15

INTERNATIONAL LAW

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INTRODUCTION

IN RECENT times, India is witnessing the reliance on international laws being used by the Indian courts to address certain grave issues of the society, where there are certain loopholes in the laws framed by the Legislature. Because it inherited a Common Law System, India refers to foreign laws to interpret its own laws. There are certain instances, where the Indian courts have found or have referred to international conventions and have addressed or directed the respective authority, with regards to the international conventions mentioned. The Indian Constitution and as per various judicial pronouncements, international law is not considered domestic or national law unless legislation to that effect has been passed by an Indian legislature. Thus an international treaty is not enforceable in India unless it has been ratified by the Parliament. In this regard India follows the 'dualist 'theory of law, that is, international laws or international treaties help India formulate laws or set benchmarks with an objective in mind . It is of great importance to the courts of India, so as to help the judiciary, in time of need. In this regard it becomes pertinent to mention the Vienna Convention on the Law of Treaties, 1969 which regulates all aspects of treaty making between states. While India has not ratified this convention yet, the Supreme Court has recognized its customary status. In this regard it is important to note that under law is different from national law unlike the 'monist' theory which stipulates that international law automatically becomes national law.

II APPROACH OF THE SUPREME COURT

In the matter of *Arjun Gopal* v. *Union of India*[1] the Supreme Court ruled out imposing a complete ban on the sale of firecrackers during Diwali but put certain conditions in place for the sale and use of firecrackers. The court has acknowledged the alarming degradation of the air quality, leading to severe air pollution in the city of Delhi and accepts that there are number of reasons which have contributed to poor air quality in Delhi and National Capital Region (NCR). At the same time, it is emphasised that air pollution hits its nadir during Diwali time because of indiscriminate

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1 AIR 2018 SC 5731.

use of firecrackers, the chemical composition whereof increases harmful particulate matters such as PM2.5 or PM10 at alarming level thereby bringing the situation of 'emergency'.

Supreme Court directs that crackers with reduced emission (improved crackers) and green crackers only would be permitted to be manufactured and sold. Petroleum and Explosives Safety Organisation (PESO) is directed to review the clinical composition of fireworks, particularly reducing aluminium content, and shall submit its report in respect thereof within a period of two weeks from today. For undertaking this exercise, PESO would also associate Fireworks Research and Development Centre (FRDC).

As there has been a lot of hue and cry in the international community regarding protection of the environment and thus even the apex court pronounced its judgment citing various international environmental conventions and protocols, *viz.*, Stockholm Declaration of the United Nations Conference on Human Environment, 1972 and more specifically the "precautionary principle", and this was reiterated in the Rio Conference of 1992 in its Principle 15.[2] The principle of precaution involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. It is based on scientific uncertainty. Environmental protection should not only aim at protecting health, property and economic interest but also protect the environment for its own sake. Precautionary duties must not only be triggered by the suspicion of concrete danger but also by (justified) concern or risk potential. The precautionary principle was recommended by the UNEP Governing Council (1989).

In the landmark case of *Common Cause (A Regd. Society)* v. *Union of India,*[3] the Supreme Court of India held that right to die with dignity is a fundamental right. The five judge bench also held that passive euthanasia and a living will also legally valid. The court issued detailed guidelines in this regard. The bench also held that the right to live with dignity also includes the smoothening of the process of dying in case of a terminally ill patient or a person in persistent vegetative state with no hope of recovery.

This ruling thus permits the removal of life-support systems for the terminally ill or those in incurable comas. The court also permitted individuals to decide against artificial life support, should the need arise by creating a living will. The court while pronouncing the judgement resorted to several international law conventions and foreign judgments.

2 Rio Declaration on Environment and Development 1992, Principle 15: In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for proposing cost-effective measures to prevent environmental degradation. *Available at*: http://www.gdrc.org/u-gov/precaution-7.html (last visited on Nov. 10, 2019).

3 AIR 2018 SC 1665.

The right to life under article 6(1) of the International Covenant on Civil and Political Rights, 1976 (ICCPR) provides that every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. The second sentence of article 6(1) imposes a positive obligation on the states to provide legal protection of the right to life. However, the subsequent reference to life not being 'arbitrarily deprived' operates to limit the scope of the right (and therefore the states' duty to ensure the right). Comments from the United Nations Human Rights Committee suggest that laws allowing for voluntary euthanasia are not necessarily incompatible with the states' obligation to protect the right to life.

The United Nations Human Rights Committee has emphasized that laws allowing for euthanasia must provide effective procedural safeguards against abuse if they are to be compatible with the state's obligation to protect the right to life. In 2002, the United Nations Committee considered the euthanasia law introduced in the Netherlands. The committee stated that:[4]

where a State party seeks to relax legal protection with respect to an act deliberately intended to put an end to human life, the Committee believes that the Covenant obliges it to apply the most rigorous scrutiny to determine whether the State party's obligations to ensure the right to life are being complied with

The European Court of Human Rights (ECHR) has adopted a similar position to the United Nations Human Rights Committee when considering euthanasia laws and the right to life in article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention). In *Pretty* v. *United Kingdom*[5] the ECHR ruled that the decision of the applicant to avoid what she considered would be an undignified and distressing end to her life was part of the private sphere covered by the scope of article 8 of the Convention. The court affirmed that the right of an individual to decide how and when to end her life, provided that the said individual was in a position to make up her own mind in that respect and to take the appropriate action, was one aspect of the right to respect for private life under article 8 of the Convention.[6]

Accordingly, the ECHR concluded that, the right to life guaranteed by article 2 of the Convention obliges states to establish a procedure capable of ensuring that a decision to end one's life does indeed correspond to the free will of the individual concerned.

In a recent decision regarding end of life issues, *Lambert* v. *France,*[7] the ECHR considered whether the decision to withdraw artificial nutrition and hydration of Vincent Lambert violated the right to life in article 2. Vincent Lambert was involved in a serious road accident which left him tetraplegic and with permanent brain damage.

4 International Covenant on Civil and Political Rights, 1976, art.2 and 6.

5 [2002] ECHR 423 (April 29, 2002).

6 European Convention for the Protection of Human Rights art. 8 provides a right to respect for one's "private and family life, his home and his correspondence", subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society".

7 [2015] ECHR 185.

He was assessed in expert medical reports as being in a chronic vegetative state that required artificial nutrition and hydration to be administered via a gastric tube. Lambert's parents applied to the ECHR alleging that the decision to withdraw his artificial nutrition and hydration breached, *inter alia*, the state's obligations under article 2 of the European Convention. The ECHR highlighted that article 2 imposes on the states both a negative obligation (to refrain from the 'intentional' taking of life) and a positive obligation (to 'take appropriate steps to safeguard the lives of those within its jurisdiction'). The court held that the decision of a doctor to discontinue life-sustaining treatment (or 'therapeutic abstention') did not involve the state's negative obligation under article 2 and, therefore, the only question for the court under article 2 was whether it was consistent with the state's positive obligation.

The ECHR emphasized that 'the Convention has to be read as a whole', and, therefore, in a case such as the present one reference should be made, in examining a possible violation of article 2, to article 8 of the Convention and to the right to respect for private life and the notion of personal autonomy which it encompasses.

Thus, the ECHR in the *Lambert* v. *France* case struck the balance between the sanctity of life on the one hand and the notions of quality of life and individual autonomy on the other.The subject of euthanasia is quite controversial and raises an array of sophisticated moral, ethical, social, philosophical, legal and religious concerns. Broadly there are two groups formed whenever euthanasia is discussed. The first group is of religion notably Christianity and Islam which don't recognize a right to die, believing life to be a divine gift.

Second group relates to the requirement of consent. The capacity of terminally-ill patients to give informed consent for their own killing is often questioned. As a reason in past there have been many campaigns relating to euthanasia some for its support whereas others for its withdrawal. However taking into account the interest of people laws have been laid down in support of euthanasia. This is against the religious beliefs, but for the benefit of society. This shows the clash of law and religion. It has been observed many a times that law remains ahead of society and religion stays behind the society.

Thus, it can be said that this is a judgment in right direction. Those suffering from chronic diseases are often subjected to cruel treatments. Denying them the right to die in a dignified manner extends their suffering. Hence, the court is right in declaring right to die with dignity is as a fundamental right as it will help in reducing the pains of those suffering from chronic treatments and they will be able to die in a dignified manner.

The Supreme Court delivered one of the most keenly awaited and historic judgment in the case of *Indian Young Lawyer's Association* v. *State of Kerala*.[8] (*Sabarimala* case), by a 4:1 majority, the court permitted entry of women of all age groups to the Sabarimala temple, holding that 'devotion cannot be subjected to gender discrimination'. Sabarimala Sree Dharmasastha Temple is a temple complex located

8 2018 (13) SCALE 75.

at Sabarimala inside Periyar Tiger Reserve in Pathanamthitta District, Kerala, India. It is the largest annual pilgrimage in the world with an estimate of between 17 million and 50 million devotees visiting every year. The temple is dedicated to the Hindu celibate deity Ayyappan also known as *Dharma Sastha*, who according to belief is the son of Shiva and feminine incarnation of Vishnu. The deity in Sabarimala temple is in the form of a Yogi or a Bramchari according to the Thanthri of the temple. The God in Sabarimala is in the form of a Naisthik Bramchari, and this is the reason why young women are not permitted to offer prayers in the temple. Since the deity is in the form of a Naisthik Brahmachari, it is therefore believed that young women should not offer worship in the temple so that even the slightest deviation from celibacy and austerity observed by the deity is not caused by the presence of such women.

The exclusion of (a class of) women from the Sabarimala temple was justified on the basis of ancient custom, which was sanctioned by rule 3(b), framed by the government under the authority of the 1965 Kerala Hindu Places of Worship (Authorisation of Entry Act). Section 3 of the Act required that places of public worship be open to all sections and classes of Hindus, subject to special rules for religious denominations. Rule 3(b), however, provided for the exclusion of "women at such time during which they are not by custom and usage allowed to enter a place of public worship." These pieces of legislation were juxtaposed against constitutional provisions such as article 25(1) (freedom of worship), article 26 (freedom of religious denominations to regulate their own practices), and articles 14 and 15(1) (equality and non-discrimination).

In response to a public interest litigation filed in 1991, the High Court of Kerala had judged that the restriction of entry of women ages 10-50 to the temple was in accordance with the usage prevalent from time immemorial, to uphold the customary traditions of the temple.

However, on September28, 2018, the Supreme Court of India overturned the restriction on the entry of women, declaring it unconstitutional and discriminatory. The Supreme Court had ruled that women, of all age groups, can enter Sabarimala temple in Kerala. The apex court in a 4:1 majority said that the temple practice violates the rights of Hindu women and that banning entry of women to shrine is gender discrimination.

The court in its judgement held that the Convention on Elimination of all forms of Discrimination Against Women (CEDAW) and the fact that India is a party to this Convention for emphasizing that it is the obligation of the state to eradicate taboos relating to menstruation based on customs or traditions and further the state should refrain from invoking the plea of custom or tradition to avoid their obligation. The court also stated that international conventions must be followed when there is a void in the domestic law or when there is any inconsistency in the norms for construing the domestic law.

In 2017, various individuals and groups (including Swapnil Trapathi, Indira Jaising, Mathews J. Nedumpara and the Centre for Accountability and Systemic Change) filed petitions before the Supreme Court of India under article 32 of the

Constitution seeking a declaration that "Supreme Court case proceedings of 'constitutional importance having an impact on the public at large or a large number of people' should be live streamed in manner that is easily accessible for public viewing" (para. 1). In addition, they sought guidelines from the court to enable the future determination of cases that would qualify for live streaming. The petitioners based their argument on the 1996 Supreme Court case of *Naresh Shridhar Mirjkar v. State of Maharashtra*[9] which had held that article 19 of the Constitution included the right of journalists to publish reports of court proceedings. In that case the Supreme Court had emphasized, "the efficacy of open trials for upholding the legitimacy and effectiveness of the Courts and for enhancement of public confidence and support."

The court, in 2018, in a landmark judgment in the case *Swapnil Tripathi* v. *Supreme Court of India,*[10] upheld the plea of the petitioners and allowed live streaming of court proceedings in the interest of the public, especially law students and interns. The court while delivering its judgment undertook a thorough comparative analysis of the use of live streaming in other jurisdictions. It noted that Australia begun including audio-visual recordings of all high court (their apex court) proceedings on its website from October 1, 2013. However, these proceedings are not live, but are made available within a couple of days of the proceedings. The lower courts in Australia have no set rules on broadcasting. In Brazil the judiciary owns a television and radio station on which Supreme Court and superior court of justice proceedings are broadcast. There is also a YouTube channel which broadcasts the Supreme Court proceedings. The Canadian Supreme Court proceedings have been broadcast on a dedicated television channel since 1994 and have been streamed on the court websites since 2009, and the lower courts make broadcast decisions on a case-to-case basis. In China, live streaming and recorded broadcast is being introduced across the judiciary. Legislation in 2005 in England ended the criminalization of recording court proceedings and allowed the broadcast and live streaming of Supreme Court hearings in England, Scotland and Northern Ireland. The ECHR proceedings are broadcast on the court's website, the International Criminal Court has delayed streaming to allow the redaction of confidential information and the International Criminal Tribunal for Yugoslavia has a YouTube channel and social media accounts with various clips from proceedings. Although Germany allows broadcast of proceedings this is subject to strict legislative restrictions. Ireland allows broadcast of proceedings, but this is on a case-by-case basis and is rarely used. In Israel live broadcasting has been allowed since 2014. New Zealand has guidelines which govern the broadcast of their court proceedings. In South Africa the right to freedom of expression was used to allow for the broadcast of criminal matters and the Supreme Court of Appeal set out guidelines to be considered by Courts in determining whether to allow broadcast of specific cases. The United States Supreme Court has allowed oral recordings of its hearings since 1955 but does not allow video broadcasting, and lower courts allow broadcast subject to guidelines.

9 [1966] 3 S.C.R 744.

10 AIR 2018 SC 4806.

The court referred to the guidelines proposed by the attorney general to govern the live streaming of proceedings in India and stated that it agreed with them in general. It noted that the process should be executed in a, "progressive, structured and phased manner, with certain safeguards to ensure that the purpose of live streaming of proceedings is achieved holistically and that it does not interfere with the administration of justice or the dignity and majesty of the Court"

In its concluding remarks, the Supreme Court quoted Bentham, "In the darkness of secrecy sinister interest, and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion, and surest of all guards against improbity. It keeps the Judge himself while trying under trial (in the sense that) the security of securities is publicity."[11]

The court was hearing petition filed by National Commission for Protection of Human Rights (NCPCR), in the case of *National Commission for Protection of Child Rights v. Rajesh Kumar.*[12] The NCPCR was aggrieved over the order of High Court of Calcutta. NCPCR and West Bengal government were at odds in the high court over the trafficking of 17 children from an orphanage in Jalpaiguri.

It was contended before the high court that that the writ petitioner had received summons dated July 20, 2017, from the NCPCR and replied thereto informing that the West Bengal State Commission for Protection of Child Rights had been informed with regard to such incidents and the said Commission had already taken cognizance of the matter and, therefore, the jurisdiction of the National Commission is barred under section 13(2) of the Commissions for Protection of Child Rights Act, 2005. Jurisdiction of NCPCR also became matter of debate as high court had accepted the said contention and had opined that the matter was required to be debated and, accordingly, had issued notice and directed the National Commission to file an affidavit and further not to proceed with the matter.

The NCPCR held local administration responsible for continuous of vicious cycle of trafficking racket but the state government questioned its jurisdiction. After hearing the matter today, the apex court decided to broaden the horizons of petition and said that it would scrutinize the affairs of orphan homes across the country. The bench referred to the provisions of the Protection of Human Rights Act, 1993 which lay down that children cannot be abandoned or parted away at whims and fancies of the person-in-charge of orphanages.

The court mentioned other international human rights conventions and covenants in its judgment and stated "human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the international covenants and enforceable by courts in India.

11 *Scott* v. *Scott* (1911) All. E.R. 1, 30

12 2018(1) SCALE 418.

Underscoring the importance of rights of children in society as sacred and holding future of country dependent upon destiny of its children, the Chief Justice of India (CJI) observed, "A right of a child in a society is sacred, for the future of the country depends upon the character and the destiny of a child and the State has a great role in that regard. It is in the realm of protection." CJI further said that nothing is more disastrous than children being sold and such a situation cannot be allowed to prevail.

In *Joseph Shine* v. *Union of India,* [13] Joseph Shine, a non-resident Keralite, in October 2017 filed public interest litigation under article 32 of the Constitution. The petition challenged the constitutionality of the offence of adultery under section 497 of the Indian Penal Code, 1860 read with section 198(2) of the Criminal Procedure Code 1973. Section 497 IPC which was challenged, criminalized adultery by imposing culpability on a man who engages in sexual intercourse with another person's wife. Adultery was punishable with a maximum imprisonment of five years. Women, including consenting parties, were exempted from prosecution. Further a married woman could not bring forth a complaint under section 497 IPC when her husband engaged in sexual intercourse with an unmarried woman. This was in view of section 198(2) of Cr PC which specified how a complainant can file charges for offenses committed under section 497 and 498 IPC.

The apex court on September 27, 2018 struck down section 497 as unconstitutional being violative of article 14, 15 and 21 of the constitution and held that section 198(2) of Cr PC shall be unconstitutional to the extent that it is applicable to section 497 IPC.

The court took into consideration the following matters while passing this landmark judgment, that the autonomy of an individual to make his or her choices with respect to his/her sexuality is the most intimate choice of life and should be protected from public censure through criminal sanction. A wrong punishable with criminal sanctions must be a public wrong against the society as a whole and not merely an act committed against an individual victim. There cannot be a patriarchal monarchy over the daughter or, for that matter, husband's monarchy over the wife. And there cannot be a community exposition of masculine dominance. Section 497 is a pre-constitutional law which was enacted in 1860. There would be no presumption of constitutionality in a pre-constitutional law (like section 497) framed by a foreign legislature. The provision would have to be tested on the anvil of Part III of the Constitution. Thinking of adultery from the point of view of criminality would be a retrograde step. This court has travelled on the path of transformative constitutionalism and, therefore, it is absolutely inappropriate to sit in a time machine to a different era where the machine moves on the path of regression. Hence, to treat adultery as a crime would be unwarranted in law.The right to live with dignity includes the right not to be subjected to public censure and punishment by the state except where absolutely necessary. In order to determine what conduct requires state interference through criminal sanction, the state must consider whether the civil remedy will serve the purpose and should examine the impact of such conduct on the society.

13 AIR 2018 SC 4898.

Reform towards achieving a more egalitarian society in practice has also been driven by active measures taken by the United Nations and other international human rights organizations, where it has been emphasized that even seemingly gender-neutral provisions criminalizing adultery cast an unequal burden on women. International trends worldwide also indicate that very few nations continue to treat adultery as a crime, though most nations retain adultery for the purposes of divorce laws. Thus, adultery continues to be a criminal offence in Afghanistan, Bangladesh, Indonesia, Iran, Maldives, Nepal, Pakistan, Philippines, and the United Arab Emirates, some states of the United States of America, Algeria, Democratic Republic of Congo, Egypt, Morocco, and some parts of Nigeria.

The judgment has put forward a good initiative as it struck down section 497 IPC and section 198(2) of Cr PC as both the sections are based on discriminative classification against women. The provision is being discriminative in two ways, firstly it does not give woman the right to prosecute an adulterous husband and secondly it does not punish a woman in adultery not even as an 'abettor'. Moreover this judgment has also put into practice the idea of transformative justice.

However the judgment has led to some kind of anomaly in the realm of adultery law as it makes the practice of adultery non punishable. It is criticized that the judgment takes away remedies available to any spouse when his or her partner indulges in adultery. And the judgment is also silent as to its effect on the social institutions like marriage and also with regard to children born out of such relationship or involved in any other manner in similar situations.

The Supreme Court judgment in *Purswani Ashutosh* v. *Union of India*,[14] directed that the physically handicapped students before it, who had been denied admissions this year despite being meritorious, should be admitted in the MBBS course in a government medical college next year. In doing so, the court directed that as the seats for physically handicapped students were handed over to the general category students this year, the seats of that category shall accordingly be reduced for the next academic session 2019-2020.

Several persons with disabilities had been denied admissions to MBBS course this year, due to 'Guidelines for Persons With Specified Disabilities' framed in June by the committee on disability constituted by the Medical Council of India (MCI). The court was now hearing appeals filed by candidates who, it noted, were required to be admitted in the physically handicapped category in medical colleges but were denied admissions in view of the recommendations made by the MCI.

The court while pronouncing its judgment cited the United Nations' Convention on the Rights of Persons with Disabilities, 2008 which lays down the following principles for empowerment of persons with disabilities:[15]

(i) respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

14 AIR 2018 SC 3999.

15 Convention on the Rights of Persons with Disabilities, Art. 3 General Principles.

(ii) non-discrimination;

(iii) full and effective participation and inclusion in society;

(iv) respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

(v) equality of opportunity;

(f) accessibility;

(g) equality between men and women;

(h) respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

India ratified the United Nations Convention on the Rights of Persons with Disabilities on October 1, 2007. The Rights of Persons with Disabilities Act, 2016 has been enacted to give effect to the United Nations' Convention on the Rights of Persons with Disabilities and for matters connected therewith or incidental thereto. The right to equality envisaged under articles 14 and 15 of the Constitution of India contemplates equal rights in every respect including equal right to be considered for admission to educational institutions and related benefits.

The Supreme Court of India unanimously held that section 377 of the Indian Penal Code, 1860, which criminalized 'carnal intercourse against the order of nature', was unconstitutional in so far as it criminalized consensual sexual conduct between adults of the same sex in the case *Navtej Singh Johar* v. *Union of India (UOI)*.[16]

The petition, filed by Navtej Singh Johar, challenged the 157 year old law, section 377 of the Indian Penal Code, 1860 on the ground that it violated the constitutional rights to privacy, freedom of expression, equality, human dignity and protection from discrimination. The court reasoned that discrimination on the basis of sexual orientation was violative of the right to equality, that criminalizing consensual sex between adults in private was violative of the right to privacy, that sexual orientation forms an inherent part of self-identity and denying the same would be violative of the right to life, and that fundamental rights cannot be denied on the ground that they only affect a minuscule section of the population.

The five-judge bench of the Supreme Court unanimously held that section 377 of the Indian Penal Code, 1860 insofar as it applied to consensual sexual conduct between adults in private, was unconstitutional. With this, the court overruled its decision in *Suresh Koushal v. Naz Foundation*1 that had upheld the constitutionality of section 377.

The court relied upon its decision in *National Legal Services Authority v. Union of India*[17] to reiterate that gender identity is intrinsic to one's personality and denying the same would be violative of one's dignity. The court relied upon its decision in *K.S. Puttaswamy v. Union of India*[18] and held that denying the *lesbian, gay, bisexual,*

16 AIR 2018 SC 4321.

17 (2014) 5 SCC 438.

18 Writ Petition (Civil) No. 494 Of 2012.

and transgender (LGBT) community its right to privacy on the ground that they form a minority of the population would be violative of their fundamental rights. It held that section 377 amounts to an unreasonable restriction on the right to freedom to expression since consensual carnal intercourse in private "does not in any way harm public decency or morality" and if it continues to be on the statute books, it would cause a chilling effect that would "violate the privacy right under article. 19(1)(a)".

The court cited article 17 of the International Covenant on Civil and Political Rights, 1976 to which India is a party, talks about privacy, No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation. The ECHR also seeks to protect the right to privacy by stating that everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals or for the protection of the rights and freedoms of others.

The court affirmed that that "intimacy between consenting adults of the same sex is beyond the legitimate interests of the state" and sodomy laws violate the right to equality under article 14 and article 15 of the Constitution by targeting a segment of the population for their sexual orientation.

The court further stated that, in the opinion of the Indian Psychiatric Society (IPS) homosexuality is not a psychiatric disorder. This is in line with the position of American Psychiatric Association and The International Classification of Diseases of the World health Organization which removed homosexuality from the list of psychiatric disorders in 1973 and 1992 respectively.

Justice Radhakrishnan, in his concluding remarks, after referring to various judgments and certain International Covenants, opined that gender identity is one of the most fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender or transsexual person.

While condemning the practice of cow vigilantism, lynching and mob violence, the apex court in the case of ***Tehseen S. Poonawalla*** **v.** ***Union of India,***[19] *has issued a host of guidelines underlining preventive, remedial and punitive measures for the purposes of preventing such heinous activities.* The petitioner in the case is a social activist and has sought direction to respondent-states to take immediate and necessary action against the cow protection groups indulging in violence and further to issue a direction to remove the violent contents from the social media uploaded and hosted by the said groups.

The three-judge bench of the Supreme Court headed by Chief Justice Dipak Misra has in the case recognized the act of lynching as unlawful and while condemning the inhumane act of cow vigilantes remarked:[20]

19 AIR 2018 SC 3354.

20 *Id.*, para 39.

That there cannot be a right higher than the right to live with dignity and further to be treated with humanness that the law provides. What the law provides may be taken away by lawful means; that is the fundamental concept of law. No one is entitled to shake the said foundation. No citizen can assault the human dignity of another, for such an action would comatose the majesty of law. In a civilized society, it is the fear of law that prevents crimes. Commencing from the legal space of democratic Athens till the legal system of modern societies today, the law makers try to prevent crimes and make the people aware of the same but some persons who develop masterly skill to transgress the law jostle in the streets that eventually leads to an atmosphere which witnesses bloodshed and tears. When the preventive measures face failure, the crime takes place and then there have to be remedial and punitive measures. Steps to be taken at every stage for implementation of law are extremely important.

These heinous acts goes against every basic human rights provisions enshrined in the international conventions and covenant which is followed by all the states in the world, the court stated in its judgment. Therefore stricter measures need to be implemented by the Centre. The Supreme Court in the case has issued guidelines in the form of preventive, remedial and punitive measures for preventing the growing incidence of lynching in India.

III HIGH COURT DECISIONS

In the case of *Managing Director, U.P. Co-operative Bank Limited, Lucknow* v. *IXth Additional District and Sessions Judge, Lucknow* ,[21] the High Court of Allahabad dealt with labour law issues predominantly enshrined in the Payment of Wages Act, 1936 and the Employee State Insurance Act, 1948.

The court delved deeper into the Employee State Insurance Act, 1948 and stated that the Act is a welfare legislation enacted by the Central Government as a consequence of the urgent need for a scheme of health insurance for workers. The Act seeks to cover sickness, maternity, employment injury, occupational disease, *etc.* The Act is a social security legislation.

The court held that right to medical and disability benefits are fundamental human rights under article 25(2) of Universal Declaration of Human Rights, 1948 (UDHR) and article 7(b) of International Convention of Economic, Social and Cultural Rights, 1976. Right to health, a fundamental human right stands enshrined in socio-economic justice of our Constitution and the UDHR. Concomitantly right to medical benefit to a workman is his/her fundamental right. The Act seeks to succor the maintenance of health of an ensured workman. The interpretative endeavour should be to effectuate the above. Right to medical benefit is, thus, a fundamental right to the workman.

In the case of *Pooja Kumari Sharma* v. *The State of U.P.,*[22] the High Court of Allahabad (Lucknow Bench) discussed extensively about discrimination against women in workplace while deliberating on an issue of maternity leave. The court

21 2018(6) ALJ 322.

22 2018 (159) FLR 998.

referred to some international conventions and norms and stated that that India is a signatory to various international covenants and treaties.

The UDHR, adopted by the United Nations on December 10, 1948, set in motion the universal thinking that human rights are supreme and ought to be preserved at all costs. This was followed by a series of Conventions. On December 18, 1979, the United Nations adopted the, "Convention on the Elimination of all forms of Discrimination Against Women, 1979". Article 11 of this Convention provides as under:

States parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular;

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave.

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

The High Court of Allahabad, in the case of *Mukesh Yadav* v. *The State of U.P.*,[23] dealt with the question of demarcation between the administrative orders and quasi-judicial orders and the requirement of adherence to natural justice. The court held that in India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially. A quasi-judicial authority must record reasons in support of its conclusions. Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies. Reasons facilitate the process of judicial review by superior courts.

The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts.

23 2018(3) ADJ 611.

Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

The court quoted. David Shapiro in his article "Defence of Judicial Candor",[24] published in the Harvard law Review and said, Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny. Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg jurisprudence. In cases like *Ruiz Torija* v. *Spain*[25] and *Anya* v. *University of Oxford,*[26] wherein the court referred to article 6 of the European Convention of Human Rights[27] which requires, "adequate and intelligent reasons must be given for judicial decisions".

In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of 'due process'."

The High Court of Allahabad in the case of *Rajendra Baitha* v. *Appellate Authority/ Director,*[28] discussed the issue of sexual harassment at workplace faced by women. It stated that each incident of sexual harassment, at the place of work, results in violation of the fundamental right to gender equality and the right to life and liberty the two most precious fundamental rights guaranteed by the Constitution of India.

As early as in 1993 at the International Labour Organization Seminar held at Manila, it was recognized that sexual harassment of woman at the work place was a form of gender discrimination against woman. The judges were of the opinion that the contents of the fundamental rights guaranteed in our Constitution are of sufficient amplitude to encompass all facets of gender equality, including prevention of sexual harassment and abuse and the courts are under a constitutional obligation to protect and preserve those fundamental rights. That sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations. The message of international instruments such as the Convention on the Elimination of All Forms of Discrimination against Women, 1979 and the Beijing Declaration which directs all state parties to take appropriate measures to prevent discrimination of all forms against women besides taking steps to protect the honour and dignity of women is loud and clear.

24 David L. Shapiro, "Defence of Judicial Candor" 4(100) *Harvard law Review*, 731-750 (1987), *available at:* https://www.jstor.org/stable/pdf/1341091.pdf (last visited on Dec. 12, 2019).

25 *Available at:* https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57909%22]} (last visited on Dec. 10, 2019).

26 [2001] IRLR 377, CA, *available at*: https://app.croneri.co.uk/law-and-guidance/case-reports/anya-v-university-oxford-2001-irlr-377-ca (last visited on Dec. 20, 2019).

27 The European Convention of Human Rights, *available at*: https://www.echr.coe.int/Documents/Convention_ENG.pdf(last visited on Dec. 12, 2019).

28 2019 (1) ADJ 380.

The International Covenant on Economic, Social and Cultural Rights, 1976 contains several provisions particularly important for women. Article 7 recognizes her right to fair conditions of work and reflects that women shall not be subjected to sexual harassment at the place of work which may vitiate working environment. These international instruments cast an obligation on the Indian state to gender sensitize its laws and the courts are under an obligation to see that the message of the international instruments is not allowed to be drowned. This court has in numerous cases emphasized that while discussing constitutional requirements, court and counsel must never forget the core principle embodied in the international conventions and instruments and as far as possible give effect to the principles contained in those international instruments. 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 a void in domestic law.

In cases involving violation of human rights, the courts must forever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field. In the instant case, the high court appears to have totally ignored the intent and content of the international conventions and norms while dealing with the case.

IV CONCLUSION

Indian Judiciary, in the recent times, has relied on a wide array of international conventions, agreements and treaties. The judiciary, where it has found that certain gaps or left over spaces are still there, while interpreting certain domestic laws, has taken aid of the laws accepted worldwide.

For example in the case of *Swapnil Tripathi* the Supreme Court gave its judgement stating that live streaming of cases will be there, subjected to guidelines prescribed. In this case, the Supreme Court reached the judgement citing various examples of other nations where live streaming of cases, in a court room is valid. Therefore, we see a comparative analysis being carried out by the judiciary to address the ever changing scenarios of modern society. In another case, it was seen that, the apex court, in order to restore gender equality and eradicate baseless customs, cited the, "Convention on Elimination of all forms of Discrimination against Women" (CEDAW).

These types of cases in the Indian courts are a testimony on how Indian courts are adopting international laws and conventions to serve justice to the society. International laws have been placing their impact into Indian judiciary not from a very long time. The fact that India is ratifying or being parties with other nations for a particular treaty or convention or agreement, itself makes the job easy for the Indian courts to apply them, as and when it is required. It is a continuous process and day by day, as gradually, India, will enter into and ratify more number of treaties or conventions, the Indian judiciary will definitely witness more and more number of cases, where international law will play a crucial role in the pronouncement of the judgement.