273 = (1995) 69, Australian Law Journal, 423. Emphasis supplied. (McHugh, J. dissented altogether on the above decision and held that no legitimate expectation arose in the case and the Appeal filed by the Minister should be allowed as the lower court judgment in Appeal solely rests on the legitimate expectation. The learned judge observed that: “No legitimate expectation arose in this case because: (1) the doctrine of legitimate expectations is concerned with procedural fairness and imposes no obligation on a decision-maker to give substantive protection to any right, benefit, privilege or matter that is the subject of a legitimate expectation; (2) the doctrine of legitimate expectations does not require a decision-maker to inform a person affected by a decision that he or she will not apply a rule when the decision-maker is not bound and has given no undertaking to apply that rule; (3) the ratification of the Convention did not give rise to any legitimate expectation that an application for resident status would be decided in accordance with Art.3).

<sup>81</sup> Philip Sales and Joanne Clement, “International Law in Domestic Courts”, *Law Quarterly Review*, Vol.124, July 2008, p.388 at 408.



enforceable by courts until legislation is undertaken by competent legislature in that behalf and

- 2) a treaty or an international convention/covenant signed/ratified by the Federal Government gives rise to a *legitimate expectation* at law that could form the basis for challenging an administrative decision.

In response to the *Teoh* Judgment the Australian Government issued a statement (Joint statement, The Minister for Foreign Affairs and the Attorney-General and Minister for Justice) which is as follows; "...The High Court in the *Teoh* case.... gave treaties an effect in Australian law...which they did not previously have. The Government is of the view that this development is not consistent with the proper role of Parliament in implementing treaties in Australian law....It is for Australian Parliament to change Australian law to implement treaty obligations. The purpose of this statement is to ensure that the executive act of entering in to a treaty does not give rise to legitimate expectations in administrative law....The prospect was left open by the *Teoh* case of decisions being challenged on the basis of a failure sufficiently to advert to relevant international obligations including where the decision maker-maker and person affected had no knowledge of the relevant obligation at time of the decision. This is not conducive to good administration. Therefore, we indicate on behalf of the Government that the act of entering in to a treaty does not give rise to legitimate expectation in administrative law which could form the basis for challenging any administrative decision made from today. This is a clear expression by the Executive Government of the Commonwealth of a contrary indication referred to by the majority of the High Court in the *Teoh* Case."<sup>82</sup>

In the year 1997, a Bill was introduced in the Federal Legislature mainly with a view to partially affirm and partially supersede the decision of the Australian High Court in *Teoh* case. The Bill was intended to affirm proposition (1) and to over-rule (2) as stated above. However the opposition in the Senate prevented its enactment in to law.<sup>83</sup>

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<sup>82</sup> Henry J. Steiner and Philip Alston, 'International Human Rights in Conflict', Oxford University Press, Oxford, 2000, p.1019.

<sup>83</sup> Ibid.

#### **5.5.4 France:**

Article 52 of the French Constitution confers power on the President to conclude treaties. The President not only negotiates but also ratifies the treaties on his own. The role of the Parliament appears to be quite restricted. According to Article 52, the Parliament comes into picture only in the case of certain types of treaties and that too after the terms of the treaty have been decided upon. Even then, the Parliament's power is only to approve or reject its ratification. The types of treaties contemplated in Article 52 include peace treaties, trade treaties, human rights treaties and treaties ceding, exchanging or adding territories. Article 55 of the French Constitution indeed provides that concluded treaties do not require implementing legislation in order to be enforceable. Once a treaty has come into force, it overrides any conflicting domestic legislation even if such legislation happens to be passed subsequent to the ratification of the treaty.<sup>84</sup>

#### **5.5.5 Switzerland:**

The legal position in Switzerland is distinct altogether. The Executive authority in Switzerland is exercised by Federal Council headed by the President and the Federal Chancellor. The Federal Council has seven members elected at a joint meeting of the two Houses of Parliament. The Federal Council negotiates and signs the treaties. Once it is negotiated and signed, it is ratified/finalized in four different ways:

- a) In some cases Parliament authorizes the Federal Council in advance not only to sign a treaty but also to bring it into force.
- b) There are treaties which require approval of the Parliament before they become enforceable.
- c) A treaty may be subjected to an optional referendum as provided for in Article 89(3) of the Constitution. The categories of treaties subjected to this procedure are treaties which are effective for an indefinite period, without the possibility of denunciation.

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<sup>84</sup> Articles 52 to 56 French Constitution deal with Treaties and International Agreements. Text of Articles 52 to 56 available at <http://www.assemblee-nationale.fr/english/8ab.asp#VI> visited on 28-6-2011 at 2.55 p.m. see also P.M. Bakshi, *Supra note 76*.

- d) In some cases, the agreement has to be approved by a compulsory referendum as provided for in Article 89(5). The agreements subjected to this procedure are those which provide for adherence to supra-national organizations and organizations for collective security.

Thus there are four different processes for conducting a treaty in Switzerland depending upon the nature of treaty. The advantage of this system is that it allow for adequate scrutiny of those agreements that have significant implications for the nation and affect the rights of the citizens. Ofcourse, in the case of urgent and sensitive treaties, an alternative method is provided where the Parliament can only denounce the agreement if it does not agree with it, but there is no question of approval or ratification by the Parliament.<sup>85</sup>

#### **5.5.6 Canada:**

The Canadian Constitution Act, 1982 (British North-American Act1867) does not contain any specific provision with reference to external affairs. However, following the British practice and particularly the decision of Privy Council in **Attorney General for Canada vs. Attorney General for Ontario**,<sup>86</sup> the Federal Government exercises the exclusive power to enter into treaties on behalf of Canada.

The peculiar feature of the Canadian Constitution is that even the Provinces have the power to enter into international agreements, which, it is said, are not binding in international law. The Government normally seeks the approval of the Parliament before ratifying an important Treaty though there is no much constitutional obligation. Both Houses of Federal Legislature give approval in the form of resolution. The Constitution also mandates that any legislation required to implement a treaty can be enacted only by the provinces and it is because of this requirement that a good amount of consultation with the provinces is undertaken before concluding a treaty.<sup>87</sup>

The situation as to judicial invocation of international human rights in to the Canadian jurisprudence is somewhat nuanced. The most often cited statement of the

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<sup>85</sup> P.M. Bakshi, *Supra note 76*.

<sup>86</sup> AIR 1937 PC 82, wherein the dualist approach was approved by the Privy Council.

<sup>87</sup> P.M. Bakshi, *Supra note 76*.

law is that of former Chief Justice Dickson in **Re Public Service Employee Relations Act (Alta.)**.<sup>88</sup> In summation, his lordship said;

“...though I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada’s international obligations under human rights conventions”

However, recent case law suggests that there has been a considerable change towards monistic treatment of international human rights norms in to the Canadian jurisprudence by the Canadian Supreme Court. For example in **United States v. Burns**,<sup>89</sup> wherein the issue was whether the Minister of Justice, in extraditing two individuals to face murder charges in the United States, was obliged to seek assurances from the U.S. that the death penalty would not be imposed. The Supreme Court examined in a comprehensive manner the international community’s position on the death penalty, as well as Canada’s stance on the world stage, including not only ratification, but also Canada’s voting position on U.N. resolutions and held that assurances that the death penalty will not be applied upon extradition must be sought in all but exceptional cases. As far as application of international customary law is concerned, Canada follows monist approach in the sense that it forms part of domestic law. However domestic legislation will prevail in the event of any inconsistency.

Thus, due to the dualist approach, international human rights treaties do not form part of Canadian *corpus juris* unless specifically incorporated through legislation. However recent cases suggest that there is a trend towards greater weight to being accorded to international human rights instruments. With regard to practice of customary international law, Canada treats it as art of the law of land that is similar to U.S. and England.

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<sup>88</sup> (1987) 1 S.C.R. 313, cited in Elisabeth Eid, “Interaction Between International and Domestic Human Rights Law : A Canadian Perspective”, a Paper presented at Sino Canadian International Conference on the Ratification and Implementation of Human Rights Covenants :Beijing, China – October 2001. Full paper available at <http://www.icclr.law.ubc.ca/publications/reports/e-eid.pdf> visited on 28-06-2011 at 4.30 p.m.

<sup>89</sup> 2001 SCC 7, Cited in Elisabeth Eid, *Supra note* 88.

## 5.6 Conclusion:

The above analysis of State Practices on the domestic use of international law unleash novel picture indicating gradual departure from dualist approach to monist in recent years. The trend is to recognize growing concern towards human rights values in the new millennium. The invention of self-executing and non-self executing treaties theory by the U.S. Supreme Court is seen as check on the exclusive treaty making power of the federal government rather than restriction on the use of international human rights norms. However English practice in this regard is not encouraging one. It still maintains the rigid dualist approach to the subject matter. The recent Human Rights Act, 1998, is applicable only to European Human Rights Convention and not to any other multilateral human rights treaties. However, the courts in England have shown great responsibility in ensuring greater accountability to the international human rights obligation through interpretative techniques like holding that “Parliament never intends to breach international obligation” whenever domestic is in conflict with international human rights norms unless contrary is clearly expressed in the statute. Australia and Canadian approach is similar to that of England. The decision of Australian High Court in *Teoh* case has set up a new precedent in the area of domestic enforcement of international human rights in which the Doctrine of Legitimate Expectation is applied to enforce international human rights treaties.

France and Switzerland tends towards monist approach, in the sense that international human rights treaties become part of their *corpus juris* from the date of ratification and no domestic legislation is necessary to enforce them at the domestic level. The above analyses reveal that, the speed, Governments have shown in ratifying the treaties the same has not been followed in their execution. The courts have also fallen prey to their respective Constitutional authority/inhibitions and common law influence on their respective jurisprudence.