

## INTERNATIONAL LAW VIS-À-VIS HUMAN RIGHTS OF WOMEN IN INDIA : ROLE OF THE SUPREME COURT\*

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All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. The United Nations in its Charter affirmed the faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom. They are derived from the dignity and worth inherent in the human person. The Universal Declaration of Human Rights (UDHR), 1948 has reiterated human rights and fundamental freedoms. Democracy, development and respect for human rights and fundamental freedoms are interdependent and have mutual enforcement. The human rights of women, including girl child are, therefore, inalienable, integral and indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation of women in political, social, economical and cultural life are concomitants for national development, social and family stability and growth, culturally, socially and economically.

India is a signatory to various International conventions and treaties. The Universal Declaration of Human Rights, adopted by United Nations on 10<sup>th</sup> December, 1948 set in motion the universal thinking that human rights are supreme and ought to be preserved at all costs. This was followed in the series of conventions. On 18<sup>th</sup> December, 1979 the United Nations adopted the Convention on the Elimination of all forms of Discrimination Against Women, 1979 (CEDAW). The General Assembly has adopted the declaration on the Elimination of Violence against Women, 1993.<sup>1</sup> The Government of India who was an active participant to CEDAW ratified it on 19<sup>th</sup> June, 1993 and acceded to it on 8<sup>th</sup> August 1993 with reservation on Articles (5e), 16(1), 16(2) and 29 thereof. At the Fourth World Conference on Women in Beijing, the government of India has also made an official commitment, *inter alia*, to formulate and operationalise a national policy on women, which will continuously guide and inform action at every level and in every sector. To set up a Commission for Women to act as a public defender of women's human rights; to institutionalize

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1 In the Article 3, it was specified that women are entitled to the equal enjoyment and protection of all human rights, which would include *inter alia* (a) the right to life (b) the right to equality, and (c) the right to liberty and security of person.

a national level mechanism to monitor the implementation of the Platform for Action.<sup>2</sup> Under such circumstances, there should be no hesitation for the Supreme Court to place reliance on the International conventions and treaties.

The Judicial Colloquia (Judges and Lawyers) at Bangalore considered the domestic application of International human rights and norms in 1988. It was later affirmed by the Colloquia that it was vital duty of an independent judiciary to interpret and apply national Constitutions in the lights of those principles. Further Colloquia were convened in 1994 at *Zimbabwe*, in 1996 at *Hong Kong* and in 1997 at *Guyana*. In all those Colloquia, the question of domestic application of International and regional human rights specially in relation to women, was considered. The *Zimbabwe Declaration 1994*, *inter alia*, stated: "Judges and Lawyers have duty to familiarize themselves with the growing International jurisprudence of human rights and particularly with the expanding material on protection and promotion of the human rights of women."<sup>3</sup> Our Constitution guarantees all the basic and fundamental human rights set out in the International conventions and pays due regard for them.<sup>4</sup> The obligation of the court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the *Beijing Statement of Principles of independence of the judiciary in the LAWASIA region*. The chief justices of the Asia and the Pacific at *Beijing* accepted these principles in 1995 as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The object of the judiciary mentioned in the *Beijing* are : (a) to ensure that all person are able to live securely under the rule of law; (b) to promote , within the proper limits of the judicial function, the observance and the attainment of human rights; and (c) to administer the law impartially among persons and between persons and the state.<sup>5</sup> Keeping in view the above developments, the Supreme Court has applied International law in the area of domestic jurisprudence. The apex court applied the principles of International law in other cases<sup>6</sup> also. In this paper, application of International law concerning

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2 As quoted in *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

3 As quoted in *Chairman Railway Board v. Chandrima Das*, AIR 2000 SC 997.

4 Article 51 provides that promotion of International peace and treaty obligation in the dealing of organized people with one another. Article 51A provides that it shall be the duty of every citizen of India:- (a) to abide by the Constitution and respect its ideals and institutions...

5 *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

6 In *Jolly George Varghese v. Bank of Cochin*, AIR 1980 SC 471. The Supreme observed that to be poor, in this land of poverty is no crime and recover debt by the procedure of putting one in prison is too unreasonable. The International Covenant on Civil and Political Rights, 1965 bans imprisonment merely for not discharging the decree debt. Unless there be some other vice or *mens-rea* apart from failure to foot the decree, International law frowns on holding the debtor's person, as hostage by the court.

human rights of women by Supreme Court shall be discussed.

In *Nilabati Behera v. State of Orissa*,<sup>7</sup> a provision in the International Convention on Civil and Political Rights, 1966 (ICCPR) was referred to support the view taken that case that ‘an enforceable right to compensation is not alien to the concept to the enforcement of a guaranteed right’. As a public law remedy under Article 32, is distinct from the private law remedy in torts. Therefore, there is no reason why these International conventions and norms cannot, be used for construing the fundamental rights expressly guaranteed by in the Constitution of India, which embody the basic concept of gender equality in all spheres of human activity. In the instant case, petitioner demanded the compensation for the death of her son in the police custody. The court referred to Article 9(5)<sup>8</sup> of the ICCPR, 1966 which indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right. Consequently, the court awarded the monetary compensation to the petitioner after considering among other grounds, the provisions of 1966 Convention.

In *Madhu Kishwar v. State*<sup>9</sup>, the Supreme Court considered the provisions of the Convention on the Elimination of All forms of Discrimination Against Woman, 1979 (CEDAW) and held the same to be integral scheme of the Fundamental rights and the Directive Principles. Article 2 (e) of CEDAW enjoins the state parties to breathe life into the dry bones of the Constitution, International Conventions and the Protection of Human Rights Act, 1993 to prevent gender based discrimination and and to effectuate rights to life including empowerment of economic, social and cultural rights. Article 2 (f) read with Articles 3, 14 and 15 of the CEDAW embodies concomitant right to development as an integral scheme of Indian Constitution and the Human Right Act. The Court observed that the state should by appropriate measures including legislation, modify law and abolish gender-based discrimination in the existing laws, regulations, customs and practices, which constitute discrimination against women. In the instant case, the Court has taken the Minority view as per Justice *K. Ramaswamy* that provision of Hindu Succession Act, 1956 and the Indian Succession Act, 1925 though in terms, would not apply to the scheduled tribes, the principle contained therein being consistent with justice, equity, fairness, justness and good conscience would apply to them. Accordingly, the scheduled tribe women would succeed to the estate of their parent, brother husband, as heirs by intestate succession and inherit the property with equal share with

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7 (1993) 2 SCC 746.

8 “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

9 (1996) 5 SCC 125.

male heir with absolute rights as per the general principle of Hindu Succession Act, 1956 as interpreted by this court and equally of the Indian Succession Act, 1925 to tribal Christians. Ironically, the Majority view taken by the Justice *M.M.Punchhi* and Justice *Kuldip Singh* had not accepted the same view.

The Supreme Court considered the provisions of UDHR and CEDAW in *Municipal Corporation of Delhi v. Female Worker*.<sup>10</sup> In this case female workers (muster roll) engaged by the corporation raised a demand for the grant of maternity leave which was made available to regular female employees but was denied to them on the ground that their services were not regularized and therefore they were not entitled to any maternity leave. The court after considering the principles of International law observed that these principles have to be read into the contract of service between Municipal Corporation of Delhi and the women employees (muster roll). By reading these provisions, the employees immediately become entitled to all the benefits conceived under the Maternity Benefit Act, 1961. Again in *Githa Hariharan v. Reserve Bank of India*,<sup>11</sup> the Supreme Court interpreted section 6 (a) of the Hindu Minority and Guardians and Wards Act, 1890 with the help of CEDAW guidelines and held that father and mother get equal status as guardian of a minor child.

In *Chairman Railway Board v. Chandrima Das*,<sup>12</sup> the apex court observed, the International Conventions and Declarations as adopted by the United Nations has to be respected by all signatory states and meaning given to the words those declarations and conventions have to be such as would help in effective implementation of those rights. The applicability of UDHR and principles thereof may be read, if need be, into the domestic jurisprudence. In the instant case a gang rape was committed by the railway employee in the building of railways namely *Yatri Niwas*, on a women from *Bangladesh*, the court held that central government would be vicariously liable to pay the compensation to the victim. The court observed that establishing *Yatri Niwas* at various places to provide for the boarding and lodging of the passengers on payment of charge is apart of the commercial activity of the state and it can not be equated with the exercise of the sovereign power.

In landmark judgment of *Vishaka v. State of Rajasthan*<sup>13</sup>, the Supreme Court observed that it is now an accepted rule of judicial construction that regard must be given to International Conventions and norms for construing domestic law when there is no inconsistency among them and there is a need of

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10 AIR 2000 SC 1282.

11 AIR 1999 SC 1149.

12 AIR 2000 SC 997.

13 AIR 1997 SC 3011.

improvement in the domestic law. In the absence of domestic law, effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality. Right to work with human dignity is provided under Articles 14, 15, 19 (1) (g) and 21 of the Constitution. The safeguards against sexual harassment are implicit therein. Any International Convention not in consistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to the subject of Constitutional guarantee. In the instant case, an incident of brutal gang rape of a social worker took place in a village of Rajasthan. This incident revealed the hazards to which working women may be exposed. In the absence of the legislative measures, the Supreme Court after taking help from CEDAW guidelines, passed certain directions to employers of women to protect them from sexual harassment at the workplace. In the similar case,<sup>14</sup> the apex court observed that the courts are under an obligation to give due regard to International conventions and norms for construing domestic laws more so when there is no inconsistency between them and there is void in the domestic law. In 1993 at the International Labour Organization (ILO) seminar held at *Manila*, it was recognized that sexual harassment of women at workplace was a form of 'gender discrimination against women'.

Subsequently, in *Grammophone Company of India Ltd. v .Barendra Pandey*<sup>15</sup>, the Supreme Court held the comity of nations require that rules of International law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. The doctrine of Incorporation also recognizes the position that the rules of International law are incorporated into national law and considered a part of it unless they are in conflict with the domestic law.

Recently, in *Sakshi v. Union of India*,<sup>16</sup> it was pleaded among other grounds before the Supreme Court that Indian Penal Code (IPC), 1861 has to be interpreted in the light of the problems of present day and a purposive interpretation has to be given. In this connection, United Nations Convention on the Elimination of All forms of Discrimination Against Women, 1979 and also United Nations Convention on the Rights of the Child, 1989 were referred. The main argument in this case was that the words 'sexual intercourse' in the section 375 of the IPC should include all types of 'penetration' and victim of child abuse and rape should be given sufficient protection inside the court during

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14 *Apparel Export Promotion Council v. A.K Chopra*, AIR 1999 SC 625.

15 AIR 1984 SC 667.

16 AIR 2004 SC 2881.

trial. The court observed that the suggestions made by the petitioner will advance the cause of justice and are in the larger interest of the society. The cases of child abuse and rape are increasing at alarming speed and appropriate legislation in this regard is, therefore, urgently required. We hope and trust that the Parliament will give serious attention to the points highlighted in the petition and make appropriate legislation<sup>17</sup> with all promptness which it deserves.

The Indian Supreme Court has tried to adopt the International standard of gender-justice, if the provisions of International law are not inconsistent with the National law. In this process, the impact of International human rights law has now permeated the judicial thinking. In this regard the apex court has liberally used and frequently relied upon the International law e.g. UDHR, CEDAW, Beijing Declaration, ICCPR etc., which are the principal source of gender justice. The court has been so much influenced by the International women's human rights jurisprudence that it has stressed the need to read these principles into the domestic law. The Supreme Court of India is heading in the right direction and it has done a commendable job. The only suggestion, in view of the above, is that the protective umbrella of International law concerning human rights of women should be expanded by the apex court to all women who are in need of it.

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<sup>17</sup> Article 253 provides that legislation for giving effect to International law to International agreements. Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or any decision made at any International Conference, association or other body. Entry 14 of the Union List in the Seventh Schedule provides that entering into treaties and agreement with foreign countries and implementing of treaties, agreements and conventions with foreign countries.