EFFECTUATION OF INTERNATIONAL LAW IN THE MUNICIPAL LEGAL ORDER: THE LAW AND PRACTICE IN INDIA*

V.S. Mani**

An examination of effectuation of international law in the Indian municipal legal order at once involves both a doctrinal perception and a functional assessment of the role a municipal legal order plays in the implementation of international law through its normative regime as well as its authoritative institutional mechanisms. The present paper, therefore, encompasses an adumbration of a perception of the role of the municipal legal order in giving effect to international law, and an overview of the framework of law and practice of India in this respect.

1. A DOCTRINAL PERCEPTION

The reality of the decentralised structure of the international community points to the formidable difficulties in the implementation of international law, both at the international as well as the national level. Implementation of international law involves recognition and effectuation of rights and obligations and the goal-values underlying the norms warranting community action. But the recognition is based on an interpretation, value judgement and prioritisation preferred by each member state of the international community. The functions of law-making, law-implementation and adjudication, which are usually exercised by centralised institutions in the municipal legal order, are decentralised on the international plane, leaving individual states to perform these functions. It is indeed extremely difficult for nation states to subordinate their 'individual wills' to their 'real wills' the cumulation of which forms the

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** Professor of International Space Law, International Legal Studies Division, School of International Studies, Jawaharlal Nehru University, New Delhi.

'General Will' of the international community – if one were to apply ROUSSEAU'S theory to the international legal order. States tend to exercise considerable discretion in this 'international state of nature', even where no scope for discretionary action is permitted under the international legal order. In the face of this reality, the principle of good faith becomes a norm of fundamental importance, seeking to ensure both integrity of the international legal order and its fair compliance by the state system. That there is no impartial centralised international machinery charged with the task of effectuation of international law further aggravates the problems of international law compliance.

A second doctrinal problem relates to eventual transformation of the nature and structure of state sovereignty, from the absolute concept of sovereignty to a functional concept. The functional concept of sovereignty views a state's claim to sovereignty in terms of the function it performs. From this point of view, validity of a sovereignty claim is correlative to the role it fulfils for the benefit of a community. One aspect of this view is that for the functions which it does not perform, or whose performance it shares with other states and/or entities (both within and outside its territorial boundaries), a state cannot raise a blanket claim of 'exclusive and absolute' sovereignty. It can only claim so much of sovereignty as adequate to enable it to perform its functions effectively.

Another, but more critical, aspect of the functional concept relates to the pluralistic interests of human society both within and outside the political boundaries of a state. Pluralistic interests of human beings are the basis for the multiplicity of associations and groups in pursuit of fulfilment of different, yet often overlapping, interests, and the sovereign state is only, even if pre-eminently, one such association, distinguished though it is with the aura of unique political and legal authority. This authority does not, however, exist to the exclusion or in supersession of other associations. The coexistence of these associations both within a state as well as transcending its political boundaries demonstrates the non-exclusiveness and non-absoluteness of sovereignty both externally and internally, and the porosity and artificiality of political boundaries. The fundamental functional touchstone of all human associations, including a sovereign state, is, as alluded to earlier, the level of human well-being or what LASKI calls 'social good', achieved through each of them. This, indeed, implies that a state's claim to sovereignty is correlative to its functional utility to the community it seeks to serve and its legitimacy derives

from its social acceptability by the generality of that community, evidently corresponding to the functional utility.¹

This view may ominously point to a chaotic situation of 'now-you-see, now-you-don't' in respect of conditions of perceptibility, tangibility, and operability of sovereignty, and to anarchy of competing claims to jurisdiction by diverse national and transnational groups and associations. But since human interests are interrelated and often inclusive – both as between humans as well as between interests – each influencing the other, each coexisting with the other, there is a need for co-ordination among them, among the functions of associations. This indeed is the function of a state and its sovereign authority. The state not only performs the function of co-ordination, it also fills in roles failed by an association, or not served by any association. It is thus expected to perform the ultimate function of the arbiter, representing the whole community, over issues of co-ordination of social action, over the rights and duties of individuals and groups.

What determines the operability of state sovereignty is this 'ultimate' function in a national society, and the contextual need to perform it either in co-operation with or to the exclusion of, other sovereign states. The role of international law and organisation, then, is to facilitate this co-operation and co-ordination of action between states, and to protect the exclusivity of action as between them. Indeed, it is the generality of states which, as the recognised representatives of national communities and the units of international society, make the choice between international action and national action, or even harmonise or amalgamate elements of international and national action at various degrees of concurrent, co-ordinate or complementary spheres of competence.

Yet the exercise of this freedom of choice is determined by the following compulsion:

"Just as, . . . , no individual can find freedom outside the common rules of his society, so also, no state can find freedom save by accepting limitation of its sovereignty by the will formed by the common decision of a society of states."²

¹ This view is generally based on pluralism and Fabian socialism. See especially, HAROLD J. LASKI, 4 *Grammar of Politics* (London, 4th ed., 1938, reprint 1960), chapters I, II (sovereignty), III (Rights), IV (Liberty and Equality), VII (Authority as Federal), XI (International Organization). See also V.K. KRISHNA MENON, 'The Modern state and International Law', 1 *IJIL*, (1960-61) 116-127.

² LASKI, *ibid.*, p. 166.

Thus, state sovereignty cannot be seen in simple terms of domestic jurisdiction versus international jurisdiction. It has to be seen in terms of contextual allocation of functions by national societies to both the national state as well as co-ordinating mechanisms at the transnational levels, on the basis of voluntary acceptance of the need for such allocation by the generality of the international community of these national societies. The end result is international law – a cobweb of norms and institutions, with many sources from the transnational and international interactions, and many others from the similarity of national experiences, whose levels of clarity, identifiability, integrity and operability correspond to those functions they are called upon to espouse, facilitate and promote, whether in the international arena, or in the national arena, or both.

The question, therefore, is not one of supremacy of international law over national law,³ but of coexistence and co-ordination of both. Both monistic and dualistic theories fail adequately to recognise the pluralistic nature of international and national societies and the nature, scope and range of functions which their respective legal regimes and institutions are expected to perform corresponding to it. The system is typified by the dual features of autonomy and co-ordination of spheres of action at diverse levels in varying contexts. The fact is that international law is borne out of the need to fulfil certain functions to serve corresponding transnational and national societal interests. When a national legal order recognises and implements international norms, it does so in fulfilment of this realisation rather than other compulsions. The social rather than the legal or formal nature of obligations is the chief motive force behind the implementation of international norms within the national legal order. The social, and hence the legal, obligation is need-based.

To put it differently, international law is founded on the coincidence of sovereign wills of states determined by the force of societal interests, both national and transnational, promoting international, co-ordinate and national action. The implementation of international law through the national legal order is thus a function of the level of performance of the national legal order of its own societal responsibilities, of its acknowledgement and commitment made on the international plane. In this sense, it is at once a matter of both international and national obligations. This also partly explains some of the problems of implementation – in terms of reservations or ambivalence a nation

³ For a discussion of this issue in terms of state attitudes in the context of the 1970 Friendly Relations Declaration, see V.S. MANI, *Basic Principles of International Law* (New Delhi: 1993) 155-63.

may evince in respect of a rule of international law, and also its inadequacy or unsuitability to fulfil the needs of a national society.

Even in a larger sense, implementation of norms is a perennial jurisprudential and sociological problem. There is always a gap between a norm and its total implementation. While the ultimate test of validity of a norm is its general social acceptability, its inadequate implementation or instances of its violation do not per se affect the jural character of the norm itself although they may raise questions of accountability of the implementing authority and/or the need for a review of the implementing mechanism.

That the degree of compliance of law can never be hundred per cent was recognised by the International Court itself. In the Nicaragua Case the Court ruled:

“It is not to be expected that in the practice of states the application of the rules [of international law] in question should have been perfect . . . The Court does not consider that for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that the instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.”⁴

These observations are particularly relevant to any examination of harmony between international law and a municipal legal order. The respective autonomy of both the legal orders is presumed, and an instance of non-effectuation of international law through a municipal legal order is treated as a breach of the former to be dealt with under the rules of international responsibility.

2. THE INDIAN LAW AND PRACTICE⁵

2.1. The international personality of India and the applicable law

The existence of India as an international person predates the granting of formal independence by the British Parliament in 1947; predates its achieve-

⁴ ICJ Rep. 1986, p. 14 et seq., at p. 98, para 196.

⁵ The author wishes to acknowledge his indebtedness to and his heavy reliance on, the valuable contributions made by P. CHANDRASEKHARA RAO, *The Indian Constitution and International Law* (New Delhi, 1993), and T.S. RAMA RAO, ‘Some Problems of International Law in India’, 6 *Indian Year Book of International Affairs* (1957) 3-15.

ment of even a modicum of self-government. It was an original member of the League of Nations, and a party to a number of international agreements. Indeed, under traditional international law, the concept of free consent in the negotiation and conclusion of treaties in particular, and in the assumption of international obligations in general, did not exist, and the principle of sovereignty, without the principle of self-determination, stayed as a formal shell without reference to the people's will. What was good for Britain was good for India too. The British imprint over the legal processes and institutions in India was indelible; India became a 'common law country'. India's ancient cultural and legal traditions suffered a definite break with history with the advent of European colonialism, except perhaps in some isolated 'Indian states', i.e., Indian principalities that had at any rate accepted the British suzerainty or sovereignty, and also, in the realm of some aspects of the private law (personal law).

Undertaking international obligations, whether through treaties or through international customary law (being part of the common law, thanks to the Blackstonian myth), by pre-independent India was indeed anomalous.⁶ It implied a misrepresentation that India was capable of effectuating those obligations in its domestic realm acting on its own, which it was not, at any rate at least until its 1935 Constitution ushered in a communal, semi-self-government. Surely from the point of view of international law, it is not difficult to impute responsibility for the breaches of India's international obligations, including the obligation to effectuate them through its municipal law, to the British Government in London. Was it perhaps to wash their hands off such problems that the British made independent India to undertake to fulfil all prior obligations? One wonders. If so, India would have been better off, had it opted for the status of a 'newly independent' state along with Pakistan.

India's situation was anomalous in another sense too. The territorial boundaries of British India did not exactly coincide with those of the post-independent India and Pakistan. Most international obligations are territorial in application. If British India had the monopoly over the name 'India' on the international plane, its implementation of international obligations in the territories of the Indian subcontinent which were not included in the British Indian territories must also follow such international representation. There were 562 Indian principalities enjoying varying degrees of 'sovereignty' on the subcontinent. One doubts whether the British authorities in London or in New Delhi had such legal competence fully to effectuate international law over

⁶ On the anomalous status of pre-independent India, see T.T. POULOSE, 'India as an Anomalous International Person', 44 BYIL (1970) 201-12.

territories not directly under their administration. This situation also raises questions of territorial succession of India and Pakistan to erstwhile international law obligations, in view of the territorial changes.

In other words, the Devolution Agreement of 1947 concluded by Britain with pre-independent India and Pakistan whereby India took over the previous obligations of British India, did not conclusively resolve all problems of state succession. Indeed, the international legal validity of the agreement is itself extremely doubtful under modern international law.⁷ For one thing, such devolution agreements are devised as an independence package and one is not sure how far they are vitiated by the circumstances of 'duress' or 'undue influence' with the erstwhile colonial Power keen to ensure continuance of the interests of its nationals or transfer of old obligations to the newly independent state, as a precondition for grant of independence. Secondly, such arrangements may run counter to the sovereign right of the new state freely to decide whether or not to continue old obligations. Finally, the very competence of the entities which have not become sovereign states to conclude such arrangements binding on them after independence is rife with considerable legal difficulties, particularly from the point of view of the domestic law.

The question, so far as India was concerned, was whether its government, prior to independence, had constitutional competence to conclude the devolution agreement. One doubts very much if it had. From the domestic law point of view, however, it was perhaps the feat of the Indian Independence Act enacted by the British Parliament in 1947 that formed the legal justification for the continuation of the pre-independence legal system through independence. This of course assumes that sovereignty belonged to the British Crown and that it devolved upon independent India (i.e., at least upon those parts of the territory of India which had earlier been part of British India). Such an assumption does run contrary to the status of a colonial territory under modern international law as, according to the principle of self-determination, a territory under colonial administration is not an integral part of the metropolitan territory of the Administering Authority whose power is only to administer the colonial territory in order to prepare the people therein to achieve self-government and a status of their choice. Upon exercise of their choice, the people shall be entitled to sovereignty in terms of their choice. In this sense, during colonial rule, their sovereignty was in a state of suspended animation, it did not belong to or merge with that of the colonial Power, although some of the rights of sovereignty were exercised, during colonial rule, by the colonial

⁷ See IAN BROWNLIE, *Principles of Public International Law* (Oxford, 3rd ed., 1979, 1985 reprint) 653.

Power, for the benefit of the people. In other words, the colonial Power could not grant sovereignty to a people who chose to become an independent state, as it could not grant what it did not possess. The colonial territory becomes a sovereign state, by the operation of international law and at the will of its people, not by the feat of a colonial legislature. Viewed in this light, so far as British India was concerned, the 'lapse of paramountcy' of the British Crown pursuant to Section 7 of the Indian Independence Act only meant the lapse of the colonial Power's erstwhile authority to exercise some of the sovereign rights on behalf of British India. But vis-à-vis the 562 Indian princes, the lapse of paramountcy meant reversion of sovereignty and these states became, once again, sovereign states.⁸

Notwithstanding the above anomalies concerning the international personality of the pre-independent India and the question of its continuity post-independence, the continued application of municipal law remained unaffected. The relevant provisions of the Government of India Act, 1935, including section 292 (the 1935 Constitution), and section 18 of the Indian Independence Act, 1947, with due alterations, became part of the Constitution of the independent India, 1950. The India (Consequential Provisions) Act, 1949, an Act of the British Parliament, ordained that all laws in force should have the same application in relation to India, as if India had not become a Republic.⁹ It is interesting to note that section 18(3) of the Indian Independence Act sought to ensure the continued application of "the law of British India and of the several parts thereof" as existed before independence, subject of course to any subsequent statutory changes.¹⁰

As Justice KERR of the English Court of Appeal discovered in *Dalmia v. National Bank*, a 1978 case, most part of the Indian law is "basically statutory, but it also incorporates large portions of the common law, in particular in the law of torts". This situation evolved mainly through the original jurisdiction of the High Courts of Bombay, Calcutta and Madras by virtue of their 18th century charters, and the jurisdictions of the Mufassil Courts (i.e., the lower courts situated outside these three presidency towns) and the appellate jurisdiction of the High Courts, pursuant to a number of general and special enactments (whether by the British Parliament or under the authority of the Viceroy or the governors) requiring these courts to apply the principles of

⁸ *Magher Singh v. Principal Secretary*, AIR 1953 Jammu and Kashmir 25, cited in RAMA RAO, loc.cit. n. 5, p. 11, fn. 21.

⁹ RAMA RAO, loc.cit. n. 5, p. 10. The Indian Independence (International Arrangements) Order 1947 sought to give legal effect to the devolution agreement, within the Indian municipal law.

¹⁰ *Dalmia v. National Bank* (1978), 2 *Lloyds Reports* 223 at 235, cited in P.C. RAO, op.cit. n. 5, pp. 119-201.

“justice, equity and good conscience”. These principles are “generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances”.¹¹

2.2. The Indian Constitution and International Law: Basic Provisions

The basic provisions of the 1950 Constitution of India, by virtue of which international law becomes implementable through the municipal law of India are Articles 51 and 372.¹²

2.2.1. Article 372

Article 372 provides that “Subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution, shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority”. Explanation I to Article 372 clarifies that the term ‘law in force’ shall include a law “passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed . . .”.

The principal implications of Article 372 for the effectuation of international law through the realm of Indian municipal law are as follows: first, the carrying forward of the law as it stood at the commencement of the Constitution on 26 January 1950 shall be “subject to the other provisions of this Constitution”. While the Constitution may be amended pursuant to the procedures laid down in the Constitution itself (such as in Article 368), the pre-Republic law, to be effective after the commencement of the Constitution, must pass the test of compatibility with other provisions of the Constitution as they stand at the material time when the test is being applied. This requirement ensures the supremacy of the Indian Constitution within the Indian municipal law, vis-à-vis the accumulated body of law previously applicable in the territory that now constitutes the Republic of India. Should there be any inconsistency between the pre-existing international law (as incorporated in the law in force immediately before the commencement of the Constitution) and the Constitution, the latter shall prevail, and the former shall be invalid to the

¹¹ Justice KERR in *Dalmia v. National Bank*, *supra* n. 10, citing *Waghela Rajsanji v. Shek Masludin* (1887), 14 *Indian Appeals* 89, 96.

¹² P.C. RAO, *op.cit.* n. 5, p. 117.

extent of inconsistency.¹³ The inconsistency may be in respect of a provision,¹⁴ a series of provisions,¹⁵ or the 'basic features' of the Constitution.¹⁶ It is not surprising, therefore, that Article 13(1) proclaims that "all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part [i.e., Part III on Fundamental Rights] shall, to the extent of such inconsistency, be void".¹⁷

Second, the term "all the law", read with explanation, includes common law, other customary law of India and the statute law in force at the time of commencement of the Constitution. Evidently, international law as it existed immediately before the commencement of the Constitution as part of the common law and the statute law in force immediately before that date has continued in force in India.¹⁸

Third, the expression "all the law in force" means that the law, to be eligible for continuance in operation, must have been in force immediately before 26 January 1950. This is a test easier to apply in respect of that part of pre-1950 international law which had been incorporated into the then Indian statute law, than with regard to other parts of that law which had been incorporated in the Indian common law. On an in-depth study of the relevant case-law on the subject, P. CHANDRASEKHARA RAO culls out the following principal test, "[b]efore any principle is accepted as a 'law in force' on account of its being a principle of common law of England", and hence of India (if one may add):

- (i) that the principle had become part of the common law of England;
- ii) that before the Indian Constitution came into force, the same principle was accepted and applied by the Indian courts; and

¹³ See P.C. RAO, op.cit. p. 118, relying on *S.I. Corporation v. Secretary Board of Revenue*, AIR 1964 SC 207, at 213-15.

¹⁴ *State of West Bengal v. Corporation of Calcutta*, AIR 1967 SC 997 at 1007, cited in P.C. RAO, *ibid.*, n. 10.

¹⁵ *Ibid.*

¹⁶ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1462.

¹⁷ Article 13(2a) clarifies that 'law' includes, *inter alia*, "custom or usage having in the territory of India the force of law".

¹⁸ Section 3(29) of the General Clauses Act, 1897, while defining the 'Indian Law' makes a distinction between "any Act of Parliament of the United Kingdom or any Order in Council, rule or other instrument made under such Act", and other law in force in India. The latter is the 'Indian Law'.

(iii) that the principle so accepted as the common law of India continued to be in force by reason of Article 372 of the Constitution.¹⁹

Fourth, “in the territory of India” encompasses not only the territory of the former Dominion of India but also the territories of Indian rulers under British suzerainty.²⁰

Fifth, “immediately before the commencement of this Constitution” means that international law as it stood incorporated in the Indian common law and statute law as at 25 January 1950 shall continue to be in force through 26 January 1950 until altered by the legislature or other competent authority. Any change in the English common law after that date shall not affect the Indian law, unless such change is incorporated into the Indian law.²¹ However, this clearly clothes the Indian courts with power to determine, with reference to the critical date of the Constitution:

- (a) whether a rule of international law was indeed such a rule (on the basis of the criteria for the determination of an international customary law rule);
- (b) whether the pre-1950 English common law recognised it as such;²²
- (c) whether it was or it could have been part of the English common law applicable to the Indian conditions (Indian common law); and
- (d) whether it is in conformity with the other provisions of the Constitution.

Finally, while the phrase “immediately before the commencement of this Constitution” has the effect of ‘freezing’ the international customary law as incorporated in the common law as it stood on the critical date, the Indian courts are likely to be moved by the principles of “justice, equity and good conscience”, and even ‘defreeze’ it by recognising the inane evolutionary character of international law, particularly taking into account their own Constitutional responsibility under Article 51 and the responsibilities of the executive and the legislature under the other provisions of the Constitution, such as Articles 73 and 253. Evidently, the term “other competent authority” in Article 372 includes the courts in performance of their basic law-finding and law-declaring functions.

¹⁹ P.C. RAO, *op.cit.*, p. 124. He bases his premises on a study of a number of cases, particularly *State of West Bengal v. Corporation of Calcutta*, AIR 1967 SC 1007; *Dalmia v. National Bank*, *supra* n. 10, p. 22; *Director of Rationing and Distribution v. Corporation of Calcutta*, AIR 1960 SC 1355; *Commissioner of Income Tax v. A.P.V. Mir Osman Ali*, AIR 1966 SC 1260.

²⁰ See the General Clauses Act, 1897, Section 3(213).

²¹ P.C. RAO, *op.cit.*, p. 119.

²² For an extensive discussion of the English case law on the question of recognition and incorporation of international law in the English common law, P.C. RAO, *op.cit.*, pp. 55-76; RAMA RAO *loc.cit.* n. 5, pp. 27-41. See also J.N. SAXENA, ‘Relation of International law to Internal Law’, 12 *Banares Law Journal* (Varanasi) (1976) 46-60.

2.2.2. Article 51

With the marginal note “Proclamation of International Peace and Security”, Article 51 of the Indian Constitution proclaims as follows:

“The state shall endeavour to:

- (a) promote international peace and security;
- (b) maintain just and honourable relations between nations;
- (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and
- (d) encourage settlement of international disputes by arbitration.”

CHANDRASEKHARA RAO points out that this formulation was inspired by the Declaration of Havana adopted on 30 November 1939 by the Second Conference of American States Members of the International Labour Organisation.²³

Introducing this provision in the Constituent Assembly, B.R. AMBEDKAR, Chairman of the Drafting Committee, said: “The propositions contained in this new article are so simple that it seems to be super-arrogation to try to explain them to the House by any lengthy speech”.²⁴ Nor was there any lengthy debate except a few statements on the importance of peace and security for the peace and economic and social progress of the country, and on the importance of arbitration of disputes to avoid war.

A few principal features of Article 51 may be identified. First, Article 51 enshrines one of the “Directive Principles of State Policy”, embodied in Part IV of the Constitution. The Directive Principles, Article 37 clarifies, are not enforceable through a court of law, but “. . . are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws”.

As AMBEDKAR said in the Constituent Assembly,

²³ The Declaration in its dispositive proclaimed “. . . unshaken faith in the promotion of international cooperation and in the imperative need for achieving international peace and security by the elimination of war as an instrument of national policy, by the prescription of open, just and honourable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and by the maintenance of justice and the scrupulous respect for treaty obligations in the dealings of organised peoples with one another”. Cited in P.C. RAO, *op.cit.*, p. 4, quoting from B. SHIVA RAO, *The Framing of India's Constitution, Select Documents* Vol. 2 (1967) 150.

²⁴ *Constituent Assembly Debates*, Vol. 7 (1948-49) 595, cited in P.C. RAO, *op.cit.*, pp. 4-5.

"It is the intention of the Assembly that in future both the Legislature and the Executive should not merely pay lip service to these principles enacted in this Part, but that they should be made the basis of all executive and legislative action that may be taken hereafter in the matter of the governance of the country."²⁵

Second, in respect of Article 51, the state conduct cannot be made justifiable at least for three reasons. One, as a Directive Principle, it has been rendered so by Article 37. Two, the Article 51 obligation is for the state to 'endeavour' to promote, to maintain, to foster, and to encourage certain conditions. An obligation to endeavour cannot easily be amenable to tests of justiciability. Three, in the realm of foreign policy and international relations, success or failure of these endeavours will depend upon the international milieu, and attitudes and conduct of individual countries in respect of whose relations with India Article 51 requires executive and legislative action.

Third, the phraseology of Article 51 indicates that its drafting leaves much to be desired. It mixes up between foreign policy goals and elements of international law. Promotion of international peace and security is surely an admirable goal of any foreign policy. It is indeed a fundamental goal of international law which is one of the instrumentalities available for states in their endeavour to achieve this goal. Evidently, Article 51(a) and (b) are mutually inclusive. "Just" refers to justice and underscores the importance of justice to the relations between nations. "Foster" respect for international law is bad drafting. Is India required to 'foster' respect for international law in its own conduct or as between nations? Why only "foster respect", why not simply 'respect international law'? Why the separate mention of "international law" and "treaty" obligations?²⁶ Does not "international law" include treaties? Why not 'international law including treaty obligations'? The preference for settlement of disputes through arbitration has perhaps been due to the influence of the League of Nations system on the founding fathers of the Indian Constitution. Yet one is not sure, if by "arbitration" they meant third party arbitration; they probably did, in view of the popularity of third party arbitration during the League era.²⁷

²⁵ Constituent Assembly Debates (1948-49), Vol. 7, p. 476, quoted in P.C. RAO, *op.cit.*, p. 3.

²⁶ One does not understand why England-trained lawyers should make this mistake. One has, of course, seen even eminent political scientists making it. See for instance, HAROLD J. LASKI, *op.cit.* n. 1, p. 600 (while dealing with the League of Nations).

²⁷ According to P.C. RAO, the inclusion of arbitration was the result of an inadequate understanding on the part of the Constituent Assembly of the system of settlement of international disputes under the United Nations Charter. See P.C. RAO, *op.cit.* n. 5, p. 6.

Finally, it is surprising, as CHANDRASEKHARA RAO rightly observes, that the drafting of Article 51 was influenced by a little-known international instrument, rather than, say the United Nations Charter, the ignorance of whose existence is impossible for one to attribute to its draftsmen.²⁸

The generally accepted rules of interpretation of statutes such as the rule of harmonious construction and the golden rule of avoiding absurdity should support the proposition that Article 51(c) would mean 'foster respect for international law including treaty obligations in the dealings of states and peoples with one another'. The term 'international law' should be interpreted in terms of Article 38(1) of the Statute of the International Court of Justice, a treaty to which India is a party.²⁹ International law primarily applies to the relations of states and the draftsmen of Article 51 must have meant this when they drafted "in the dealings of organised peoples with one another", a phrase taken out of the Havana Declaration, 1939. Indeed, in terms of the functional test introduced by the International Court of Justice in the Reparations case³⁰ 'the peoples', too, have *jus standi* under international law commensurate with the function they perform in relation to applicable rules of international law, such as those flowing from human rights law.

That Article 51 and, hence, the rules of international law are *per se* non-justiciable in the realm of Indian municipal law calls for two qualifications. In the first place, as emphasised in the Constituent Assembly, non-justiciability does not affect the nature or depth of the obligation cast upon the executive and legislative wings of government to strive in good faith to achieve the objectives set by the Directive Principles. "State actions, including actions of the instrumentalities and agencies of the state, must not only be in conformity with the Fundamental Rights guaranteed by Part III of the Constitution, but must also be in accordance with the Directive Principles of State Policy prescribed in Part IV".³¹ Secondly, to the extent that the fundamental rights under Part III are evolutionary in character and that their exposition in the hands of the judiciary takes this into account, even absorbing in its stride many elements of the Directive Principles, the latter have ceased to be non-justiciable. The Indian Supreme Court has in fact declared that its tasks

²⁸ P.C. RAO, *ibid.*

²⁹ J.N. SAXENA interprets 'international law' in Article 51(c) to mean customary international law. See SAXENA, *loc.cit.* n. 22, p. 49. One would opt for the more liberal interpretation in terms of Article 38(1) of the ICJ Statute, for obvious reasons.

³⁰ ICJ Rep. 1949, p. 174.

³¹ P.C. RAO, *op.cit.* n. 5, p. 3, citing in support *Central Inland Water Transport Corporation v. Brojo Nath*, AIR 1986 SC 1571 at 1617.

encompass advancement of the human rights jurisprudence.³² Additionally, the effect of Article 37 on the judiciary is that

“while Courts are not free to direct the making of legislation [in fulfilment of the Directive Principles *per se*], Courts are bound to evolve, affirm and adopt principles of interpretation which will further and not hinder the goals set out in the Directive Principles of State Policy. This command of the Constitution must be ever present in the minds of Judges when interpreting statutes which concern themselves directly or indirectly with matters set out in the Directive Principles of State Policy.”³³

The judicial function may, in appropriate cases, even justify filling up of any gaps in the Constitution or in other statutes. But the Courts will be most circumspect in performing this ‘legislative’ function; they may invoke it only “in the case of clear necessity and when reason for it is found in the four corners of the statute itself”.³⁴

2.3. Executive and Legislative Powers in Respect of External Relations

Besides the Directive Principle embodied in Article 51, the Constitution of India contains provisions relating to foreign relations law.

Under Article 73, the executive power of the Union (the Central Government) extends to:

- “(a) the matters with respect to which Parliament has power to make laws; and
- (b) the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.”

The executive power is, of course, subject to the provisions of the Constitution.³⁵

³² P.C. RAO, *ibid.*, p. 148, citing *Ajay Hasia v. Khalid Mujib*, AIR 1986 SC 487, at 493 and *M.C. Mehta v. Union of India*, AIR 1987 SC 1086 at 1089, 1097.

³³ *U.P.S.E. Board v. Hari Shankar*, AIR 1979 SC 65 at 69, *per* CHINNAPPA REDDY, J., cited in P.C. RAO, *op.cit.*, pp. 124-5.

³⁴ *Income Tax Commissioner, Calcutta v. National Taj Traders*, AIR 1980 SC 485 at 489, cited in P.C. RAO, *op.cit.*, p. 125, who also cites a recent affirmation of this doctrine of necessity in *Sub-Committee on Judicial Accountability v. Union of India*, AIR 1992 SC 320.

³⁵ Article 256 seeks to ensure that the executive power of states (provinces) conform to the laws made by Parliament; Article 257 seeks to ensure that it does not impede or prejudice the executive power of the Union. Article 258 provides for delegation of executive power from the Union to states.

The legislative power under the Indian Constitution is shared by Parliament and state legislatures "subject to the provisions of this Constitution".³⁶ The Constitution enumerates three lists of subjects – the Union List, the State List and the Concurrent List – in respect of which the legislative power may be exercised,³⁷ provided that the legislative power of Parliament overrides that of the state legislature in respect of the Concurrent List.³⁸

A number of items on the Union List relate to India's external relations. They include items 1 (Defence of India), 2 (Armed forces of the Union), 3 (Deployment of forces), ("Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India"), 10 ("Foreign affairs, all matters which bring the Union into relation with any foreign country"), 11 ("Diplomatic, consular and trade representation"), 12 ("United Nations organisation"), 13 ("Participation in international conferences, associations and other bodies and implementing of decisions made thereof"), 14 ("Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries"), 15 (War and peace), 16 (Foreign jurisdiction), 17 (Citizenship, naturalisation and aliens), 18 (Extradition), 19 (Admission into, and emigration and expulsion from India; passports and visas), 21 ("Piracy and crimes committed on the high seas or in the air; offences against the law of nations committed on land or the high seas or in the air"), 25 (Maritime shipping and navigation), 29 (Airways, aircraft and air navigation), 31 (Post and telegraph, telephone, wireless, broadcasting and "other like forms of communications"), 37 (Foreign loans), 41 (Trade and commerce with foreign countries) and 57 (Fishing and fisheries beyond territorial waters). By virtue of Item 97 read with Article 248, Parliament retains residuary legislative power in respect of "any matter not enumerated" in any of the three Lists.

The effect of Article 73 is that the executive power of the Union (the Central Government) encompasses the whole of the Union List and the Concurrent List, particularly the above-noted subjects directly relevant to external relations, subject of course to the other provisions of the Constitution, and also to any law made by Parliament.

³⁶ Article 245 of the Indian Constitution.

³⁷ Article 246 and the Seventh Schedule of the Constitution.

³⁸ Article 254.

2.4. Making and implementation of Treaties

Two aspects of the relationship between treaties and the Indian Constitution may be considered, namely treaty-making and treaty-implementation.

2.4.1. Treaty-Making

Following the Commonwealth practice, treaty-making in India still continues to be regarded as a function falling within the executive powers of the Union, by virtue of Article 73 read with Article 246 and Item 14 of the Union List, Seventh Schedule to the Constitution. Indeed, Parliament has power to enact a law regulating treaty-making power pursuant to Article 246 and Item 14 and other Items of the Union List, but it has not done so. Hence the continuance of the Commonwealth practice. The point to note, however, is that there is nothing in the Constitution preventing the Executive from deviating from the Commonwealth practice so long as such deviation is not inconsistent with any of the provisions of the Constitution.³⁹

The Government of India has made the following statement on the treaty-making power of the executive in India:

“Parliament has not made any laws so far on the subject [of treaties] and until it does so, the President’s power to enter into treaties remains unfettered by any internal constitutional restrictions.

In practice, the President does not negotiate and conclude a treaty or agreement himself. Plenipotentiaries are appointed for this purpose and they act under full powers issued by the President. It is however, the President who ratifies a treaty.”⁴⁰

This is in line with the British, and hence the Commonwealth, practice. The executive claims the prerogative to decide whether or not to make and ratify a treaty. The legislature comes into the picture only if the treaty calls for any legislation to facilitate its implementation within the country or any

³⁹ This point is material to Article 46 of the Vienna Convention on the Law of Treaties, 1969, whereby a state’s consent to a treaty may be invalidated on ground of a manifest violation of a rule of its internal law of fundamental importance.

⁴⁰ *Law and Practice Concerning the Conclusion of Treaties* (United Nations Legal Series: New York, 1953) 63, quoted in C.G. RAGHAVAN, ‘Treaty Making Power under the Constitution of India’, in S.K. AGRAWALA, ed., *Essays on the Law of Treaties* (New Delhi, 1972) 217-250 at 219.

specific allocation of financial resources. This practice has its origin in the British constitutional convention whereby the Crown is not only the executive, but also the fountain-head of law and justice. In other words, legally there is a mythical fusion of the three organs of government under the Crown.

This fusion was a reality in the days of the divine right of kings, but is only a myth now, in view of the emergence of democratic principles. The concepts of parliamentary sovereignty and cabinet accountability impose serious limitations on the powers of the executive. Yet the ghost of history continues to haunt representative government including its conduct of foreign relations. In recent times, however, questions have been raised against the so-called executive prerogative. A case in point has been the nation-wide debate recently witnessed in Britain on the need for a national referendum to decide whether or not the country should ratify the Maastricht Treaty. The debate clearly transcended party affiliations. The need to consult the people was particularly highlighted in view of the serious abridgement of British sovereignty which the Maastricht Treaty involved.

Apart from the British heritage, other justifications for the executive discretion to decide on the participation in treaties include (a) the cabinet accountability to Parliament, and (b) the mandatory requirement of parliamentary approval implicit in adoption of a piece of enabling legislation. Unfortunately, both these justifications do not adequately fulfil the need for prior parliamentary approval for assumption of international obligations by the Union Government binding the country. The cabinet accountability comes into play only after the event, i.e., after the country has been committed to treaty obligations. The government of the day could lose the confidence of Parliament, but a change of government does not *per se* terminate or alter the international obligations already accepted by the outgoing government. The termination (if not provided for in the treaty itself) or alteration of a treaty already in force may have to be renegotiated – i.e., it is subject to further agreement of the parties and may carry with it special costs in terms of practical politics. The other requirement of parliamentary approval through enabling legislation is clearly subject to two limitations. One, it arises only after the executive has committed the country to a treaty and therefore, on the international plane, the treaty obligations will have full force regardless of whether or not Parliament enacts a piece of enabling legislation. Two, not all treaties may require enabling legislation, and therefore, where there is no need for enabling legislation, Parliament will have little chance of even discussing the pros and cons of the treaty, even if such a debate may be of mere academic interest. In other words, the current practice whereby the executive exercises absolute discretion in committing the country definitively with respect to a treaty is clearly an anachronism and out of step with the principles of

parliamentary supremacy in a democracy in which the people are supposed to govern themselves through their elected representatives.

There are at least four principal reasons why the consent of the peoples' representatives, if not the people themselves, must be a prerequisite for India, or for that matter for any democratic polity, to be bound by a treaty. First, when the current Commonwealth practice came to be established, the number of treaties negotiated between nations was very limited, and so were the scope and range of subjects covered by those treaties. Those were the days of limited government. But the post-Second World War international relations witnessed a horizontal as well as vertical expansion of matters covered by treaties and agreements, precisely because of the phenomenal expansion of the role of government in the governance of a country and of the scope of international relations. The recent negotiations on the issues of protection of the environment through the Rio Summit and of international trade through the Uruguay Round highlight this. The recent Indo-European Union treaty on economic matters is a similar example of a treaty, though of a non-universal character. One could add to the list items like human rights. These are fundamental issues that most directly and substantially affect the lives of individuals transcending the artificial boundaries of national jurisdiction and those of federal-state relations. It is, therefore, not only desirable but essential to bring the acceptance of the people to bear on a definitive decision on the participation of a country in a treaty involving such issues. Parliamentary consent thus legitimises acceptance of serious restraints on state sovereignty, both externally as well as internally. In fact it would greatly facilitate national compliance with a treaty. The criticality of such consent to coalition governments, or governments surviving on a razor-thin majority can hardly be exaggerated.

Secondly, one needs to emphasise time and again that India is a federation of states. The federal principles must be given full effect even if the Indian federalism is a much watered down version of the original concept, in comparison with the United States, Canada, or Australia. The Senatorial advice and consent, the *sine qua non* of the American Constitution, is based on respect for the federalist principles. The Rajya Sabha, or the Council of states (which is the Upper House of Parliament) could perform a similar function.

Thirdly, the rule of prior parliamentary consent is likely to act as a shield greatly assisting the executive in protecting, as far as possible, the legitimate interests of the country.

Finally, as already noted above, there is a need to enforce the principles of cabinet accountability and parliamentary supremacy. This cannot be meaningfully achieved by the current Commonwealth practice whereby

Parliament is confronted with a *fait accompli*, when the executive comes before it, after undertaking binding international obligations through treaties.⁴¹

Article 73(a) of the Indian Constitution in fact places both the executive and Parliament at par with each other, except that the latter may regulate executive 'discretion' by enacting a law. As the jurisdictions of both the Union executive and the Union legislature are co-extensive by virtue of this provision, and as both are subject to the provisions of this Constitution, the so-called Commonwealth practice of untrammelled executive prerogative in treaty matters is not exactly in consonance with the provisions of the Indian Constitution.⁴²

It is submitted that in order to limit the executive discretion to acceptable levels in undertaking treaty obligations, to make the principle of parliamentary supremacy meaningful and realistic, and to obviate any hiatus between undertaking of treaty obligations on the international plane and their effectuation in the realm of municipal law, Parliament should urgently consider passing a law stipulating some form of prior parliamentary consent as a prerequisite to ratification or accession to an international agreement. In the absence of such a specific law, there is no way to restrain the government of the day from committing the country to international obligations of serious consequences, including substantial surrender of national sovereignty, even amounting to compromising the basic structure of the Indian Constitution.⁴³

⁴¹ The executive has not followed a consistent practice of consulting Parliament before ratification of or accession to a treaty by it. Thus, for instance a resolution was moved by the relevant minister seeking parliamentary approval of the UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954 and of its ratification by the Government. The resolution was passed authorising the Government to ratify the Convention, see, M.N. KAUL and S.L. SHAKHDAR, *Practice and Procedure of Parliament* (New Delhi, 4th ed., 1991) 588, cited in P.C. RAO, op.cit., p. 132. See also K. NARAYANA RAO, 'Parliamentary approval of treaties in India', *Indian Yearbook of International Affairs*, Vol. 9-10 (1960) 22-39.

⁴² On the limits of application of the Crown prerogatives to India, see *State of West Bengal v. Corporation of Calcutta*, AIR, 1967 SC 997, discussed at length in P.C. RAO, op.cit. pp. 120-123. RAO predicts a functional approach to be adopted by the Indian judiciary.

⁴³ RAGHAVAN rightly refers to the invalidity of a treaty entered into by the executive, if it leads to a change in the form of government as set up by the Constitution, for it could not have been the intention of the Constitution that a power conferred by it should be used to alter or destroy the constituent instrument itself. See RAGHAVAN loc.cit. n. 40, p. 246. In fact RAGHAVAN anticipated the need for parliamentary enactment on the treaty-making power of the executive, more than two decades ago. See RAGHAVAN, *ibid.*, p. 228.

There is an urgent need for an informed and non-partisan public debate on this vital matter in India.⁴⁴

2.4.2. Treaty implementation

Thus the Union executive enjoys somewhat unbridled power in the conclusion of treaties and in deciding the extent to which India should be bound by a treaty.⁴⁵ Implicit in this power is the duty to carry out the obligations under the treaty both within and outside the realm of Indian municipal law. Steps must be taken to incorporate the treaty into the body of the Indian domestic law, should such incorporation be necessary for the effectuation of the treaties in that realm. Indeed, it is the responsibility of the executive to see that there is no time gap between assumption of international obligations by India and their implementation as the state is expected, pursuant to Article 51 of the Constitution, to foster respect for treaty obligations (under Article 73 executive powers are subject to this and other provisions of the Constitution). At the same time it must also be noted that what cannot be implemented, for constitutional or other reasons, should not be undertaken by the executive as a feat of its prerogative. India, though in the august company of many other countries, does not have an enviable record of prompt ratification of treaties which it has arduously negotiated, or of their prompt implementation through domestic legislation, despite the often professed policy to the contrary. One of the reasons for this appears to be the endemic lack of co-ordination among the

⁴⁴ For a critical analysis of some of the Indian judicial pronouncements which show a “tendency of undue deference to the executive, in all matters relating to foreign affairs”, see T.S. RAMA RAO, ‘Some Constitutional Aspects of Treaty-Making Power in India’, in S.K. AGRAWALA, op.cit. n. 40, pp. 251-8. For a more conservative assessment of the judiciary’s role, see P.C. RAO, op.cit., pp. 197-231 on ‘Acts of state’, and ‘Facts of state’.

⁴⁵ It is, of course, common knowledge that the reservations made by a state while becoming a party to a treaty, to be valid, must be compatible with the object and purpose of the treaty - see Article 19 of the Vienna Convention on the Law of Treaties, 1969. At times, however, a reservation made in respect of domestic law may be invalidated by the developments in domestic law of the reserving country. For instance, with reference to the right of compensation for victims of unlawful arrest or detention in violation of the Covenant on Civil and Political Rights, 1966, India’s Instrument of Accession to that treaty declared that there was no such right enforceable under the Indian legal system (see 20 IJIL (1980) 118, para II). But this has been countermanded by judicial rulings under Article 21 of the Constitution, whereby there is now a right to compensation for unlawful arrest and detention. See for instance the Rudul Shah case, *Supreme Court Cases* (SCC) (1983) 4, p. 141; Bhim Singh v. J&K, AIR 1986 SC 494; Rajalakshmi v. UT of Pondicherry, SCC (1992) Supplement 2 p. 27; Saheli v. Commissioner of Police, Delhi, AIR 1990 SC 513.

various government departments each of which functions like a monolithic leviathan.

Article 253 of the Constitution provides as follows:

“Notwithstanding anything in the foregoing provisions of this Chapter, 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 countries or any decision made at any international conference, association, or other body.”⁴⁶

Additionally, Article 260 envisages making of a law to regulate the exercise of foreign jurisdiction by the government of India, pursuant to an agreement with the Government of any territory, not part of India.⁴⁷

P. CHANDRASEKHARA RAO, on the basis of case-law, identifies the following categories of treaties requiring constitutional amendments or legislation by Parliament:

- (i) treaties involving cession of territory;
- (ii) treaties whose implementation requires addition to, or alteration of, the existing law;
- (iii) human rights covenants and other instruments.⁴⁸

Indeed, no exhaustive enumeration of the various types of treaties requiring parliamentary legislation is possible. As a general rule, as Justice SHAH observed in *Maganbhai Ishwarbhal Patel v. Union of India*:⁴⁹

“The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the laws of the state. If the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty.”

CHANDRASEKHARA RAO rightly notes that although India became a party to a number of treaties, “the number of treaties which have been incorporated

⁴⁶ It is interesting to note, from the point of view of international law, that this provision uses the phrase “treaty, agreement or convention”, and Item 14 of the Union List repeats this. It perhaps means a ‘treaty, however named’, and if so construed, Article 253 would be in harmony with Article 1(a) of the Vienna Convention on the Law of Treaties, 1969, embodying the definition of a treaty.

⁴⁷ See Foreign Jurisdiction Act 1947, a pre-independence enactment.

⁴⁸ P.C. RAO, *op.cit.* pp. 137-48.

⁴⁹ AIR 1969 SC. p. 783, also cited in RAGHAVAN, *loc.cit.* n. 40, pp. 224-5.

into Indian law, either fully or partly, is small".⁵⁰ On an analysis of nineteen such selected statutes incorporating treaties, RAO finds that three different legislative methods have been used by Parliament, namely:

- (1) making provisions in compliance with the relevant provisions of the treaties without enacting the treaty provisions;⁵¹
- (2) annexing to the statute in a schedule to it, those provisions of the treaty which required enforcement under Indian law;⁵² or
- (3) reproducing the whole of the treaty in the schedule to the statute.⁵³

It is needless to say that the first two methods are likely to play havoc with the process of effectuation of treaty obligations through the Indian law in so far as they encourage subjectivity and selectivity in identification of treaty provisions requiring statutory incorporation.⁵⁴ They also defeat the application of the basic rule of interpretation of treaties that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose",⁵⁵ in so far as the truncated reproduction or municipal law redraft of the treaty provisions may fail to assist the judiciary seeking to implement the treaty through the statute law, constrained as it is to be bound by the authority of the Legislature.⁵⁶

International lawyers are likely to be fascinated by the last phrase employed in Article 253 of the Constitution, namely "or any decision made at any international conference, association or other body", at a time when they continue to argue over the legal significance of resolutions of international organisations. A similar phrase is found in Item 13 of the Union List. Evidently, the legislative competence of Parliament under Article 253 is regardless of the international legal significance of any decision of an international conference, association or other body. If Parliament feels a decision of an international conference to be important enough to be legislated

⁵⁰ P.C. RAO, *op.cit.*, p. 149.

⁵¹ E.g. the United Nations (Security Council) Act, 1947; the Merchant Shipping Act, 1958; the Tokyo Convention Act, 1975; the Anti-hijacking Act, 1982; the Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982. For an examination of the last three enactments, see V.S. MANI, 'Aviation safety, international terrorism and the law', 12 *IJIL* (1992) 1-59 at 40-8.

⁵² E.g., the Diplomatic Relations (Vienna Convention) Act, 1972.

⁵³ E.g., the Arbitration (Protocol and Convention) Act, 1937 and the Geneva Conventions Act, 1960.

⁵⁴ This is indeed besides the point that P.C. RAO makes regarding the municipal law language and treaty obligations. See P.C. RAO, *op.cit.*, p. 151.

⁵⁵ Article 31 of the Vienna Convention on the law of Treaties, 1969.

⁵⁶ See, e.g. *V/O Tractorexport v. Tarapore & Co*, AIR 1971 SC 1, discussed in P.C. RAO, *op.cit.*, pp. 173-6.

on, it may do so. “[I]nternational conference, association or other body” does not have to be inter-governmental, although it may encompass inter-governmental meetings. The words “international . . . association or other body” would undoubtedly include inter-governmental organisations (other than the United Nations, because Item 12 of the Union list specifically refers to that organisation). CHANDRASEKHARA RAO points out that the modern environmental legislation in India was largely inspired by the 1972 Stockholm Conference.⁵⁷

The role of the judiciary in interpretation and application of statutes enabling implementation of treaties is equally important. As the Guardian of the Constitution, it has the responsibility to facilitate action in implementation of treaties, the functions of treaty-making and treaty-legislation being constitutionally approved functions. However, it appears that the Indian judiciary has not been able to evolve a uniform approach to construction of treaty-implementing statutes and that it tends to be seriously inhibited by its essentially municipal law orientation. Hence one agrees with CHANDRASEKHARA RAO’s recommendation that the judiciary has, through Article 51, a constitutional duty to apply the principles of interpretation embodied in the Vienna Convention on the Law of Treaties, 1969. These principles have by now become part of international customary law.⁵⁸

2.5. Implementation of International Customary Law

Some of the issues relating to whether and how international customary law is part of the Indian municipal law have already been discussed earlier, particularly in the context of Articles 372 and 51 of the Constitution. CHANDRASEKHARA RAO discusses *Gramophone Co. of India v. Birendra Bahadur Pandey*.⁵⁹ Since his study, the Indian Supreme Court had occasion to deal with some aspects of the interface between international customary law and Indian municipal law in *M. V. Elizabeth and others v. Harwan Investment and Trading Pvt. Ltd.*,⁶⁰ which now appears to be the *cause célèbre* on the subject. The sole question for the decision of the Indian Supreme Court in this case was whether any courts in the state of Andhra Pradesh or in any other state in India (including the High Courts and the Supreme Court) had admiralty

⁵⁷ P.C. RAO, *op.cit.*, pp. 190-194.

⁵⁸ *Ibid.*, pp. 177-8.

⁵⁹ AIR 1984 SC p. 667, P.C. RAO, note 5, pp. 181-183.

⁶⁰ SCC (1993) Supplement (2), 433 (also in 3 AsYIL (1993) 183 et seq).

jurisdiction to proceed in rem against the arrested ship on a cause of action concerning carriage of goods from an Indian port to a foreign port. There was an array of earlier High Court decisions holding that the Indian High Courts' admiralty jurisdiction was determined in terms of the British Admiralty Courts Act, 1861, that it remained unaffected by the statutory changes in Britain, and that the High Courts' admiralty jurisdiction was limited and distinct from their other jurisdictions. According to these decisions, the Indian High Courts and the Supreme Court would not have the jurisdiction to grant the remedy sought.

The Supreme Court's decision was handed down by a Bench of two judges (Justice T.K. THOMMEN and Justice R.M. SAHAI, with the former giving the main judgement and the latter a short concurring one). The Court rejected outright the above reasoning of the earlier High Court decisions. Justice THOMMEN said at the outset:

"It is true that the Colonial statutes continue to remain in force by reason of Article 372 of the Constitution of India, but that does not stultify the growth of law or blinker its vision or fetter its arms. Legislation has always marched behind time, but it is the duty of the Court to expound and fashion the law for the present and the future to meet the ends of justice."⁶¹

Justice THOMMEN, on an examination of an array of British and British-Indian statutes, observed:

"The wide jurisdiction vested in the English Courts is derived from ancient principles of Maritime Law developed by custom and practice as well as from subsequent statutes many of which incorporated the provisions of International Conventions unifying the laws practised in several maritime countries."⁶²

The learned judge, after a perceptive excursus into the evolution of maritime law in England, France and some other civil law countries, said:

"Maritime law is as much a part of the general legal system as any other branch of the law . . . [T]his branch of the law . . . is no longer treated as a separate and independent branch."⁶³

The judge asserted that in tracing the history of admiralty law in India, it is "misleading and incorrect to confine it to statutes", and that this is so in the

⁶¹ *Ibid.*, p. 449, para. 18.

⁶² *Ibid.*, p. 454, para. 33.

⁶³ *Ibid.*, pp. 463-4, para. 59.

case of the law obtaining in Britain.⁶⁴ “Where statutes are silent and remedy has to be sought by recourse to basic principles, it is the duty of the Court to devise procedural rules by analogy and expediency”, he reminded the Court.⁶⁵ Also, “where substantive law demands justice for the party aggrieved, and the statute has not provided the remedy, it is the duty of the Court to devise procedures by drawing analogy from other systems of law or practice”.⁶⁶

Thus the Court, speaking through Justice THOMMEN, ruled that it was

“within the competence of the appropriate Indian Courts to deal, in accordance with the general principles of maritime law and the applicable provisions of statutory law, with all persons and things found within their jurisdiction. The power of the Court is plenary and unlimited unless it is expressly or by necessary implication curtailed.”⁶⁷

The Court noted that

“[i]t is well recognised in international law that a merchant ship, though generally governed by the laws of the flag state, subjects itself to the jurisdiction of a foreign state as it enters its waters. The Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958 and the Law of the Sea Convention, 1982 affirm that the sovereignty of a state extends over its internal and territorial waters.”⁶⁸

The judgment also referred to the Brussels Convention relating to the Arrest of Seagoing Ships, 1952, the Maritime Liens and Mortgages Conventions of 1926 and 1967, the Brussels Convention on Bills of Lading, 1924, the UN Convention on Carriage of Goods by Sea, 1978, and various other conventions to some of which India is a party and to many, still a non-party.

The Court found that “Indian statutes lag behind the development of international law” in comparison with the statutes in England and other maritime countries.⁶⁹ “In the absence of any statute in India comparable to the English statutes on admiralty jurisdiction”, the Court said,

⁶⁴ Ibid., p. 465, para. 65.

⁶⁵ Ibid., para. 66.

⁶⁶ Ibid.

⁶⁷ Ibid., p. 466, para. 67.

⁶⁸ Ibid., p. 467, para. 71, citing NAGENDRA SINGH, *International Maritime Law, British Shipping Laws*, Vols. I to IV, in support.

⁶⁹ Ibid., p. 469, para. 76.

“there is no reason why the words ‘damage caused by a ship’ appearing in Section 443 of the [Indian] Merchant Shipping Act, 1958 should be so narrowly construed as to limit them to physical damage and exclude any other damage arising by reason of the operation of the vessel in connection with the carriage of goods.”⁷⁰

The Court then suggested that the gap in admiralty law should be plugged:

“The remedy lies, apart from enlightened judicial construction, in prompt legislative action to codify and clarify the admiralty laws of this country. This requires thorough research and investigation by a team of experts in admiralty law, comparative law, and public and private international law. Any attempt to codify without such investigation is bound to be futile.”⁷¹

Referring to the various Brussels Conventions to which India is not a party, the Court said that these Conventions were “the result of international unification and development of maritime laws of the world and can, therefore, be regarded as the international common law or transnational law rooted in and evolved out of the general principles of national laws, which, in the absence of specific statutory provisions, can be adopted and adapted by courts to supplement and complement national statutes on the subject. In the absence of a general maritime code, these principles aid the courts in filling up the lacunae in the Merchant Shipping Act and other enactments concerning shipping.”⁷²

The following comments on the case are in order. First, the Court’s concern in the case was, essentially, the fact that there were gaps in the statute law of India in respect of the law of admiralty. There were two kinds of gaps, one in relation to the jurisdiction of the state High Courts and the other in relation to the extent of remedy available under the Indian Merchant Shipping Act, 1958. Second, as regards both, the Supreme Court relied heavily on the ‘judicial sovereignty’ of the people vested in the Courts of record (i.e., the State High Courts and the Supreme Court) through the Constitution of India; their plenary and unlimited inherent powers to dispense justice according to the principles of “justice, equity and good conscience”, rather than being constrained by the “imperial statutes of the bygone era” which had fallen into the dustbins of history, even in the metropolitan countries. Finally, to fill up these gaps, the Court relied, in equal measure, on the developments in international

⁷⁰ Ibid., p. 473, para. 79.

⁷¹ Ibid., p. 475, para. 85.

⁷² Ibid., p. 476, para. 86.

maritime law, construing international conventions having evolved from the generally shared principles of the various legal systems (although the Court's analysis was largely inveighed by its analysis of the English, the American and some of the civil law systems), speaking variously about "general principles of law" common to the legal systems of the maritime countries, general principles of different legal systems, "principles of international maritime law", principles of "international common law", and principles of international customary law, all in one breath! Indeed, it is often difficult to distinguish one category from the other. Even in terms of Article 38(1) of the Statute of the International Court, there is so much of give and take and mutuality of influence between the different sources of international law (the Court also spoke of "transnational law", "maritime law", "comparative law", "private and public international law" all at one go without bothering to distinguish between them).

The Court's observations that the various maritime conventions have evolved on the basis of general principles of law drawn from various legal systems and that, therefore, the principles embodied in these conventions are binding even on countries which had not become parties to these conventions, are significant. The Court was in fact referring to the interface between general principles of law, treaty law and international customary law by one single sweep! By the same feat, the Court suddenly filled up the hiatus in the Indian statute law. The utilization of international law, the Court having incorporated it as part of the "common law of India", to plug the gaps in the Indian statute law is remarkable!

Equally important are the two pieces of the Court's advice to the legislature and the executive. First, the Court said, the entire maritime law of India should be subjected to an expert-scrutiny and research so that an updated piece of legislation was put in place in lieu of the existing archaic one. Second, noting that the non-ratification by India of many treaties, the formulation of some of which was contributed by "active and fruitful Indian participation", was due to circumstances such as lack of co-ordination among the various Government departments, the Court suggested the constitution of "an adequate and specialised machinery for implementation" of these treaties, to "facilitate adoption of internationally unified rules by national legislation", and proposed a role for the Law Commission of India at par with that of its counterpart in England.⁷³ Hopefully, the executive and Parliament would take follow up actions.

⁷³ *Ibid.*, p. 477, para. 91.

3. CONCLUSION

The purpose of this paper has been to present an overview of some of the principal issues involved in the effectuation of international law through the Indian municipal law. It in no ways claims to be an exhaustive treatment of the subject. Indeed, in view of space limitations, it has even stayed clear of an in-depth examination of the Indian statute law and common law against the whole gamut of international law, to evaluate how far the Indian law has been able to assimilate the latter into its body juridic. Without such an evaluation no study can be considered complete.

The above presentation points to a number of conclusions. The effectuation of international law in India is facilitated through incorporation of treaties into the internal law through legislation and incorporation of specific rules and principles of international law into the Indian common law by the Indian courts following the Commonwealth practice. Often, the judiciary is presented with opportunities to play an active role in this regard. Even when a treaty has not been specifically incorporated into the Indian law, the courts may, as far as possible, interpret the Indian statute law in harmony with the principles embodied in the treaty, thereby avoiding gaps in implementation of international treaty obligations undertaken by India.

As regards international customary law, the *M. V. Elizabeth* case has shown that the Indian courts can play an activist role in evolving an Indian common law, in recognizing, interpreting and incorporating into that law even the most recent principles and rules of international law developed on the basis of multilateral treaties to which India may not even be a party. This case is indeed a trail-blazer in the realm of effectuation of international law through Indian municipal law.

However, the Indian judicial decisions often show a municipal lawyer's ignorance or inadequate understanding of various aspects and concepts of international law, including the processes of international law-making. CHANDRASEKHARA RAO's recent work has been aimed, *inter alia*, to clarify to the Indian municipal lawyers and judiciary the various important aspects and concepts of international law relevant to the judicial task of their effectuation into the internal law of India, which duty is cast upon the judiciary under Article 51 of the Constitution.⁷⁴

The Supreme Court has, in the *M. V. Elizabeth* case, highlighted the problem of lack of co-ordination among the various Government departments in respect of effectuation of treaty principles into the municipal law of India.

⁷⁴ P.C. RAO, op.cit. n. 5.

This problem has seriously affected not only the ratification of or accession to international agreements, but also getting them incorporated into municipal law once India became a party thereto. However, one is not sure to what extent the Law Commission of India can play the 'crucial role' in the specialized co-ordinating machinery proposed by the Supreme Court. It is submitted that this role should be performed by the Legal and Treaties Division of the Ministry of External Affairs and the Ministry of Law & Justice, working together. One finds that the former is often sidelined in matters having a bearing on international law. The Law Commission has enough work to do in the realm of codification of municipal law and review of the statute law as such. It is a different question, however, if the Commission has, with its current manner of working, found itself on the periphery of the law-making process in India. If so, part of the blame must be borne by the Commission itself. One hopes that, should the Government of India decide to take follow-up action on the suggestions of the Supreme Court, it would not limit these exercises to the confines of its bureaucracy, but would liberally draw upon the plentiful professional expertise available outside.