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LABOUR DISPUTES LITIGATION IN NIGERIA: HIGH COURTS OR NATIONAL INDUSTRIAL COURT?

ANDREW EJOVWO ABUZA*

ABSTRACT : On 4 March 2011, the Constitution (Third Alteration) Act was enacted to further amend the Constitution of the Federal Republic of Nigeria, 1999. It vests on the National Industrial Court exclusive original Jurisdiction over all labour and employment related matters. Three years after the coming into force of the Act, labour dispute litigations are still on-going in the High Courts. Worse still, some labour disputants still have recourse to the High Courts for the litigation of their labour disputes. These are attributable to the fact that the Act is silent on the fate of part-heard labour disputes in the regular courts and the fact that many Nigerians are unaware of the import and purport of the amendments of the Nigerian Constitution introduced by the Act. This article examines the jurisdiction of the various High Courts and the National Industrial Court. It is the view of the writer that the National Industrial Court is the only or proper forum for the litigation of labour disputes in Nigeria. The writer suggests that there is urgent need to further amend the Nigerian Constitution to provide that part-heard labour disputes in the regular courts shall abate and be null and void upon the coming into force of the amendments introduced by the Act and that it is a criminal offence to commence actions on labour disputes in the regular courts after the date on which the further amendment Act comes into force. Finally, it is the view of the writer that the government of Nigeria needs to organise public lectures and other public enlightenment programmes to sensitise Judges of the High Courts, legal practitioners, trade unionists, employers, workers and other Nigerians on the import and purport of the amendments to the Nigerian Constitution introduced by the Act.

KEY WORDS : Labour Disputes Litigation, Regular Courts, National Industrial Court, Exclusive Original Jurisdiction

I. INTRODUCTION

On 4 March 2011 the Federal Government of Nigeria (FGN) under the leadership of President Goodluck Jonathan enacted the Constitution (Third Alteration)

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Act, 2010 (Third Alteration Act) to further amend the Constitution of the Federal Republic of Nigeria (CFRN) 1999.[1] The Third Alteration Act which came into force on the date above re-constituted the National Industrial Court (NIC).[2] Section 254 C(1) of the CFRN 1999 as amended by the Third Alteration Act vests on the NIC exclusive original jurisdiction in all labour and employment related matters. The CFRN 1999 as amended by the Third Alteration Act emphasises in its sections 6(5) (cc) and 254 D(1) that the NIC shall be a superior court of record (SCR) and have all the powers of a High Court (HC), respectively. It is rather sad that despite the provisions above, labour dispute litigations are still on-going in the HCs three years after the commencement of the Third Alteration Act. The Act is blameworthy for allowing this problem to rear its ugly head, as it is silent on the fate of part-heard labour disputes in the regular courts. Worse still, some labour disputants still have recourse to the HCs for the litigation of their labour disputes notwithstanding the provisions above. Thus, it is not clear to many persons whether it is the NIC or HCs that has or have jurisdiction to hear and determine litigations founded on labour disputes.

This article examines the jurisdiction of the various HCs as well as NIC, analyses the relevant statutory provisions and case-laws, states clearly that the NIC is the only forum for the litigation of labour disputes in Nigeria, highlights the practice in other countries, identifies the short–comings in the various laws and offers suggestions which, if implemented, would make Nigeria eradicate the problem of labour disputes being litigated in the regular courts instead of the NIC and further strengthen or reposition the NIC for a better or more efficient and effective discharge of its constitutional duties.

II. MEANING OF LABOUR DISPUTE

Labour dispute is also known as industrial dispute. The CFRN 1999 as amended by the Third Alteration Act does not define the term-labour dispute. In a similar vein, the Nigerian Trade Unions (Amendment) Act (TUAA) 2005 and NICA 2006, although both statutes used the term – labour dispute unlike the Nigerian Constitution, do not also define the term – labour dispute.It can be seen clearly that the term – labour dispute consist of two words, that is, labour and dispute. The

1. The Laws of the Federation of Nigeria (LFN) 2004, Cap C 23.
2. NIC was first established in 1976 by section 19(1) of the Trade Disputes Decree 7 of 1976 for the settlement of trade disputes. In 2006, the NIC was re-constituted by the National Industrial Court Act (NICA) 2006 which in its section 7(1) vests on the NIC exclusive original jurisdiction over labour and employment related matters.

former can be defined as 'work of any type, including mental exactions'.[3] It can also be defined as referring to work for wages as opposed to profit.[4] Of course, the definition of employment which is often – times used interchangeably with labour can help in throwing more light on the meaning of labour. Employment has been defined as the relationship between employer and employee or the act of employing or the state of being employed or work for which one has been hired and is being paid by employer.[5]

Uvieghara states that labour is defined in item 33 of the exclusive legislative list in the second schedule of the CFRN 1999 as including trade unions, industrial relations; conditions, safety and welfare of labour; industrial disputes; prescribing a national minimum wage for the Federation or any part of it; and industrial arbitrations.[6] The learned author is wrong, as it is item 34 of the exclusive legislative list in the second schedule of the CFRN 1999 which defines labour as mentioned above. Dispute, on the other hand, can be defined as an argument or disagreement between two people, groups or countries.[7] Put differently, it is a disagreement over or about something. In *Kalango v. Dokubo*,[8] the Nigerian Court of Appeal (CA) stated that in ordinary parlance, any difference of opinion or conflict of claims is a dispute.

From the foregoing discourse, labour dispute can be defined as a disagreement or conflict of claims between a worker[9] and his employer[10] or workers and workers

3. B.A. Garner (ed), *Black's Law Dictionary* (St Paul MN: West Publishing Co., 7thedn, 2004) at 890.
4. *Ibid*.
5. *Ibid*.
6. E.E.Uvieghara, *Labour Law in Nigeria* (Lagos: Malthouse Press Ltd., 2001) at 2.
7. Sally Wehmeier*et al* (eds), *AS Hornby's Oxford Advanced Learner's Dictionary of Current English* (7thedn) (Oxford: Oxford University Press, 2005) at 423.
8. (2003)15 Weekly Reports of Nigeria (WRN) 32, 37.
9. Member of any such public service who has entered into or works under a contract with an employer, whether the contract is for manual labour, clerical work or is otherwise expressed or implied, oral or in writing and whether it is a contract personally to execute any work or labour or a contract of apprenticeship. See section 48(1) of the Trade Disputes Act (TDA) Cap T8 LFN 2004. This definition can be criticised on the ground that it includes as a worker any person under contract of apprenticeship and contract personally to execute any work or labour, that is, independent contractor. These persons cannot be said to be under a contract of service to make them workers. *See,* A.E.Abuza, "Lifting of the Ban on Contracting Out of the Check-off System in Nigeria: An Analysis of the Issues Involved", 42(1)*The Banaras Law Journal*, 2013, at 61.
10. Note that an employer in Nigeria means any person who has entered into a contract of employment to employ any other person as a worker either for himself or for the service of any other person, and includes the agent, manager or factor of that first mentioned person and the personal representatives of a deceased employer. *See,* The Labour Act, 2004, Cap LI LFN, Section 91.

or workers and employers or the organisation of workers or employers and organisation of workers or employers or disagreement or conflict of claims involving or connected with labour relations.

Labour dispute can be categorised mainly into two, namely, individual labour or employment dispute and collective or group labour or employment dispute. The former is dispute involving an individual employee and his employer and 'vice versa'. Of course, this would include wrongful dismissal and termination claims arising from employer and employee relationship. To be specific, an individual labour or employment dispute may arise where a bank as employer terminates the employment of a female employee who could not source for money in favour of the bank. This is a notorious practice amongst some banks in Nigeria which has been decried by some Nigerians, including Justice Benedict Kanyip of the NIC.[11] The truth of the matter is that a lot of people in Nigeria were actually upset by the practice. Collective or group labour dispute, on the other hand, involves trade dispute as well as trade union dispute such as intra - union dispute and inter - union dispute. It needs to be pointed out here that both strike and lock-out are forms of trade dispute. Intra - union dispute has been judicially defined as a dispute between members of a union, on the one hand and the union itself, on the other hand or a dispute between or amongst the members of the same union.[12] In Nigeria, statute defines intra–union dispute thus:[13] 'dispute within a trade union or an employers' association'.

> Similarly, inter-union dispute has been judicially defined as a dispute between one union and or member(s) thereof and another union or its members.[14] Also, statute in Nigeria defines inter-union dispute as follows:[15] 'dispute between trade unions or employers associations'. Trade dispute is defined in section 48(1) of the TDA 2004 as: Any dispute between employers and workers or between workers and workers, which is connected with the employment or non-employment, or the terms of employment and physical conditions of work of any person.

In a similar vein, section 54(1) of the NICA 2006 defines trade dispute thus:

> Any dispute between employers and employees including disputes between their respective organizations and federations:- which is connected with

11. *See, Vanguard* (Lagos) 16 August 2011 at 7.
12. *Kalango*v. *Dokubo*, *supra* n. 8.
13. The NICA, 2006, Section 54(1).
14. *Kalangov. Dokubo, supra* n. 8.
15. *Seethe* TDA, 2004, Section 48(1).

> the employment or non-employment of any person or the terms of employment and physical conditions of work of any person or the conclusion or variation of a collective agreement, and an alleged dispute.

The definition of a trade dispute above is preferable. This is so because it is wider than the definition of a trade dispute under the TDA 2004 and it is contained in a later statute. In the final analysis, it is submitted that labour disputes would cover inter or intra-union disputes, trade disputes and all sorts of disputes associated with interest of labour.[16] Labour disputes would not be limited to disputes of right as defined in section 30(9)(a) of the Trade Unions Act (TUA) 1990 as amended by the TUAA 2005 thus: 'any labour dispute arising from the negotiation, application and interpretation of a contract of employment or collective agreement under the Trade Unions Act or any other enactment or law governing matters relating to terms and conditions of employment.' They would also dovetail to wrongful dismissal or termination claims arising from employer and employee relationship.[17] Evidently, labour disputes would cover individual and collective labour disputes.

It is interesting to note at this stage that the idea of labour dispute embracing or encompassing both individual and collective labour disputes is acceptable Worldwide. For example, in India both individual and collective labour disputes are considered as industrial disputes. In actual fact, the definition of industrial disputes in section 2(k) of the Indian Industrial Disputes Act 1947 is similar in verbiage to the definition of a trade dispute in section 48(1) of the TDA 2004. Perhaps, it should be recalled that section 2(A) of the Indian Industrial Disputes Act 1947 as amended by the Industrial Disputes (Amendment) Act 1965 provides that:

> Disputes or differences between an individual workman and his employer connected with or arising out of (1) discharge (2) dismissal (3) retrenchment (4) other termination of services of an individual workman shall be deemed to be an industrial dispute even though no fellow workmen or any union of workmen is a party to the dispute.

In closing on the concept of labour dispute, a note-worthy point to bear in mind is that labour law[18] in many countries, including Trinidad and Tobago, South Africa, India, Britain and Nigeria makes provision for the litigation of labour disputes.

16. I.N.EmeWorugji, "The NIC Act (2006) and the Jurisdictional Conflict in Adjudicatory Settlement of labour disputes in Nigeria: An Unresolved Issue", 1(2) *Nigerian Journal of Labour Law and Industrial Relations,* 2007, at 33.
17. *Ibid*.
18. Labour Law can be defined as the field of law governing the relationship between employers and employees, especially the law governing the dealings of employers and unions that represent employees. Garner, *supra* n. 3.

III. LABOUR DISPUTES LITIGATION IN NIGERIA: THE ISSUE OF JURISDICTION

Labour disputes litigation apparently refers to suit or case bordering on labour disputes. What is of concern here in the main is the issue of which of the courts, that is, Federal High Court (FHC), High Court of the Federal Capital Territory, Abuja (HCFCT) State High Court (SHC)[19]and NIC has jurisdiction to hear and determine a suit or case founded on labour dispute. Jurisdiction is fundamental and crucial to all court proceedings. No matter how well conducted the proceedings of a case in court might be such proceedings would be a nullity where the court lacks jurisdiction to hear and determine the case. Of course, the legal practitioners and judges involved in a case would labour in vain where the court lacks jurisdiction to hear and determine the case.[20] In the case of *Warri Refining and Petrochemical Company Limited (WRPC) and Another* v. *Onwo*[21]the CA stated thus: 'Jurisdiction is fundamental to the question of competence of a court in the judicial process' For his part, Bello, Chief Justice of Nigeria (CJN) (as he then was) explained clearly in the case of *Utih*v. *Onoyivwo*[22] that:

> … jurisdiction is blood that gives life to the survival of an action in a court of law and without jurisdiction, the action will be like an animal that has been drained of its blood. It will cease to have any life and any attempt to resuscitate it without infusing blood into it will be an abortive exercise.

The decision of the Supreme Court of Nigeria (SCN) in *Peoples Democratic Party (PDP)* v. *AnayoRochas Okorocha* and Ten others[23] is very instructive here. On meaning of jurisdiction, the SCN stated thus:[24]

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19. Note that controversies trailed the establishment of Federal and State High Courts. *See,* T.Osipitan"The Crises of Jurisdiction under the 1979 Constitution, *State* v. *Federal High Court*",*Nigerian Current Law Review,* 1983 pp.231-248; T.Osipitan, "Judicial Legislation in the Supreme Court, *Savannah Bank* v. *Pan Atlantic Shipping Agencies Ltd*.", *NCLR*, 1987,pp.162-178; and T.Osipitan, "Two Decades of Jurisdictional Conflict: Two High Courts or One?", *NCLR*, 1993, pp.94-107.
20. T. Osipitan, "Debt Recovery Litigation: Failed Banks or High Court", 3(1) *Modern Practice Journal of Finance and Investment Law*, 1999, at 178.
21. [1999] 12 Nigerian Weekly Law Reports (NWLR) (part 630)312, 316. *See also*,*Tidex*v. *Maskew and Anor* (1998) 3 NWLR (part 582) 404, 405 where the CA held that the issue of jurisdiction is a fundamental issue because any decision reached devoid of jurisdiction is a nullity, no matter how well conducted.
22. [1991] 1 NWLR (part 160) 206.
23. (2012) 15 NWLR (part 1323) 205.
24. *Id.,* at 222.

> A court must have both jurisdiction and competence to be properly seised of a cause or matter. Jurisdiction in that sense means the legal capacity, power or authority vested in it by the Constitution or statute creating the court.

With respect to the source and fundamental nature of jurisdiction of court, the SCN declared that:[25]

> The jurisdiction of any court or tribunal is confined, limited and circumscribed by the statute creating it. Jurisdiction is the very basis on which any court or tribunal tries a case. It is the lifeline of all trials. Any trial without jurisdiction is a nullity… Jurisdiction is a matter of substantive law. No litigant can confer jurisdiction on the court where the constitution or statute or any provision of the common law says that the court does not have jurisdiction. The court cannot also assume jurisdiction in the interest of justice. A court cannot give itself jurisdiction by misconstruing a statute.

With regards to effect of absence of jurisdiction of court, the SCN held as follows:[26]

> Any judgment, however well written if given without jurisdiction is no judgment at all. A judgment given without jurisdiction is no longer alive and no appeal can lie or be heard on it... Absence of jurisdiction is irreparable in law. Therefore, the court cannot invoke section 294(5) of the 1999 Constitution (as amended) to save a judgment affected by lack of jurisdiction under the provision of section 285(7) and (8) of the Constitution.

Section 251 of the CFRN 1999 as amended vests in the FHC the exclusive[27] jurisdiction[28] to entertain all civil causes and matters relating to the revenue of the

25. *Id.,* at 223.
26. *Id.,* pp.222 & 224.
27. Note that the word exclusive has been defined in *Webster's New Twentieth Century Dictionary* as 'excluding all others, shutting out other considerations, not shared or divided: sole, single, as an exclusive right'. Quoted in *Oyediran*v. *Egbetola* (1997) 50 Law Report of Courts of Nigeria (LRCN) 1376, 1380.
28. Exclusive jurisdiction is defined by the *Black's Law Dictionary* as: 'a court's power to adjudicate an action or class of actions to the exclusion of all other courts'. *See*, Garner, *supra* n. 18, at 809. Simply put, by exclusive jurisdiction is meant the jurisdiction exercised by the court to the exclusion of any or all other courts. A.E.Abuza, "An Examination of the Jurisdiction of the National Industrial Court in Nigeria", 2(4) *NJLIR*, 2008, at 27.

Federal Government, Federal Taxation, Banking and so on[29] as well as Federal offences.[30]It is glaring from the provisions of section 251 above, that the FHC is not vested with unlimited Jurisdiction. The CFRN 1999 merely granted to the FHC exclusive jurisdiction to hear and determine civil causes and matters listed in section 251(1) as well as jurisdiction to hear and determine criminal causes and matters as provided under section 251(2) and (3) of the CFRN 1999 as amended.

Actually, nowhere in section 251 of the Constitution above, which deals with jurisdiction of the FHC is labour dispute mentioned as one of the civil causes or matters for which the FHC is to exercise jurisdiction. Besides, no Act of the National Assembly of Nigeria (NA) confers jurisdiction on the FHC to hear and determine labour dispute matters. It is therefore right to aver that the FHC lacks jurisdiction to hear and determine suits or cases bordering on labour disputes. In this way, no civil proceedings in respect of individual labour dispute, trade dispute, inter and intra-union disputes can be entertained by the FHC.

With respect to the jurisdiction of the HCFCT, section 257(1) of the CFRN 1999 as amended declares that:

> Subject to the provisions of section 251 and any other provisions of this Constitution and in addition to such other jurisdiction as may be conferred upon it by law, the High Court of the Federal Capital Territory, Abuja shall have Jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.

The CFRN 1999 as amended goes further to declare thus:[31]

> The reference to civil or criminal proceedings in this section includes a reference to the proceedings which originate in the High Court of the Federal Capital Territory, Abuja and those which are brought before the High Court of the Federal Capital Territory, Abuja to be dealt with by the Court in the exercise of its appellate or supervisory jurisdiction.

With regards to the jurisdiction of a SHC, section 272(1) of the CFRN 1999 as amended states as follows:

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29. The CFRN, 1999, Section 251(1).
30. *Id.,* Sections 251(2) & (3).
31. *Id.,* Section 251(2).

> Subject to the provisions of section 251 and other provisions of this Constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.

The CFRN 1999 as amended goes further to state that:[32]

> The reference to civil or criminal proceedings in this section includes a reference to the proceedings which originate in the High Court of a State and those which are brought before the High Court to be dealt with by the Court in the exercise of its appellate or supervisory jurisdiction.

It is also correct to point out that no Act of the NA confers jurisdiction on the HCFCT to hear and determine labour dispute.Three view-points which assail the exclusive original jurisdiction of the NIC in labour disputes readily come to mind here. They are those of Ejere,[33]Worugji[34] and Chiafor.[35]Ejere is of the view that any inter or intra-union dispute that is not a trade dispute as defined in section 47(1) of the Trade Disputes Act 1990 (now section 48 of the TDA) is outside the jurisdiction of the NIC and that such a dispute must be referred for resolution to the High Court (HC) which, he contends, is the court that traditionally has jurisdiction to resolve all disputes between persons or authorities. For their part, Worugji and Chiafor are of the view that the CFRN 1999 confers unlimited Jurisdiction on the HCFCT and SHC in its sections 257(1) and 272(1), respectively. Specifically, Chiafor argues that the expression 'any civil proceedings' in sections 257(1) and 272(1) of the CFRN 1999 to describe the jurisdiction conferred on the HCFCT and SHC imports without more a feature of illimitability to the genre of civil proceedings that the courts could entertain, except there is a feature in the provision or the rest of the

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32. *Id.,* Section 272(2).
33. O.D.Ejere, "The High Court's Jurisdiction to Hear and Determine Inter or Intra-Union Dispute is not completely ousted by the Trade Disputes Act as amended and the 2006 NIC Act", 1(2) *NJLIR*, 2007, pp.56-72.
34. Worugji, *supra* n. 16 at 34.
35. Amaechi B.Chiafor, "Reflections on the Constitutionality of the Superior Court of Record Status and Exclusive Jurisdiction Clauses of the National Industrial Court Act, 2006",1(3) *NJLIR*, 2007, at 44.

Constitution which suggests a limitation.[36] In his view, the only limitation in the CFRN 1999 is section 251 which confers on the FHC exclusive jurisdiction over certain Federal matters.[37] He maintains that aside from the civil matters stipulated in section 251 of the CFRN 1999 the HCFCT and SHC have unlimited jurisdiction.[38] Chiafor further contends that since labour and matters related to it are indisputably civil matters, then proceedings in respect thereof can be handled by the HCFCT and SHC.[39]

The writer does not share the view-points of these learned writers. Their mindset is far from correct. It is submitted that the jurisdiction conferred on the HCFCT and SHC by sections 257(1) and 272(1) of the CFRN 1999, respectively is general but limited. Both sections are made general subject to the provisions of some sections of the CFRN 1999 such as section 251 and any other provisions of the CFRN 1999.[40] Sections 257(1) and 272(1) of the CFRN 1999 are unlike section 236(1) of the 1979 Nigerian Constitution which confers unlimited jurisdiction in the SHC. It is submitted that the FHC, HCFCT and SHC are courts of limited jurisdiction under the CFRN 1999.[41] A critical perusal of sections 257(1) and 272(1) of the CFRN 1999 would reveal that the word 'unlimited' is omitted in the jurisdiction conferred on the HCFCT and SHC.[42] This was deliberate. The omission of the word was intended not to confer unlimited jurisdiction on the HCFCT and SHC.[43] If the drafters of the CFRN 1999 had intended or wanted these Courts to be courts of unlimited jurisdiction, they would have clearly stated so by the inclusion of the word unlimited in sections 257(1) and 272(1) of the CFRN 1999.[44] The point comes out well in the view advanced elsewhere thus:[45]

> The phrase 'unlimited jurisdiction' which determined the jurisdiction of the State High Courts under the 1979 Constitution is conspicuously missing, that is, left out under section 272 of the 1999 Constitution. This means

36. *Id.,* at 38.
37. *Ibid*.
38. *Ibid*.
39. *Ibid*.
40. *ImeEkong and Anor* v. *Godfrey Oside*and 2 Ors (Ekong case) (2005) 9 NWLR (part 929) 114.
41. Abuza, *supra* n. 28, at 32.
42. *Ibid*.
43. *Ibid*.
44. *Ibid*.
45. B.B.Kanyip, "Trade Unions and Industrial Harmony: The Role of the National Industrial Court and Industrial Arbitration Panel", 1(2) *Nigerian Bar Journal,* 2003, pp.230-231.

> that the State High Courts under the Constitution do not enjoy unlimited jurisdiction even in those matters that are outside of section 251.

What all these boil down to is that the HCFCT and SHC are not courts with unlimited jurisdiction under the CFRN 1999 as contended by Worugji and Chiafor.The courts, like the learned writers, have not been helpful on the issue of exclusive original jurisdiction of the NIC over labour disputes. Whereas, there are some court decisions in favour of the NIC having exclusive original jurisdiction over labour disputes, there are, however, some court decisions against the NIC having exclusive original Jurisdiction over labour disputes. To be specific, the CA in the Ekong case[46] disagreed that the HCFCT has unlimited jurisdiction by virtue of section 257(1) of the CFRN 1999. The CA, remarkably, held in *Apena* v. *National Union of Printing Publishing and Paper Products*,[47] *the Ekong case*[48] *and Shuaib Oba Abdulraheem and others* v. *Taiwo Olorumtoba –*[49] that the NIC has exclusive jurisdiction over trade disputes. It is note- worthy that the SCN affirmed the decision of the CA in the latter case when it came before the apex court on appeal.[50]

But in *National Union of Electricity Employees and Another* v. *Bureau of Public Enterprises*[51] a case that can be pinpointed with grief on the matter, the Learned Justice Christopher Mitchell Chukwuma–Eneh, JSC delivering the leading judgment of the SCN to which the other four Justices of the SCN in the case concurred dismissed the appeal of the appellants and held, amongst other things, that the implication of conferring exclusive jurisdiction in trade disputes by the Trade Disputes (Amendment) Decree 47 of 1992 on the NIC is to exclude the wide powers of the SHC, thus causing a conflict between Decree 47 and section 272 of the CFRN 1999. His Lordship declared Decree 47 null and void on the ground that it was inconsistent with section 272 of the CFRN 1999.

According to the learned Justice Chukwuma – Eneh, the only difference between the jurisdiction conferred on the SHC by the CFRN 1979 and that conferred on the SHC by the CFRN 1999 is that the jurisdiction of the SHC has been made subject to section 251 of the CFRN 1999, thus giving exclusive

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46. *Ekong* case, *supra* n. 40, at 115.
47. (2003) 8 NWLR (part 822) 444, 449.
48. *Ekong* case, *supra* n. 40. The CA re-iterated the decision of the SCN in the earlier case of *Udoh* v. *Orthopaedic Hospital Management Board* (1993) 7 NWLR (part 303) 139, 149 to the effect that NIC has exclusive jurisdiction in trade union cases.
49. (2006) 15 NWLR (part 1003) 586.
50. *See, Taiwo Oloruntoba Oju*v. *O Shuaib Abdulraheem*(2010) 178 LRCN 131, 143-144.
51. (2010) 7 NWLR (part 1194) 538, 544-545.

jurisdiction to the FHC over matters listed therein. The Honourable Justice further held that it is only the CFRN 1999 that can curtail or restrict the jurisdiction of the SHC.

Another case that can also be pinpointed on the matter is that of *African Petroleum Public Limited Company* v. *Francis FolaAkinnawo*.[52]Honourable Justice OlukayodeAriwoola, JCA delivering the leading judgment of the CA to which the other two Justices of the CA in the case concurred dismissed the appeal of the appellant and held, amongst other things, that where a claim is related to labour matters or matters incidental thereto, the SHC has jurisdiction to entertain such claim as in the instant case by virtue of the provisions of section 272(1) of the CFRN 1999.

His Lordship declared that the implication of conferring exclusive jurisdiction in trade disputes or labour matters on the NIC by the NICA 2006 is to exclude the wide powers of the SHC, thereby resulting into a conflict with the provisions of the CFRN 1999.Although, the learned Justice Ariwoola did not declare NICA 2006 null and void for being inconsistent with the CFRN 1999, His Lordship seemed to hold that NICA 2006 is null and void to the extent of its inconsistency with the provisions of the CFRN 1999.

The writer has resentment about the judgments of the SCN and CA in both cases above. Without mincing words, it is the writer's humble view that both courts are wrong for the ensuing reasons. First, the jurisdiction of the SHC under the CFRN 1999 is not only made subject to section 251. Rather, a critical perusal of section 272(1) of the CFRN 1999 clearly reveals that the jurisdiction of the SHC is also made subject to any other provisions of the CFRN 1999. Of course, any other provisions of the CFRN 1999 may include section 315 of the CFRN 1999 which saves the Decree or Acts that created the NIC and conferred jurisdiction on it[53] as well as sections 6(5)(J) and 4(2) of the CFRN 1999 and item 34 of the exclusive legislative list in part 1, second schedule to the CFRN 1999 which authorises the NA to, by law, establish the NIC and confer jurisdiction on it in labour matters. Such jurisdiction can be exclusive or concurrent. The exclusive character of the jurisdiction conferred on the NIC by the NA through its enactments, namely, TDA and NICA 2006 is in consonance with the spirit and letters of the CFRN 1999. And secondly, it is not correct that it is only the CFRN 1999 that can curtail or restrict the jurisdiction of the SHC. An enactment of the NA such as the Trade Disputes Act 1990 as amended by Decree 47 of 1992 and NICA 2006 can also curtail or restrict the jurisdiction of the SHC under the CFRN 1999. Support for this contention can be drawn from the views of Uvieghara.

52. (2012)4 NWLR (part 1289) 100, 105.

53. *Ekong* case, *supra* n. 48 pp.114-115.

According to the learned writer, the view that only the constitution can exclude the resolution of certain disputes from the jurisdiction of the HC is wrong.[54] He maintains that even if the view is correct, it is clear that it would be against the spirit of section 6(5)(g) of the CFRN 1979 (now section 6(5)(J) of CFRN 1999) and that it would be a clog to the establishment of courts with specialised jurisdiction.[55]

It may be interesting to point out here that under section 251(1) (s) of the CFRN 1999, the NA is authorised, by an enactment, to confer on the FHC such other Jurisdiction, civil or criminal and whether to the exclusion of any other court or not. Suppose the NA now makes an enactment conferring exclusive jurisdiction on the FHC in land disputes, can any person be right to say that the enactment is inconsistent with section 272(1) of the CFRN 1999 which vests jurisdiction on the SHC to hear and determine any civil proceedings since land dispute is a civil matter? Of course, the answer is in the negative. A reading of sections 4(1) and (2), 6(5)(J), 251(1), 251(1)(s), 272(1) in conjunction with item 34 of the exclusive legislative list in part 1, second schedule to the CFRN 1999 would reveal that the exclusive jurisdiction conferred on the NIC by the Trade Disputes Act 1990 as amended by the Trade Disputes (Amendment) Decree 47 of 1992 and NICA 2006 is not unconstitutional and therefore sections 1A(1) of the Trade Disputes Act 1990 as amended by Trade Disputes (Amendment) Decree 47 of 1992 as well as sections 7(1) and 11(1) of the NICA 2006 are not void for inconsistency with section 272(1) of the CFRN 1999. A germane point to note is that the constitution is an organic scheme of government to be dealt with as an entirety; a particular provision cannot be dissevered from the rest of the constitution.[56] It is also noteworthy that the provisions in a constitution are of equal strength and constitutionality. None of its provisions is inferior to the other and *afortiori* no provision is superior to the other.[57] Perhaps, if the justices of the CA and SCN had adverted their minds to the points above, they would have come to a different conclusion in both cases above.

Somehow, the situation depicted above called for a clear and definitive action. It was the enactment of the Third Alteration Act which amended the CFRN 1999

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54. *See,* E.E.Uvieghara, "Nigeria Labour Law: The Past, Present and Future", *Inaugural Lecture Series,* University of Lagos Press, 1987, at 45, as quoted in Ejere, *supra* n. 33, at 65.
55. *Ibid*.
56. *See,Attorney General of the Federation and 2 Ors*v. *Atiku Abubakar(Abubakar Case)* [2007] 150 LRCN, 1632, 1644-1645. This is one of the 12 principles for the interpretation of Nigeria's Constitution stated by Obaseki, *JSC in Attorney - General of Bendal State* v. *Attorney- General of the Federation [1980] 10 Supreme Court (SC)* 1, 77-79.
57. *Oshiomhole* v. *FGN* (2007) 8 NWLR (part 1035) 58, 63.

that became the saving grace. An intriguing aspect of the whole matter is that the CFRN 1999 as amended by the Act above has laid to final rest the issue of exclusive original jurisdiction of the NIC over labour disputes. The CFRN 1999 as amended by the Third Alteration Act re-establishes the NIC as a SCR with both civil and criminal jurisdiction. Its civil jurisdiction is as contained in section 254 C of the CFRN 1999 as amended by the Third Alteration Act. The section states as follows:

254 C(1)Notwithstanding the provisions of sections 251, 257, 272 and anything contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the National Industrial Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters:-

a) relating to or connected with any labour, employment, trade unions, industrial relations and matters arising from work place, the conditions of service, including health, safety, welfare of labour, employee, worker and matters incidental thereto or connected therewith;
b) relating to, connected with or arising from Factories Act, Trade Disputes Act, Trade Unions Act, Labour Act, Employees Compensation Act or any other Act or law relating to labour, employment, industrial relations, workplace or any other enactment replacing the Acts or laws;
c) relating to or connected with the grant of any order restraining any person or body from taking part in any strike or lock-out or any industrial action or any conduct in contemplation or in furtherance of a strike or any industrial action and matters connected therewith or related thereto;
d) relating to or connected with any dispute over the interpretation and application of the provisions of chapter IV of this Constitution as it relates to any employment, labour, industrial relations, trade unionism, employers' association or any other matter which the court has jurisdiction to hear and determine;
e) relating to or connected with any dispute arising from national minimum wage for the Federation or any part thereof and matters connected therewith or arising therefrom;
f) relating to or connected with unfair labour practice or international best practices in labour, employment and industrial relations matters;
g) relating to or connected with any dispute arising from discrimination or sexual harassment at work place;
h) relating to, connected with or pertaining to the application or interpretation of international labour standards;
i) connected with or related to child labour, child abuse, human trafficking or any matter connected therewith or related thereto;
j) relating to the determination of any question as to the interpretation and application of any-

i) collective agreement;
ii) award or order made by an arbitral tribunal in respect of a trade dispute or a trade union dispute;
iii) award or judgment of the court;
iv) term of settlement of any trade dispute;
v) trade union dispute or employment dispute as may be recorded in a memorandum of settlement;
vi) trade union constitution, the constitution of an association of employers or any association relating to employment, labour; industrial relations or workplace;
vii) dispute relating to or connected with any personal matter arising from any free trade zone in the Federation or any part thereof;

k) relating to or connected with disputes arising from payment or non – payment of salaries, wages, pensions, gratuities, allowances, benefit and any other entitlement of any employee, worker, political or public office holder, judicial officer or any civil or public servant in any part of the Federation and matters incidental thereto;
l) relating to –
i) appeals from the decisions of the Registrar of Trade Unions, or matters relating thereto or connected therewith;
ii) appeals from the decisions or recommendations of any administrative body or commission of inquiry arising from or connected with employment, labour, trade unions or industrial relations; and
iii) such other jurisdiction, civil or criminal and whether to the exclusion of any other court or not, as may be conferred upon it by an Act of the National assembly;
iv) relating to or connected with the registration of collective agreement.

The criminal jurisdiction of the NIC is as provided in section 254 C(5) of the CFRN 1999 as amended by the Third Alteration Act. It declares thus:

> The National Industrial Court shall have and exercise jurisdiction and powers in criminal cases and matters arising from any cause or matter of which jurisdiction is conferred on the National Industrial Court by this section or any other Act of the National Assembly or by any other law.

The words to emphasise in relation to the jurisdiction conferred on the NIC in civil causes and matters are: 'Notwithstanding the provisions of sections 251, 257 and 272 and anything contained in this Constitution… and the National Industrial Court shall have and exercise jurisdiction to the exclusion of any other court in civil

causes and matters...' It should be recalled that section 251 above confers on the FHC exclusive jurisdiction in certain civil and criminal Federal matters. While sections 257 and 272 above confer on the HCFCT and SHC, respectively general jurisdiction in civil and criminal matters. The quotation above, means that nothing contained in the sections above and in any other provisions of the CFRN 1999 shall be a bar or limitation to the exercise of exclusive jurisdiction by the NIC over the civil causes and matters listed in section 254 C(1) of the CFRN 1999 as amended by the Third Alteration Act.

Apparently, the original jurisdiction of the NIC under the CFRN 1999 as amended by the Third Alteration Act is by far wider than its original jurisdiction under the NICA 2006.[58]The CFRN 1999 as amended by the Third Alteration Act avoids the use of the terms –labour disputes and organisational disputes. Rather, there is use of such terms like trade dispute, employment dispute and trade union dispute. A pertinent question to ask here is: what would constitute the trade dispute, trade union dispute and employment dispute for the purpose of the CFRN 1999 as amended by the Third Alteration Act? The question is significant because it is upon same that issues relating to the jurisdiction of the NIC would anchor.

It is rather sad that the Nigerian Constitution does not define trade dispute, trade union dispute and employment dispute. The CFRN 1999 as amended by the Third Alteration Act may have used trade dispute to replace labour dispute which, as stated before, is used in the TUAA 2005 and NICA 2006. As earlier disclosed, NICA 2006 in its section 54(1) defines a trade dispute. Trade union disputes, as disclosed before, may be taken to mean intra and inter-union disputes. Such disputes within and between trade unions or employers' associations would qualify for trade union disputes. Employment disputes, as already stated, would mean disputes relating to employer and employee relationship as individual employees or in their collective employment relationship. This would cover both individual and collective labour or employment disputes. The writer wishes to re-iterate here that these would include wrongful dismissal or termination claims arising from employer and employee relationship.

It must be correct to postulate that by virtue of section 254C(1) of the CFRN 1999 as amended by the Third Alteration Act, the NIC has exclusive original jurisdiction over matters bordering on labour disputes. In this way, neither the FHC nor the HCFCT or SHC can legally exercise jurisdiction over labour disputes. As already mentioned, the jurisdiction conferred upon the FHC under section 251 above is limited. Besides, no Act of the NA, as earlier indicated, has conferred on the FHC jurisdiction to try labour disputes. It has also been earlier mentioned that

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58. For details on the jurisdiction of the NIC under the Act, *see,* NICA 2006, Section 7(1).

the jurisdiction conferred upon the HCFCT[59] and SHC under sections 257 and 272 above, respectively is general but limited. It is, of course, subject to the provisions of section 251 above and other provisions of the CFRN 1999 as amended, including section 254 A(1) which re-establishes the NIC as a SCR going by section 6(5)(cc) and section 254 C(1) which confers on the NIC exclusive original jurisdiction over all labour and employment related matters.

The foregoing discussion is capable of yielding to the pleasant conclusion that today the only forum or venue for labour disputes litigation is the NIC. As the law stands in Nigeria today, the High Courts lack jurisdiction to entertain any labour disputes, whether or not it is an individual labour or employment dispute, trade dispute, inter or intra-union dispute. If judicial authority is sought for this assertion, the decision of the court in *Nigeria Union of Teachers (NUT), Niger State Chapter* v. *Conference of Secondary School Tutors (COSST), Niger State Chapter and 15 Others*[60] would suffice. In that case, the CA held that by virtue of section 254 C(1) above the NIC has exclusive original jurisdiction over all labour and employment related matters in Nigeria. The new approach of the Nigerian Constitution is in consonance with the practice in other countries. For example, all employment disputes, be they individual or collective, are heard and determined in: Britain by the Employment Tribunals;[61]Trinidad and Tobago by the Industrial Court;[62] and India by the National Industrial Relations Court.[63]

In summing up on the issue of jurisdiction of the NIC, it is not out of place to emphasise seven new acceptable provisions of the CFRN 1999 as amended by the Third Alteration Act. The first is section 6(5)(cc). This implicates that the NIC is now a SCR in Nigeria that is constitutionally recognised. It is in consonance with the practice in other countries. For example, in Trinidad and Tobago, the Industrial Court established under its law of Industrial Relations[64] is a SCR.

Second, section 254 D(1). This implicates that for the purpose of exercising

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59. Note also that no Act of the NA, as earlier disclosed, has conferred on the HCFCT Jurisdiction to try labour disputes.
60. (2012) 10 NWLR (part 1307) 89, 114.
61. They started life as Industrial Tribunals in 1964 under the British Industrial Training Act, 1964 but were re-named Employment Tribunals in 1998. See Tom Harrison, *Employment Law* (Sunderland Tyre and Wear: Business Education Publishers Ltd 1990) pp.9-10 and Ian Smith and Gareth Thomas, *Smith and Wood's Employment Law* (New York: Oxford University Press Inc., 9th ed., 2008) pp.24-25. *Seealso,* Kanyip, *supra* n. 45, at 229.
62. *See,* Kanyip, *Ibid*.
63. *See,* The Indian Industrial Relations Act, 1971, Chapter 72. Available at: *http:// en.m.wikepedia .org /Industrial Relations*.
64. *See,* Kanyip, *supra* n. 62, at 233.

any jurisdiction conferred upon the NIC by the Nigerian Constitution or an Act of the NA, the NIC shall have all the powers of a HC. Thus, it is empowered to punish a person for contempt whether the contemptuous act is committed in the face or outside the face of the court[65], make an award for compensation or damages to be paid to any person entitled to same, grant declarations, make orders of injunction and exercise all other inherent powers and sanctions of a court of law.

Third, section 254 C(5). This implicates that the NIC has jurisdiction to try criminal matters which relate to trade or labour disputes and or arises from any of the civil causes or matters for which jurisdiction has been conferred on the NIC. The provisions of the Criminal Code,[66] Penal Code,[67] Criminal Procedure Act,[68] Criminal Procedure Code[69] or Evidence Act,[70] shall apply for the purpose of exercising the NIC's criminal jurisdiction.[71] Under the NICA regime, the power to commit for contempt is the only criminal jurisdiction conferred on the NIC in its section 10. This is not acceptable. The new approach of the Nigerian Constitution is in tune with the practice in other countries, including Trinidad and Tobago where the Industrial Court is empowered to try criminal matters which relate to labour or trade disputes.[72]

Fourth, section 253(2) and (3). This implicates that the decision of the NIC is final except on questions of fundamental rights as contained in chapter IV of the CFRN 1999 as it relates to matters upon which the NIC has jurisdiction, in which case an appeal shall lie from the decision of the NIC as of right to the CA. This is in tune with the practice in some other countries where there is a system of appeal over the decisions of the Industrial Court. For example, in South Africa, there exists the Labour Appeal Court that hears appeal from the labour courts.[73] Furthermore, in Britain where there exist the Employment Tribunals and Employment Appeal Tribunals (EATs), appeals from the Employment Tribunals lie to the EATs and appeals from the EATs lie to the CA and thence to the House of Lords on questions of law.[74]

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65. The power to punish for contempt is bestowed on the NIC not for the personal aggrandizement of the judges but to protect the awe of the Court.
66. *See*, for example, Criminal Code Act, Cap 77, LFN 1990 (now Cap C38 LFN 2004).
67. *See,* Penal Code Law, Cap 89 Laws of the Defunct Northern Nigeria, 1963.
68. Cap 80 LFN 1990 (now Cap C41 LFN 2004).
69. Cap 30 Laws of the Defunct Northern Nigeria, 1963.
70. Cap 112 LFN 1990 (now Cap E14 LFN 2004). See also the new Evidence Act, 2011.
71. *See,* CFRN 1999 as amended by the Third Alteration Act, Section 254 F(2).
72. *See,* Kanyip, *supra* n. 64, at 234.
73. *See,* S.R. Van Jaarsweld and B.P.S. Van ECK, *Principles of Labour Law* (Durban: Butterworks 1998)pp.363-368.
74. Pitt Gnyneth, *EmploymentLaw* (London: Sweet and Maxwell, 1997) pp.13-18.

Fifth, section 254 C(1)(J)(i). This implicates that collective agreements are now to be legally enforceable by the NIC.[75] According to Babatunde Adejumo, President of the NIC:[76]

> Since March 2011...the law has changed our political history, the sixth National Assembly amendment to the Constitution has changed our labour jurisprudence. The Constitution has given NIC power to interprete collective agreement and enforce, this is one of the achievements of the amendment.

The new approach of the Nigerian Constitution is not in tune with the practice in some other countries. For example, in Britain collective agreements are not legally enforceable by the courts on the ground that they are gentlemen's agreements which parties to same do not intend to create legal relations under the common law.[77] This practice is wrong. The presumption of the law of contract derived from common law is that parties to a commercial or business transaction intend to enter into a legally enforceable relationship unlike in a social or domestic transaction where the presumption of the law of contract is that there is no intention to enter into a legal relationship. Collective agreements do not fall under social or domestic transactions. Instead, such agreements fall squarely under commercial or business transactions. They ought to be legally enforceable by the courts in the circumstances.

Sixth, section 254 C(1)(c). This implicates that the NIC now has power to grant an order of injunction restraining a strike, lock–out or any industrial action, or any conduct in contemplation or in furtherance of a strike, lock–out or any industrial action. This will certainly go a long way towards checkmating incessant strikes in Nigeria. The new approach of the Nigerian Constitution is in tune with the practice in other countries. For instance, in India the National Industrial Relations Court is imbued with the authority to grant injunctions if necessary to prevent injurious strikes.[78]

It should be recalled here that based on the provisions above, the NIC wasted no time in granting an order of interim injunction on 6 January 2012 restraining the Nigeria Labour Congress (NLC), Trade Union Congress (TUC) and their affiliates

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75. By virtue of the provisions of section 54(1) of the NICA, 2006 a dispute connected with the conclusion or variation of a collective agreement is a trade dispute in Nigeria for which the NIC has exclusive original jurisdiction to adjudicate upon.

76. *See, Vanguard* (Lagos) 7 July 2011,at 40.

77. *See,Ford Motors Company Limited* v. *Amalgamated Union of Engineering and Foundry Workers* [1969] 2 Queens Bench (QB) or [1969] 1 Weekly Law Reports (WLR) 339.

78. *See,* Indian Industrial Relations Act, 1971, chapter 72. Available at: *http:// en.m.wikepedia.org /Industrial relations*.

from embarking on an indefinite nation – wide strike and mass protest starting from 9 January 2012 over the increment in the pump price of fuel from 65.00 naira (₦) per litre to ₦ 141.00 per litre on 1 January 2012 by the FGN.[79] Of course, the NIC is right in granting the injunction against the strike. But it is certainly not right in granting an injunction against the mass protest even though it may be regarded as a conduct in furtherance of a strike. This is so because sections 39 and 40 of the CFRN 1999 as amended guarantee to all citizens of Nigeria the right to freedom of expression and the right to peaceful assembly andassociation, respectively. What flows from the provisions above is that Nigerians, including workers are constitutionally entitled to mass protest with a view to expressing their disenchantment or disagreement over policies of government provided it is conducted peacefully. The order being a case law of the NIC restraining the mass protest is void for inconsistency with the provisions of the Nigerian Constitution. This contention is grounded on an insightful provision in section I(3) of the CFRN 1999 which declares that 'if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void'. The CA is imbued with authority to declare the order restraining the mass protest, on appeal, void as it relates to questions on fundamental rights guaranteed in sections 39 and 40 under chapter IV of the CFRN 1999.

It is significant to note here that the Nigerian Constitution does not accord workers the right to strike,[80] unlike the practice in some other countries. For example,

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79. *TheGuardian* (Lagos) 10 January 2012, pp.1 & 2. Note that the NLC, TUC and their affiliates disobeyed the order of interim injunction of the NIC restraining the strike. This is wrong. Yet the labour leaders involved in the strike, including Abdulwaheed Omar, President of NLC and Peter Esele former President-General of TUC were not prosecuted and penalised for contempt of the Court. Arguably, the public outcry that the prosecution and punishment of these labour leaders may have generated compelled the FGN to allow 'sleeping dogs lie'. A wise suggestion to make, however, is that the government must cultivate the political will to prosecute and penaliselabour leaders for contempt of the Court as they are obligated to obey the subsisting orders of a competent court. A judgment of a court is valid and must be obeyed until set aside by a court of competent jurisdiction. *See,Fame Publications Ltd* v. *Encomium* (2000) Federation Weekly Law Reports (FWLR)(part 9) 1440, 1441. *See also*, *Adebayo* v. *Johnson* (1969) 1All Nigeria Law Reports (All NLR) 176 and *Peoples Democratic Party* v. *Anayo Rochas Okorocha and Ors, supra* n. 23.

80. This is not a surprise, as sections 18(1) and 30(6) of the TDA and TUA 1990 as amended by the TUAA 2005, respectively have the net effect of banning strikes in Nigeria.

in South Africa, France, Argentina, Portugal, Angola, Rwanda and Brazil[81] the right to strike is constitutionally guaranteed. Without doubt, picketing is one of the industrial actions over which the NIC is imbued with authority to restrain through an order of injunction under the provisions above. It is a conduct engaged in by workers in contemplation or furtherance of a strike. Workers certainly do not picket while working conscientiously. They picket only in furtherance of a strike.[82]

It is also not a surprise that the NA through its amendment of the Nigerian Constitution by the Third Alteration Act bestowed on the NIC the power to restrain picketing. After all, section 30(6) of the TUA 1990 as amended by the TUAA 2005 prohibits 'any conduct in contemplation or furtherance of a strike or lock–out', thus banning peaceful picketing in Nigeria. This constitutes a devastating assault on the right to picketing guaranteed under section 42(1) of the TUA 1990. The provisions of section 30(6) above, to the extent that it prohibits 'any conduct in contemplation or furtherance of a strike or lock–out', is inconsistent with the provisions of sections 39 and 40 of the CFRN 1999 as amended above. The TUA is therefore void to the extent of its inconsistency with the CFRN 1999.[83] The legal substratum for this contention is section 1(3) of the CFRN 1999 above. The contention is fortified by the decisions of the SCN in *Attorney – General of Abia State* v. *Attorney General of the Federation*[84] and *National Union of Electricity Employees and Another* v. *Bureau of Public Enterprises.*[85] It should be noted that in some other countries, including Zimbabwe, South Africa, United States of America and Britain the right to peaceful picketing is guaranteed under the law.[86]

And lastly, section 254 C(1)(d). This implicates that the NIC now has exclusive original jurisdiction to hear and determine application for the enforcement of fundamental rights as it relates to any employment under the Fundamental Rights (Enforcement) Procedure Rules 2009 made by the CJN pursuant to section 46(3)

81. *See,* Constitution of the Republic of South Africa 1996, section 23(2)(c); Preamble of the Constitution of the Republic of France 1946 affirmed in the Constitution of the Republic of France 1958; Constitution of Argentine Nation 1853 as amended in 1994, section 14 bis(2); Constitution of Portugal 1976 as amended in 1997, Article 57; Constitution of Rwanda 1991, Article 32; and Constitution of Federal Republic of Brazil 1998 as amended, Article 9.
82. E.Chianu, *Employment Law* (Akure: Bemicov Publication Nig. Ltd 2004) at 284.
83. Abuza, *supra* n. 9, at 72.
84. (2002) 6 NWLR (part 763) 264.
85. *National Union of Electricity Employees and Anor* v. *Bureau of Public Enterprises,supra* n. 51, at538.
86. *See* Zimbabwean Labour Relations (Amendment) Act, 2003, Section 38; Constitution of South Africa 1996, Section 17; *Thornmill*v. *Alabama* 310 US 88(1940) and British Trade Unions and Labour Relations (Consolidation) Act 1992, section 220(1)(a) and (b).

of the CFRN 1999 with respect to the practice and procedure of a High Court for the purpose of enforcing any of the fundamental rights guaranteed in chapter IV of the CFRN 1999.[87]

The issue of some unsatisfactory provisions in the Nigerian Constitution is the final issue that would elicit the response of the writer. To begin with, section 254 C(1). It is silent on the fate of labour disputes pending before the regular courts such as the FHC, HCFCT and SHC at the time of the amendments, thus the regular courts can continue to hear and determine cases on labour disputes. This is unlike the NICA 2006 which in its section 11(2) gives the regular courts one year after the commencement of the Act to hear and determine part – heard labour disputes otherwise same shall abate. Second, section 254 B(4). It excludes non-legal practitioners sitting as judges of the NIC. Some labour unionists, including John Odah, former General Secretary of the NLC decry the absence of professional civil servants or expert industrialists sitting as Judges of the NIC.[88] No doubt, the absence of professional civil servants or expert industrialists in the membership of the NIC is a serious concern. The fact is that industrial or labour relations matters are not strictly legal matters. The fear exist in industrial or labour circles that, like the regular courts, the NIC would be bogged down by technicalities.[89] And lastly, section 294(1). It gives the NIC and other courts created by the Nigerian Constitution a maximum period of 90 days after the conclusion of evidence and final addresses to deliver their decisions in writing.[90] This timeline or time frame is too long.

It may be necessary to recall here with nostalgia that on 4 March 2011 at the occasion of the official signing of the Third Alteration Act, President Goodluck Jonathan admonished stakeholders in the industrial sub-sector of Nigeria's political economy to support and utilise the NIC in resolving their trade or labour disputes.[91] Adejumo had given similar admonishment.[92] Rather unfortunately, many

87. Note that in *PanyaAnigborov. Sea Trucks Ltd* (1995) 6 NWLR (part 399) 41, 62 where the appellant an employee of the respondent brought an application under the Fundamental Rights (Enforcement) Procedure Rules 1979 made by the CJN pursuant to section 42(3) of the CFRN 1979 before a Warri HC, the CA held, on appeal, that the summary dismissal of the appellant because he joined a trade union other than the one preferred by the respondent was a violation of appellant's right to freedom of association under section 37 of the CFRN 1979.

88. *See* 'Big Story' on African Independent Television (AIT) News Hour on 4 October 2011 broadcasted between 8 and 9pm.

89. *Ibid*.

90. *See,* also *PDP* v.*Anayo Rochas Okorocha*, *supra* n. 79, at 220.

91. The 'Big Story', *supra* n. 88.

92. *See, Vanguard* (Lagos) 7 July 2011, at 40.

stakeholders in the industrial sub-sector of Nigeria's political economy believe that the admonition of Jonathan and Adejumo above may fall on deaf ears. To cut matters short, the fear exist that because of the delay in the determination of employment disputes in the Nigerian Courts, including the NIC an employee may even die before his appeal over the decision of the NIC is finally determined as the case may be. This is one of the reasons advanced by Esele for non-adherence to the admonition of Jonathan and Adejumo above.

It should be recalled that under section 20(2) of the TDA the NIC has 30 working days to determine any trade dispute from the day it begins to consider same. This provision was repealed by NICA 2006.[93] No provision of the 2006 enactment provides any timeline or frame within which the NIC is to determine any labour dispute. In this way, the NIC was not obligated to deliver its decisions within 90 days since it was not one of the courts established by the CFRN 1999. Albert, the position now is far better than the position under the NICA regime. Regardless, it is still not acceptable.

IV. OBSERVATIONS

It is clear from the foregoing examination of the jurisdiction of FHC, HCFCT, SHC and NIC that the latter has exclusive original jurisdiction over all labour and employment related matters under the CFRN 1999 as amended by the Third Alteration Act. Thus, it is the only or proper forum for the litigation of labour disputes in Nigeria. This is in tune with the practice in other countries such as Trinidad and Tobago, Britain and India. It is observable that despite the amendment of the Nigerian Constitution by the Third Alteration Act to confer exclusive original jurisdiction on the NIC over all labour and employment related matters, labour dispute litigations are still on-going in the HCs. In addition, some labour disputants still have recourse to the HCs for the litigation of their labour disputes. These unsatisfactory developments are attributable to many factors, including the fact that the Act above is silent on the fate of labour dispute cases, commenced in the HCs prior to the coming into force of the Act above as well as the fact that many Judges of the HCs, legal practitioners, trade unionists, employers, employees and other Nigerians are oblivious or unaware of the import and purport of the amendments of the CFRN 1999 introduced by the Act above.

It is also observable that some unsatisfactory provisions enure in the Nigerian Constitution such as section 254 B(4) which excludes non-legal practitioners from membership of the NIC and section 294(1) which gives the NIC and other constitutionally created courts not later than 90 days after the conclusion of evidence

93. *See,* NICA 2006, Section 53.

and final addresses to deliver their decisions in writing. These provisions are clogs in the wheel of progress of the NIC. They, infact, constitute obstacles or stumbling blocks to the functioning of the NIC as a veritable tool for the quick, efficient and effective resolution of labour disputes in Nigeria.

The problem of labour disputes litigation taking place in the HCs despite the amendments of the CFRN 1999 introduced by the Act above must be given the highest consideration it deserves by the government so that it may not be accused of paying lip service to the issue of vesting on the NIC exclusive original jurisdiction over all labour and employment related matters. A continuation of the problem above poses a grave danger to the survival of the NIC. Without doubt, it will lead to a situation where there are many conflicting court decisions on labour and employment related matters. This is bound to engender confusion and or pandemonium in the industrial sub-sector community in Nigeria as its members may not know which of the court decisions to apply or follow. The confusion may generate industrial disharmony with capacity to stall economic growth and development of Nigeria. In this way, President Goodluck Jonathan may not be able to realise the Transformation Agenda of his administration for the overall socio-economic development of Nigeria. Worse still, Nigeria may not be able to attain its goal to become one of the 20 most industrialised economies in the year 2020.

V. RECOMMENDATIONS

The problem of labour disputes being litigated in the regular courts instead of the NIC being the Court specifically created to handle all labour and employment related matters should be seriously and urgently tackled by the government. This is imperative so as not to create the impression that the government itself is not concerned with the extermination of the problem but only playing politics with it.

The writer recommends that the CFRN 1999 should be further amended urgently in its section 254 C(1) to provide that prior to the commencement of this section any action inconsistent with the terms of the provisions of section 254 C(1) of the CFRN 1999 as amended by the Third Alteration Act shall abate and be null and void. The amendment Act should nullify and render ineffective 'any interim or interlocutory order, judgment or decision made by any court' other than the NIC respecting labour and employment related matters, after the commencement of the Third Alteration Act. Moreover, the amendment Act should make it a crime punishable in Nigeria for anyone to start any action founded on labour disputes and other labour and employment related matters in the regular courts after the date on which the amendment Act comes into force. The amendments suggested above are bound to constitute a devastating assault on the problem of labour disputes litigation taking place in the HCs instead of the NIC. They are actually in tune with the approach

warmly embraced by the Trade Disputes (Amendment) Decree 47 of 1992.[94]

The writer also recommends the organisation of public lectures and other public enlightenment programmes by the government of Nigeria to sensitise judges, legal practitioners, trade unionists, employers, workers and other Nigerians on the import and or purport of the amendments of the CFRN 1999 introduced by the Third Alteration Act. It is also recommended that the CFRN 1999 be further amended to provide that in addition to the requirement of being a legal practitioner for at least ten years, a holder of the office of a judge of the NIC must be a professional civil servant or expert industrialist.[95] In the alternative, the position under NICA 2006 where there are both legal and non-legal practitioner judges constituting the membership of the NIC,[96] should be retained.[97]

It is the view of the writer that there is nothing fundamentally wrong with the arrangement of having the NIC consist of legal and non-legal practitioners,[98] as it is in consonance with the practice in other countries, including Britain and Trinidad and Tobago.[99] To be specific, in Britain the Employment Tribunal is composed of three members, that is, a legally qualified Chairman who must be a Barrister or Solicitor of at least seven years' standing and two lay members, one of whom is usually a nominee of an employer's organisation, and the other the nominee of a workers' trade union.[100] In the view of Agomo:[101]

> The composition of the Court comprising a quality legal practitioner and lay members is commendable and must be maintained so that the NIC, like its British counterpart… will continue to functions as (sic) 'a court

94. Note that Decree 47 of 1992 was declared void by the SCN on the ground that its conferment on the NIC of exclusive jurisdiction in trade disputes was to exclude the wide powers bestowed on SHC by section 272 (1) of the CFRN and thereby made it inconsistent with the Nigerian Constitution. See *National Union of Electricity Employees and Anor* v. *Bureau of Public Enterprises, supra* n. 85. It has been earlier shown that the decision of the apex court in Nigeria was wrong.

95. A.E.Abuza, "The National Industrial Court and the Third Alteration Act 2010: An Evaluation", 12(3) *The Constitution: A Journal of Constitutional Development,* 2012, at 80.

96. *See,* NICA, 2006, Sections 1(2)(b) and 2(3) & (4)(b).

97. Abuza, *supra* n. 95.

98. A.E.Abuza, "The Jurisdiction of the National Industrial Court in Nigeria: An Analysis of the Issues Involved"4(1) *Ahmadu Bello University Journal of Commercial Law*, 2008-2009, at 13.

99. Kanyip, *supra* n. 72, at232.

100. *See,* Harrison, *supra* n. 61, pp.9-10. *Seealso,* Inns of Court School of law,*Employment Law and Practice* (London: Blackstone Press Ltd., 4thedn., 2000) pp.20-21.

101. Quoted in Kanyip, *supra* n. 99.

of law industrially informed'. It is only so that it can continue to contribute meaningfully to the development of labour laws and industrial relations practice in Nigeria.

It is further recommended that there should be an overhaul of the legal system in Nigeria to ensure speedy dispensation of justice. In this respect, the CFRN 1999 as amended should be further amended to give NIC and the other courts created by the Constitution a period not later than 60 days within which judgments must be delivered after the conclusion of evidence and final addresses.[102]Surely, all over the world, Industrial Tribunals or Courts are designed to provide means of speedy resolution of labour disputes which will often turn very heavily upon their particular facts. In Britain, the Denovan Reports in 1968 referred to their potential advantages of being ease of access, informality, speed and inexpensiveness.[103]

The effectiveness of the NIC in resolution of labour disputes is bound to diminish by delay in giving judgments.[104] A noteworthy latin maxim is: '*Justicia cunctator est Justicia denego*', meaning 'Justice delayed is Justice denied'. The truth of the matter is that where there is an inordinate delay in determining a labour dispute certain remedies or reliefs like re-instatement or specific performance may prove impracticable given the time lag between the action and the judgment.[105]

VI. CONCLUSION

This article has examined the Jurisdiction of the FHC, HCFCT as well as NIC and stated clearly that the NIC is the only or proper forum for the litigation of labour disputes in Nigeria today. It has identified shortcomings in the various laws. It has also discussed the effects of labour disputes being litigated in the regular courts inspite of the amendments of the Nigerian Constitution introduced by the Third Alteration Act on Nigeria's system of industrial relations. It has equally highlighted the practice in some other countries and made suggestions, which if implemented would exterminate the problem of labour disputes litigation in the regular courts instead of the NIC and further strengthen or reposition the NIC for a more efficient and or effective discharge of its constitutional duties.

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102. This is in tune with the approach adopted in section 285 (7) of the CFRN 1999 as amended by the Constitution of the Federal Republic of Nigeria (First Alteration) Act 2010 which provides that an appeal from a decision of an election tribunal or court shall be heard and disposed of within 60 days from the date of the delivery of judgment of the tribunal. See also the SCN decision in *PDP* v. *Okorocha, supra* n. 90, at 221.

103. Smith and Thomas, *supra* n. 61.

104. Abuza, *supra* n. 98, at 12.

105. *Ibid.*

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THE BASIC STRUCTURE DOCTRINE AND IMPLIED LIMITATIONS ON THE EXERCISE OF LEGISLATIVE POWERS UNDER THE NIGERIAN CONSTITUTION

EKOKOI SOLOMON*

ABSTRACT : In 1999Nigeria retraced its steps towards constitutional democracyfounded on the concept of constitutional supremacy with the courts as its guardians. This is to ensure that democracy withthe protection of fundamental rights albeit in a limited sense; separation of executive, legislative and judicial powers; the distribution of governmental powers among democratically elected national, state and local institutions; consociational government based on the need to fashion a cohesive polity; and supremacy of a rigid Constitution, justiciable by an independent judiciary, are failsafe.This article argues that certain provisions in a written constitution constitute it basic features,as they are fundamental to its design. And if this notion is true of the Nigerian Constitution, it therefore implies that the National Assembly will be acting beyond its legislative powers under the Constitution, where the exercise of such powers result inchanges or removal of any of thebasic features of the Constitution. The object of this article is to examine the applicability of the basic structure doctrine in Nigeria as well as the constitutionality of constitutional amendment by the Legislature, which alters or removes fundamental feature(s) of Nigeria's constitutional design.

KEY WORDS : Basic Structure, Constitution Amendment, Constitutional Supremacy, Constitutional Entrenchment, Legislative Powers.

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I. INTRODUCTION

Nigeria is currently in its Fourth Republic operating with a constitution that was promulgated on 5 May 1999 by the Constitution of the Federal Republic of Nigeria (Promulgation) Act No 24 of 1999. The Constitution,[1] which is set out in the schedule to the Act, came into force on 29 May1999.[2]Since coming into force, the 1999 Constitution has been amended or altered three times.[3] The attempt to further amend or alter the Constitution by the 7th National Assembly (Nigerian Legislature)–through the Constitution of the Federal Republic of Nigeria (Fourth Alteration) Bill 2015 which was transmitted to the president in February 2015 for assent–was far reaching and very controversial up until the end of that legislative body on 4 June 2015.[4]The Fourth Alteration Bill 2015 led to a face-off between former President Goodluck Jonathan and the National Assembly as the former refused to assent to the alteration bill, after which the attorney general of the Federation commenced legal actionagainst the National Assembly at the Supreme Court of Nigerian late April 2015 for a judicial decision on the disputed sections of the Fourth Alteration Bill 2015.[5]

The proposed constitutional amendment was far reaching in the sense that for the first time in the history of constitution-making in Nigeria, socio-economic rights were to become justiciable rights. In effect, the provision of section 6(6)(c) of the Constitution was amended to allow forthe enforcement of socio-economic rights and obligations contained in Chapter 2 of the Nigerian Constitution. The amendment bill also sought to, among other things, remove the requirement for presidential assent to constitutional amendments, erode the efficacy of presidential veto powers, limit the tenure of office of the president to a single term of six years, separate the office of the attorney general of the Federation from the Minister of Justice and limit the powers of the president on matters such as the appointment of certain public officers.[6]

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1. The Constitution of the Federal Republic of Nigeria, 1999, Cap C23 Laws of the Federationof Nigeria 2004 [hereinafter Nigerian Constitution or the 1999 Constitution or the Constitution].
2. *Id.,* Section 1(1) &(2).
3. Through the Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010, Constitution of the Federal Republic of Nigeria (Second Alteration) Act 2010 and Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010.
4. The 8th National Assembly was inaugurated on 9 June 2015.
5. *See,Attorney General of the Federation* v. *National Assembly* April, Suit No. SC/214/ 2015, commenced in late April 2015. However, the Court noted that the correct plaintiff ought to have been the president and not the attorney general since it was the president who declined to assent to the Bill.
6. These changes were also to affect *mutatis mutandis* the state governors as well as the office of attorneys general & commissioners of Justice of the states.

This article interrogates the argument that insofar as the making of legislation is the constitutional role of the legislature it is illegitimate, because it is undemocratic and counter majoritarian, for the courts to attempt to or indeed limit the powers of the legislature to amend the constitution through the legislative process. It argues that the above argument is flawed, especially, whenlegislative power is exercised in a manner that removes or changes the basic features or the constitution's design, without taking into consideration the purpose of the constitutional structure. This articleexamines the exercise of legislative powersin relation to the removal or change of basic features of the constitution in the context ofa written constitution such as the Nigerian Constitution. It contends that the application of legislative powers by the National Assembly to change the constitutional design will impugn the spirit of the Constitution, of which the Nigerian courts have been vested with the powers to so determine.[7]The article also identifiesthe extent of the legislative powers of the Nigerian National Assembly in relation to the Constitution. Part II of this article explores the philosophicalbasis for and against the basic structure doctrine. Part III identifies the nature of the Nigerian Constitution which is impacted by the context in which it emerged. Part IV suggests some features of the Nigerian Constitution that may be considered as fundamental to the constitutional design.Part V analyses the amending provision of the Nigerian Constitution, drawing comparatively from the constitutions of India and South Africa (jurisdictions with no eternal clauses), and also drawing on the constitutional order of countries with express eternal clauses in the constitution. Part VI examines whether the basic structure doctrine is applicable under Nigerian constitutional law, applyingboth case law and academic arguments. Part VII concludes by addressing the implication of thepassive posture adopted by the Nigerian Supreme Court in a view to avoidingits role as guardian and interpreter of the Constitution.

II. THE PHILOSOPHICAL BASIS

Before we examine the philosophical basis for the basic structure doctrine, it is important to note the following propositions, namelythat there are two, not mutually exclusive,viewpoints to a written constitution–commonly described as the spirit and the letters of the constitution, and that the doctrineof constitutional supremacy and the sovereignty of the legislature cannot coexist under a written constitution. However, how thesepostulations are conceptualized in constitutional theory possess the key to unlock our understanding of the basic structure doctrine and its foundation.

The basic structure doctrine holds that certain parts of the constitution are beyond amendment by the legislature exercising its legislative powers. In essence, it is aimed at insulating certain constitutional provisions or features from change–even when

7. *See,supra* n. 1, Sections 6(1), (2)& (6)(a).

the change was effected through the formal procedure set out in the constitution. The implication of this doctrine is that theamending provision in a written constitution is neither absolutenor sacrosanct and the courts are required to determine which parts of the constitution are not amendable. In order to appreciate the philosophical basisfor the basic structure doctrine, it is important to examine the various orientations in constitutional theory whic hinfluence how the courts may approach constitutional issues brought before them for determination. They include the object, the subject and the passive philosophical orientation. At this point, it important to observe that the constitutional doctrine applied by the courts in the interpretation of the constitution depends on which of these philosophical orientations they are favourably predisposed to adopt. We shall now briefly examine them in turns.

The Object Orientation

The object orientation emphasizes that there is something inherent in the object– in this context, the constitution–that impacts or impinges on the subject (the courts) so as to ensure that the latter acts in a certain way to protect the former from being violated. The basic structure doctrine is based on the idea of the object orientation. And at the core of the basic structure doctrine is the notion or idea that there is something inherent in the constitution that resists change beyond certain limits– something that matters.[8] The rationale for the basic structure doctrine is the need to entrench the constitution by aligning the *spirit* and the *letters* of the constitution in order to ensure that it remains a living document (otherwise referred to as the concept of constitutional entrenchment).This, inevitably, coincides with the notion of the constitution as a supreme and enduring document–at least in terms of a written constitution.

The Subject Orientation

The subject,as indicateda bove, refers to the courts in its role as the interpreter and guardian of the constitution. The subject orientation is the reverse of the object orientation and thus recognises that there is nothing inherent in the constitution that requires the courts to act, respond or be concerned about preserving the constitution in a particular form. The subject orientation advances the concept of constitutional defeasibility,which emphasises that there is nothing inherent in the constitution that prevents change, rather what matters isthat the courts interpret the constitution in a manner that does not consider its entrenchment.Accordingly, the courts is only expected be mindful of the wordings (letters) which are contained in the constitutional document. The inherent danger in this choice of orientation is that it might well limit the capacity of the courts in relation to the other branches of government and make non-sense of the concept of constitutionalism.

8. *See,* R.M. Hare, *Applications of Moral Philosophy: New Studies in Practical Philosophy* (London: Macmillan, 1972) pp.33-34.

The Passive Orientation

The passive orientation is based on the idea that the courts need not take action to legitimise or entrenchthe constitution or strike down its amendment–albeit in a manner that upsets the constitutional design.This orientation is rooted in the practice of constitutional avoidance.[9]Some constitutional scholars have argued that the courts need not exercise their power of judicial review in the determination of questions reflecting on constitutional law, in order not to become entangled in controversial and sensitive constitutional questions. And that the courts can decide to return a constitutional problem to the political realm for resolution and in the process encourage institutional dialogue between the legislative and executive branches.[10]However, by doing nothing, and adopting to remain passive on issues that border on constitutional law, the court might as well be abdicating its role of judicial review under the constitution–and especially under a written constitution.It is important to point out that the practice of constitutional avoidance, in its original conceptualization, was only intended to be applied to minor constitutional questions and not issues concerning amendment of the constitution.[11]

III. NATURE OF THENIGERIANCONSTITUTION

Since Nigeria gained political independence from Britain in 1960, it has had five constitutions – the 1960 Constitution that ushered in independence, the 1963 Constitution that ended colonial representation in the government of Nigeria, the 1979 Constitution that replaced parliamentary government with presidential government and brought about the Second Republic, the 1989 Constitution that was designed to usher in the Third Republic but only operated for two years and the 1999 Constitution which returned the country to civil rule and marked the commencement of the Fourth Republic. Nigeria has always operated with a written constitution even when it had a parliamentary government with parliamentary supremacy. Nigeria's Constitutions since 1979, have been fashioned after the Constitution of the United States of America. However, it is different from the US Constitution in some respects. Even though some constitutional commentators in Nigeria have made the mistake of suggesting that because a constitutional principle is applicable under US constitutional law, it should apply *mutatis mutandis* to

9. *See,* L.A.Kloppenberg, "Avoiding Constitutional Questions", 35(5) *Boston College LawReview,*1994, at 1003.

10. *See,* A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: The Bobbs-Merrill Company, Inc., 1962) PP.21, 70, 115.

11. *Supra* n. 8, pp.1016-1017.

Nigerian constitutional jurisprudence.[12]This is far from the reality, because the two societies were confronted with different types of challenges at the time their constitutions were written.[13] In essence, the context in which the Nigerian Constitutionemerged determines howit was intendedto regulate the actions of the government and citizens. For example, under the US Constitution, it is the Congress that has the power to declare war,[14]whereas under the Nigerian Constitution, the president has war powers–albeit limited.[15]And it may be argued that the drafters of the Nigerian Constitution intended a politically powerful and unifying figure in the president than contemplated by the US Constitution.Nevertheless, there are immutable principles that are applicable to written constitutions by virtue of their nature. Given this fact, therefore, to a large extent the meaning of constitutional texts should be construed within the meaning at the time of adoption or ratification or the meaning that the majority of citizens would adopt (usually in a referendum),[16] and above all, they should be more concerned with identifying and interpreting the constitution in the light of the holistic purpose it sets out to achieve.[17]

There exists the argument in constitutional law which postulates that in interpreting a written constitution, the courts "should focus on the document's broad goals rather than details of the adopted text",[18]as constitutional purposivism appears to be best suited in maintaining fidelity to constitutional originalism.[19] The idea of the spirit and letters of the constitution as well as the doctrine of supremacy of the constitution, arguably, find fertile ground with this broad objective of the constitution. And it may be argued that the broad goals of a written constitution are basically to

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12. *See*, the argument made by F.Falana, "Constitutional Amendment: Presidential Assent Not Required" *Sahara Reporters*, 2010, available at: *saharareporters.com/2010/11/22/constitutional-amendment-presidential-assent-not-required*.
13. *See,* B.Nwabueze, *Constitutionalism in the Emergent States* (New Jersey: Associated University Presses, Inc., 1973) pp.23-30; OO Aguda, "A New Constitution for Nigeria: Some Fundamental Issues Arising", available at: *www.hg.org/article.asp?id=28629*.
14. *See,* US Constitution, Art.1, Section 8, Cl.11.
15. *Supra*n. 1, Sections 5(5) & 305(3)(a).
16. *See,* comment by W. Dellinger, "Panel on Originalism and Unenumerated Constitutional Rights", in SG Calabresi(ed), *Originalism: A Quarter-Century of Debate* (Washington DC: RegneryPublishing, Inc., 2007) at 117.
17. *See,*V.C. Jackson, *Constitutional Engagement in a Transnational Era* (New York: OxfordUniversity Press,2010) at 135.
18. J.F. Manning, "Federalism and the Generality Problem in Constitutional Interpretation", 122(8) *Harvard Law Review,* 2004 at 2007; *see also*,the Nigerian cases of *Senator Adesanya* v.*Presidentof the Federal Republic of Nigeria* [1981] ANLR 1, 25 (SC); *Awolowo* v.*Sarki*[1966] 1 All NLR 178 (SC).
19. *See,* Jackson, *supra* n. 17, pp.134-136.

promote limited exercise of governmental authority, while ensuring the supremacy of the constitution. Hence, the nature of the Nigerian Constitution, as distinguishable from a British-styled unwritten constitution which permits the exercise of unlimited legislative powers and ensures the sovereignty of the parliament,[20] may be branded by the need to limit the powers of each branch of the government–of which the legislature is most famous for exercising discretionary powers–while ensuring constitutional supremacy.

IV. BASIC FEATURES OF THE CONSTITUTION

The basic structure doctrine was first applied in 1973 by the Indian Supreme Court in the case of *KesavanandaBharati v State of Kerala*,[21] when it struck down an amendment of the Constitution by the Indian Parliament–which the Court considered as attempting to restrict property rights, asserting that the Indian Constitution possesses a basic structure of constitutional principles which could not be destroyed by Parliament despite its wide powers under the Constitution. As distilled from the decision of the Court in that case, it identified the following as forming the basic features of the Indian Constitution: supremacy of the Constitution, separation of powers between the legislature, executive and the judiciary, free and independent judiciary, republican and democratic form of government, parliamentary democracy, secular character of the Constitution, federal character of the Constitution, unity and integrity of the country, sovereignty of India, individual freedoms secured to the citizens, and the mandate to build a welfare state contained in the Directive Principles of State Policy. In the same vein, it has been argued that under the Singapore Constitution, separation of powers and judicial powers exercised through judicial review are basic features which cannot be subjected to the principle of "what Parliament gave, Parliament could take back".[22] In the case of Nigeria, the provisions of the Constitution–which is not a creation of the National Assembly–portrays a constitution designed to reflect the sovereignty of the people,[23] supremacy of the Constitution,[24] integrity of the Nigerian state and republicanism,[25] fundamental

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20. B.O.Nwabueze, *The Presidential Constitution of Nigeria* (London: C. Hurst & Co. (Publishers) Ltd,1982) pp. 1-16; *see also*,Nwabueze, *supra* n. 13, pp.1-30.
21. [1973] 4 SCC 225 (SC).
22. C. Liang and S. Shi, "The Constitution of our Constitution: A Vindication of the Basic Structure Doctrine",*Singapore Law Gazette*, 2014, pp.18-19.
23. *Supra* n. 1, Preamble & Section 14(2)(a).
24. *Id.,* Section 1(1).
25. *Id.,* Section 2(1).

rights of citizens,[26]federalism,[27] presidential democracy,[28]*consociationalism* (commonly referred to as federal character) [29]the power of judicial review[30]and separation of powers between the legislative, executive and judicial branches of government[31]–which gives rise to the doctrine of checks and balances.And because these components reflect on the constitutional design, they could be considered as forming the basic structure of the Nigerian Constitution and therefore unamendable through the legislative process by the application of the legislative powers of the National Assembly.

It might therefore be said that constitutional supremacy, separation of powers, the power of judicial reviewand sovereignty of the people exercising constituent power are some of the basic features of a written constitution, in contradistinction to an unwritten constitution wherein the sovereignty of the legislature, exercising unlimited legislative powers–which in itself makes non-sense of the idea of enacting a constitution.[32]This is irrespective of whether such a country has adopted presidential democracy as is the case with Nigeria or parliamentary democracy as is the case with India and Singapore or a hybrid of the two as adopted by South Africa. It might imply that any amendment of the constitution by the legislature, acting by virtue of its legislative powers, in such a way as to remove or change the basic features of the constitution,is unwholesome as it would be contrary to the spirit of the constitution. The plausible explanation would be that a constitutional amendment or alteration which upsets the basic structure of the constitution may be unconstitutional despite the fact that the formal conditions for its alteration as contained in the constitutional text had, in fact, been fulfilled. This was the premise on which the Indian SupremeCourt decided in the *KesavanandaBharati* case that the amending provision in Article 368 of the Indian Constitution provided for the power and the procedure for amending the Constitution, but that amending the Constitution was not the same as amending a law. Whereas the latter may be fundamentally restructured to suit the intention of the legislature, the former could not be restructured as it would amount to changing the constitution inthe exercise of legislative powers rather than in the exercise of constituent powers. The decision of the Indian Supreme

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26. *Id.,* Sections33-46.
27. *Id.,* Section 2(2).
28. *Id.,* Chapter VI (A), Sections 130-152.
29. *Id.,* Sections 14(3) & 147(3).
30. *Id.,* Section 6(a).
31. *Id.,* Chapters V, VI and VII.
32. *See,* V.Bogdanor and S Vogenauer, "Enacting a British Constitution: Some Problems", *Public Law*, 2008 pp.40-41.

Court in that case brought out ablurred but important distinction between the kinds of functions performed by the legislature operating under the doctrine of constitutional supremacy–the function of law making in the exerciseof its legislative powers and the function of amending *certain* provisions of the constitution in the exercise of its legislative powers as distinct from the function of amending basic features of the constitution in the exercise of constituent power.[33]

V. THE AMENDING PROVISION IN THE CONSTITUTION

The amending provision in the Nigerian Constitution is similar to those of the Indian and South African Constitutions. For the purpose of clarity, the various amending provisions of the three jurisdictions are identified below.The Indian Constitution states that"[n]otwithstanding anything in this Constitution, Parliament may in exercise of its constituent power *amend* by way of *addition*, *variation* or *repeal* any provision of this Constitution in accordance with the procedure laid down in this article."[34] The amending provision under the South African Constitutionis more elaborate as it is divided into three categories of Founding Provisions, Bill of Rights provisions and any other provision, all of which may be amended by the National Assembly and the National Council of Provinces, with varying supporting votes as the case may demand.[35] In essence, the amending provisions in the South African Constitution is to the effect that any constitutional provision may be amended subject to fulfilling the necessary constitutional requirements. In the same vein, the Nigerian Constitution provides that "[t]he National Assembly may, subject to the provisions of this section, *alter* any of the provisions of this Constitution."[36]

By the ordinary wordings of the amending provisions in section 9(1) of the Nigerian Constitutionas well as sections 368(1) and 74(1),(2)&(3) of the Indian and South African Constitutions respectively, all the constitutional provisions are

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33. *Supra* n. 1, Sections 4(2) & 9; *see also,* the Constitution of the Republic of South Africa, Act 108 of 1996, Sections 74(1), (2) & (3); *see also*, the *obiter* dictum per Mohamed DP in *Premier of KwaZulu-Natal and Others* v. *President of the Republic of South Africa and Ors* [1995] 12 BCLR 1561 at para 47 (CC).
33. The Constitution of India, 1950 Article 368(1).
34. *See,* the Constitution of the Republic of South Africa, Sections 74(1), (2) & (3) (emphasis mine).
35. *Supra* n. 1, Section 9(1).
36. This is akin to Israel's experience as depicted by Barak when he observed that though the Knesset is the constitutional assembly, in relation to the establishment of a new basic law or the amendment of an existing basic law, where it act in contravention of the framework of Israel's basic character as a Jewish and democratic state, its action will be unconstitutional. *See,* A. Barak, "Unconstitutional Constitutional Amendments", 44 *Israel Law Review*, 2011, pp.339-340.

amendable. Yet some provisions of the Nigerian Constitution (as are those of the other two jurisdictions mentioned above) are entrenched. The reasons for this constitutional character are not implausible–they are written constitutions and by implication rigid, as special procedures and majorities are required to validate their amendment. Beyond their rigidity and requirement for special procedures and majorities, there are certain provisions that cannot be removed or changed because of their relationship with the constitution. For example, a constitutional amendment that seeks to alter or remove the Fundamental Rights provisions in Chapter 4 of the Nigerian Constitution or the Founding Provisions/Bill of Rights provisions in Chapters 1 and 2 of the South African Constitution would be unconstitutional; an amendment that seeks to change the governmental system or affect the workings of the governmental system would be in violation of the constitutional order and therefore unconstitutional; the same will apply to a constitutional amendment that seeks to remove the federal nature or character of the Nigerian Constitution. Yet there is no provision in the Nigerian Constitution that expressly prohibits these amendment. [37]

On the other hand, some jurisdictions have incorporated express restrictive provisions known as eternal clausesinto their constitutions to forbid the amendment of certain provisions. For example, the US Constitution contains a restriction as Article V protects each state's equal representation in the Senate irrespective of its population. Article 79(3) of the German Basic Law entrenches the basic features of federalism and human dignity as it prohibits any amendment to these principles as contained in Articles 1 & 20 of the Constitution. In France, Article 89 of the Constitution does not permit any amendment affecting the republican form of government under the constitution. Under the Nepalese Constitution of 1990, Article 116(1) declares an amendment to the constitution which violates the spirit of the Preamble as invalid. Also, the 1988 Constitution of Brazil contains eternal clauses which prohibits the amendment of the federal nature of the State, direct, secret, universal and periodic election, separation of governmental powers and individual rights.[38] And in Turkey, Article 4 of the Constitution of 1982 prohibits any amendment that will remove the republican, democratic and secular nature of the State. The foregoing illustrates (both jurisdictions where eternal clauses are contained as well as absent from their constitutional texts) that rules which govern constitutional politics go beyond the everyday politics. For rules of constitutional politics ensure that constitutional amendment is not used as a tool to advance partisan objectives, thereby

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37. *Id.,* at 331; *see also,* L. Maia, "The Creation and Amendment Process in the Brazilian Constitution"in M Andenas (ed), *The Creation and Amendment of Constitutional Norms* (London: British Institute of International and Comparative Law, 2000).

38. *Supra* n. 1, Section 4(3) & (4).

destroying, in the process, the originality and efficacyof the constitution to imbue constitutionalism.

VI. APPLICABILITY OF THE BASIC STRUCTURE DOCTRINE IN NIGERIA

By the provisions of the Nigerian Constitution, the powers of the Federation are divided into legislative, executive and judicial. All legislative powers of the Federation are vested in the National Assembly–the Senate and the House of Representatives; the executive powers are vested in the president; and the judicial powers are vested in the courts established under the Constitution as well as courts that may be established by Acts of the National Assembly from time to time. The Constitution confers specific enumerated powers on these branches of government. The enumerated powers specifically conferred on the National Assembly are, namely the power to make laws[39] as well as the power to alter or amend the Constitution.[40]The Constitution has not conferred the power to change the Constitution. This is an implied limitation which springs from the nature of the Constitution as a written document and the governmental system it puts in place to support the fundamental principles inherent in the spirit of the constitutional order.[41] The ability of the legislature to enact law, including the power to amend the constitution in any manner it deems fit, is rooted in the claim of unconstrained capacity to make laws–an idea which has its roots in Britain in the wake of the Glorious Revolution of the 17th century. This has given birth to the notion of parliamentary sovereignty and the unwillingness of the courts, especially in common law countries (especially in the United Kingdom), to reject the notion even when it acknowledges that judicial review is a fundamental feature in a democracy.[42]This was well noted by the UK House of Lords in*Jackson &Ors. v Attorney General*,[43]when it stated in dictum, and called to questionthe idea that Parliament has unlimited legislative powers,suggesting that if Parliament were to attempt to remove the courts' powers of judicial review, the courts might refuse to recognise such legislation as valid.

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39. *Id.*, Section 9(1).
40. *See,* R.C. Dale, "Implied Limitations upon the Exercise of the Legislative Power", 49(10)*The American Law Register*, 1901, at 581.
41. *See,* M. Elliott, "The Sovereignty of the United Kingdom Parliament",*Public Law forEveryone*, Available at: *www.publiclawforeveryone.com/2014/10/15/1000-words-parliamentary-sovereignty*.
42. [2005] UKHL 56 online: *www.bailii.org/uk/cases/UKHL/2005/56.html*.
43. *Supra* n. 5.

Case Laws

In the case of *Attorney General of the Federation v National Assembly*,[44] the Nigerian Supreme Court had a golden opportunity to determine whether the National Assembly can amend the Constitution in a manner that changes or removes basic features of the Constitution. Regrettably, that opportunity was not utilised as the Court decided to be passive and avoided to give an interpretation of the Constitution in relation to the matter in dispute. However, there are other prior cases in which the Court suggested that the Nigerian Constitution has certain basic features, namely separation of powers, which could not be derogated or moderated. In *Lakanmi&Ors v Attorney-General (West)&Ors*,[45] the Supreme Court noted that the Nigerian government as well as the Constitution are based and structured on the principle of separation of powers. Also, in *Senator AbrahamAdesanya v President of the Federal Republic of Nigeria&Anor*, the Court decided that it is only in circumstances where the civil rights and obligations of citizens are affected that the courts can exercise its judicial powers with regard to an act of the legislature or executive, as the Constitution imposes certain limitations on judicial powers.[46] And in *Attorney-General of Bendel State v Attorney General of the Federation &* the Court held that by virtue of provisions of the Constitution, courts of law in Nigeria have the power and duty to see to it that there is no infraction in the course of the exercise of legislative powers, whether substantive or procedural, as contemplated or set out in the Constitution. And where such infraction exists, the courts are empowered to declare such legislative action as unconstitutional.[47]

Academic Opinion

Section 9(1) of the Nigerian Constitution provides that any of its provisions may be amended or alteredby the National Assembly. However, it is argued that the provision in section 9(1)–as well as the procedure to be followed in amending the Constitution which is set out in subsections (2) and (3)–is limited to the amendment or alteration of the provisions of the Constitution and does not grant the National Assembly the power to remove or change the basic structure of the Constitution. In other words, the power to remove or change the basic feature(s) of the Constitution does not fall within the scope of section 9 of the Constitution. Therefore, if in the course of amending the Constitution, the Nigerian Legislature acts in a manner that removes or changes a basic feature of the Constitution, such act would have

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44. [1970] LPELR-SC.58/69 (SC).
45. [1981] ANLR 1, 58 at para 5 (SC).
46. [1981] ANLR 85, 133 at para 2 (SC).
47. *See, United Democratic Movement* v. *President of South Africa &Ors* [2003] 1 SA 495 at para 13 (CC).

amounted to a change of the Constitution. And this will be unconstitutional as there is an implied limitation of the Legislature's legislative powers in this regard under the Nigerian Constitution.[48] This principle of law has wasrestated by the South African Constitutional Court, when it held that:

> There is a procedure which is prescribed for amendments to the Constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable. It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and reorganising the fundamental premises of the Constitution, might not qualify as an 'amendment' at all.[49]

This idea finds fertile ground in Nigeria because the provisions which set out the legislative powers of the National Assembly does not include the power to make a new Constitution.[50]This suggests, as Preuss has aptly put it, that "the creation of a [new] constitution is an inherently revolutionary act. It includes the power to create the basic structures of a polity; in fact, it is tantamount to the power to create an entirely new polity."[51] And this power resides in the people who:

> are no empirical entities; they are social constructs which embody the aspirations, the ideals, and the unity of the society and which are purified from all traces of its more trivial and disuniting attributes like self-interested, myopic, and irresponsible individuals and their relentless struggles for material goods, power, and esteem.[52]

What this implies, in essence, is that constituent power is different from legislative power and that the former is, at all times, superior to the latter. Therefore, the

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48. *Premier of KwaZulu-Natal and Others* v. *President of the Republic of South Africa and Ors.*,*supran*. 33 (emphasis mine).

49. *See,supra* n. 1, Sections 4(2) & 9.

50. UK Preuss, "The Exercise of Constituent Power in Central and Eastern Europe", in M. Loughlinand N. Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007) at 213.

51. *Id.,* at 216.

52. *See,* K.S.A.Ebeku, "Making a Democratic and Legislative Constitution in Nigeria: Lessons from Uganda", in W.J.G.Mohlig*et al* (eds), *Recht in Afrika*(Köln: RmdigerKOppe Verlag, 2005) 54.

legislature cannot exercise constituent power as if it were exercising legislative powers.[53]

VII. CONCLUSION

The question whether separation of powers–insofar as is practicable, desirable and the extent of its applicability–should exist under the constitution is a question to bedetermined by the constituent power exercised by the people.[54] For "[i]n modern constitutional thought …[c]onstitutionalism rests on the principle that constituent power resides in the people, who delegate a limited authority to government to promote the public good", as opposed to that of a select individuals.[55]And in order to promote constitutionalism, there is the need for virile constitutional jurisprudence as expounded by the judiciary to clamp down on arbitrary actions of the legislature or executive, as it is the duty of the judiciary to discover and declare, when the legislature or executive is forgetful of its limitations–especially when it affects the Constitution.[56]By virtue of the nature of the composition of the legislature, it has the most tendency to exercise wide and discretionary powers. This explains why Jefferson observed that "[t]he tyranny of the legislature is really the danger most to be feared, and will continue to be so for many years to come."[57]

In this regard, the Nigerian Supreme Court missed an opportunity to deepen Nigeria's constitutional jurisprudence, as is the case in other jurisdictions such as India, South Africa and even Nepal.[58]It also missed the opportunity to make a landmark pronouncement on the principle(s) that should serve as guide to future amendments to the Constitution, by ordering the parties to seek a political solution

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53. *See,* P. Jackson and P. Leopold, *O. Hood Phillips and Jackson: Constitutional and Administrative Law*(London: Sweet & Maxwell, 8th ed,2001) at 12.
54. M. Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2004) at 46.
55. *See,* D.H. Ginsburg, 'On Constitutionalism', paper presented at the first annual B. Kenneth Simon Lecture in Constitutional Thought, delivered at the Cato Institute on 17 September 2002, available at: *http://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2003/9/constitutional.pdf*.
56. Letter from Jefferson to Madison, 15 March 1789, quoted in A de Toqueville, "Unlimited Power of the Majority in the United States, and its Consequences",*Democracy in America, available at: http://xroads.virginia.edu/~HYPER/DETOC/toc_indxhtml.*
57. *See,* R. Stith, "Unconstitutional Constitutional Amendments: The Extraordinary Power of Nepal's Supreme Court", 11(1) *American University International Law Review*, 1996, pp.50-77.
58. This is so because the out-of-court talks between the president and the National Assembly broke down and the Bill effectively lapsed with the 7th National Assembly, as there was no time for the legislators to effect the agreed changes to the Bill.no time for the legislators to effect the agreed changes to the Bill.

on the issues which led to the president's veto of the Fourth Alteration Bill 2015. With due respect to the Justices of the Supreme Court, it was wrong, for the Court to have suggested an out of court resolution of constitutional issues of the nature of the alteration or amendment to the Constitutionas effected by the National Assembly in the failed Fourth Alteration Bill 2015.[59]Separation of powers is a constitutional principle under the Nigerian Constitution. It was adopted not only to promote governmental efficiency but to preclude the exercise of arbitrary power. It was not adopted for the purpose of avoiding friction, but to respond to inevitable frictions– by distributing governmental powers among the various branches of government as well as ensure the exercise of limited authority under the Constitution. This article has argued that to allow the Nigerian National Assembly to change the basic structure or design of the Constitution under the pretext of its amendment powers which is contained in section 9(1) of the Nigerian Constitution will not only be unconstitutional but dangerous to Nigeria's fledging constitutional democratic experiment.

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INTELLECTUAL PROPERTY RIGHTS IN HUMAN GENES AND GENE FRAGMENTS: PATENTING AND PUBLIC ACCESS TO HEALTHCARE ISSUES

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ABSTRACT : In recent years, the issue of patenting human genes has become increasingly controversial. At the outset of the controversy, is the debate over the most suitable legal form of eventual intellectual property protection of human genetic material. The patentability of genetic material is an intricate and complex issue. The issue of patenting human genetic material has raised greater debate at the international and national levels than has the legal status of such material. Since the gene is the basic unit of life, positions on patenting the human genome may be determinant of the patentability of other bodily parts and tissue. The current literature holds that the patent law framework does not explicitly address important ethical concerns. A growing consensus seems to be that patent law is unable to serve as a tool to solve the controversy because of the limited attention paid to the underlying ethical and policy concerns. This paper calls for intervention at national and international levels in order to reach common consensus that might take several forms.

KEY WORDS: Genes, Intellectual Property, Public access and Public Health..

I. INTRODUCTION

The biotechnology industry must raise enormous amounts of capital to develop products and bring them to market. Developing a new human pharmaceutical typically requires at least five years, costs several hundred million dollars, and involves the very considerable risk that a competitor all over the world, will develop and market a competing product. The capital required to develop new products can only be raised if the risks are balanced by adequate patent protection. The key starting materials for product development are synthetic copies of human genes. The prospect of all human genes being identified in the course of the Human Genome Project, therefore, emphatically raises the issue of how human genes can be protected so that they will be useful as starting materials for the development of new human therapeutics and other useful products.

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Ethical disputes about patenting a portion of the human genome are inextricably linked with conflicting views about the entire enterprise of genetic research involving human beings. The same is true for patents on human cell lines (which have already been issued in the United States, Canada and Europe), as well as for patents on tissues and organs. Once again, the importance attached to the availability of patents by supporters of human genetic research has the effect of deepening opposition on the part of skeptics. Although a comprehensive outline of the ethical issues raised by (for instance) human gene therapy and germ line modification or by the uses of genetic information by employers and insurers is not the subject matter of this paper. However, several issues with a specific connection to patenting deserve further examination.

The mapping of the genome and the advent of genetic testing have triggered a plethora of perplexing ethical conundrums. The most prominent of these involve the interconnected issues of privacy and the ownership of one's "genetic information." That information is broadly defined as information about genes, gene products, or one's inherited characteristics, that is, derived from a genetic test or a person's DNA sample.[1]

I. PROPERTY AND OWNERSHIP VERSION OF GENETIC INFORMATION

The expansive version of the property argument is that ownership rights should be conferred on genetic source material including the human tissue sample and any information about the genes derived here from. There are narrower versions of this argument but in general what we are talking about is the proprietary "rights of sources." Should a person's genetic source material belong to that person and be classified as his or her personal property? Should any of that material be regarded as part of the public domain? Is it fair for researchers to receive patents for genes extracted from individuals, especially given that those individuals do not share in the rewards when their genetic material is later commercialized? Should a person own or have some proprietary right to his or her medical and genetic information (and its source)? Will such an ownership right better protect the confidentiality of this sensitive data and allow for a "just" sharing of the rewards of genetic research? Many countries presume otherwise, but this question clearly needs more critical attention. Clearly, this information does have financial value but it is by no means obvious how that value can be most equitably appropriated.

Scholars such as Westin, Miller, and Branscomb have postulated that

1. A DNA sample refers to any human biological specimen such as human tissue or blood from which DNA can be extracted.

individuals should have property rights in all personal information about themselves. Personal information includes the simplest data about an individual such as name, address, phone number, birthday, along with facts about one's financial history or credit background. It is the set of data that describes our unique backgrounds and history. According to Westin, "personal information thought of as the right of decisions over one's private personality, should be defined as a property right with all the restraints on interference by public and private authorities and due process guarantees that our law of property has been so skillful in devising."[2] Branscomb made a similar argument, underscoring the tangible benefits that could accrue from such ownership.[3]

Finally, Miller claimed that the best safeguard for privacy was "a property right vested in the subject of the data and eligible for the full range of constitutional and legal protection that attach to property."[4] Once information is regarded as one's private personal property, as an asset with legal attributes, the legal system can begin to develop a set of laws and appropriate regulations. Those nuanced regulations will define when information should be protected from misappropriation, how individuals should be compensated when their information is used by a third party, and when information must be relinquished for the sake of social, public policy, or even technological priorities. Property rights, of course, are not absolute and just as one's physical property may be subject in extreme cases to eminent domain, one's personal information may at times need to be relinquished for the common good.

II. PERSPECTIVES ON PROPERTY AND PERSON ISSUES

The question is, whether human materials removed from the body be considered property, or ought they still be considered as part of the body and thus, of the person and controlled by that person's personal rights, dominate policy discussions around the world? With a few notable exceptions,[5] these policy texts do not generally address the issue of ownership of bodily material by explicitly stating whether they adopt a property rights or a personal rights legal regime. Indeed, option for one or the other regime can only be inferred from the position taken on

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2. *See generally,* A. Westin, *Privacy and Freedom Atheneum* (New York, 1967).
3. A. Branscomb, *Who Owns Information? From Privacy to Public Access* (Harper Collins, New York, 1994).
4. A. Miller, "Personal Privacy in the Computer Age: The Challenge of New Technology in an Information-Oriented Society", 67 *Michigan Law Review*, 1969, at 1203.
5. G.J. Annas, L.H. Glantz and P.A. Roone, *The Genetic Privacy Act and Commentary* (1995).

commercialism as the personal rights approach generally forbids any monetary compensation for human materials. Exceptions do exist, however, and commercial transactions are sometimes allowed under a personal rights approach while they are forbidden in a property rights regime.

Turning to the Canadian context, the only legislation that deals with the status of human materials is the Civil Code of Quebec. It adopts a personal rights approach[6] that in fact constitutes an expansion of informed consent. Article 22 reads as follows: "A part of a body, whether an organ, tissue or other substance, removed from a person as part of the care he receives may, with his consent or that of the person qualified to give consent for him, be used for purposes of research." Hence, according to this provision, all types of research be it on nominative, anonymous or anonymized samples, requires that specific consent be obtained for the use of removed material until recently considered as waste.

In 1994, the Health Council of the Netherlands seemingly rejected the notion of property rights over the human body as a whole.[7] Various views have been expressed over the years regarding the legal basis for the individual's right to determine what happens to his or her body. The notion that the body is an integral part of the person implies that it has a special position in law. Certainly the living body is not seen merely as a thing: the body is a means of existence, not an item of property.[8] It considered that human tissue removed from the body as having a distinct "legal position." The notion expressed above that the law of property has no relevance to the body as a whole is associated with the view that material which has been removed from the body has no legal existence in its own right: the process of separation makes it the property of the person from whom it has been taken. In this view ownership may be transferred, as happens when blood is given to a blood bank. In special cases such as that of sperm (unlike blood, hair or urine) a refinement is

6. The Civil Code of Quebec (C.C.Q.) being a comprehensive code, placing provisions dealing human material in the "Book on 118 Persons", "Title Two - Certain Personality Rights", is clearly indicative if the legislators' intent to consider human bodily material as parts of persons and not as things to be appropriated. Other elements, such as the prohibition of remuneration for tissue donation and classical principles of integrity and dignity of the person, endorse the personal rights approach. The issue of claims to intellectual property rights or share of profits is not covered except to the extent of compensation for the research participant. Art. 25 C.C.Q. states: "Any experiment may not give rise to any financial reward other than the payment of an indemnity as compensation for the loss and inconvenient suffered".

7. Health Council of the Netherlands, Committee on Human Tissue for Special Purposes, *Proper Use of Human Tissue* (The Hague: Health Council of the Netherlands, 1994).

8. *Id.*, at 32.

introduced, in that the *personal rights* of the donor continue to play a background role.[9]

In 1995, the Nuffield Council on Bioethics, of the United Kingdom, published a report on the ethical and legal issues raised by the use of human tissue in medical research.[10] In accordance with most European policy positions, commercialization of tissue procurement should be prohibited except for certain removed body products such as hair and nails that may be bought and sold since they are common waste products.[11] The Nuffield Council does not explicitly establish whether a person from whom tissue is removed retains any claim over the tissue. The report recalls that, in addition to rights over the actual removed tissue, "a person may also claim an entitlement to share in any benefits arising from the exploitation of the tissue removed and, where relevant, any consequent intellectual property rights. Abandonment and donation, however, do not ordinarily give rise to intellectual property rights."[12] However, it recommended that any claim over removed tissue should be examined on the basis of the consent given to the procedure resulting in the removal.

Despite this seemingly established practice, patent applications on DNA sequences remain controversial. The gene patenting controversy arises from international tension symptomatic of the opposing views and attitudes of government agencies (mostly US and European), researchers, industries, nongovernmental organisations and lay persons,[13] based not only on the property-person, sale-gift dichotomies, but also on differing interpretations of the actual and potential reach of patent law.

III. LEGAL PROTECTION FOR PRIVACY-ENHANCING PROPRIETARY RIGHTS

While it may not be obvious that proprietary rights are necessary for privacy, it is obvious that the inappropriate release of genetic information can be devastating.

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9. *Id*., at 35.
10. *See,* Nuffield Council on Bioethics, *Human Tissue: Ethical and Legal Issues* (London: Nuffield Council on Bioethics, April 1995) at 67.
11. *Id.,*para. 13.24.
12. *Id.,*para. 9.18.
13. *See*, for example, D. Dickson, "British MPs Likely to Oppose Gene Patents", 373 *Nature,* 1995, at 550; S. Lehrman, "Coalition Plans Challenge to Genetic Patenting in the US", 375 *Nature*, 1995, at 268; R. Stone, "Sweeping Patents Put Biotech Companies on the Warpath", 268 *Science,* 1995, at 656; R. Stone, "Religious Leaders Oppose Patenting Genes and Animals", 268 *Science,* 1995, at 1126; F.B. Charatan, "US Religious Groups Oppose Gene Patents", 310 *British Medical Journal,* 1995, at1351.

As we have seen, it could easily lead to employment discrimination, denial of health insurance coverage, and other forms of dignitary harm or stigmatization due to rash and oversimplified judgments. Hence the concern about genetic privacy is not misplaced or exaggerated and some lawmakers have contemplated the use of a property regime to ensure the protection of genetic privacy. In the United States there are no federal laws that specifically protect genetic privacy, but the Health Insurance Portability and Accountability Act (HIPAA) does offer protection to all types of medical information. According to HIPAA genetic test results are considered to be "protected health information." But critics argue that HIPAA provides "minimal protection" and does "little to preserve the privacy of all genetic test results."[14]

In the United States there have been serious proposals for more specific legislation such as a national Genetic Privacy Act (GPA). Advocates of a GPA see the need for a "unified approach," reassuring the public that genetic information is fully protected.[15] One popular version of this GPA claims that it must "grant a federal property interest in one's own genetic material as well as the right to order the destruction of one's DNA samples."[16] According to the original draft of this Act, "an individually identifiable DNA sample is the property of the sample source."[17] Advocates of this legislation have consistently argued that a federal property right would protect privacy and enhance clarity about ownership rights in a way that would actually promote commerce by increasing research. They contend that patients would now be incentivized to allow the use of their genetic materials in exchange for a possible monetary reward.

A number of US states have enacted legislation to safeguard genetic privacy, and several have sought to use the framework of property rights. New Jersey's genetic privacy statute tried to incorporate a limited property right in genetic tissue samples as a means of allowing individuals to maintain control over their genetic material. Pharmaceutical companies objected, however, since the property right would allow people to demand royalties from products that might be derived from that material. Eventually, New Jersey gave in to these concerns and the property right idea was abandoned.[18]

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14. A. Ito, "Privacy and Genetics: Protecting Genetic Test Results in Hawaii", 25 *Hawaii Law Review*, 2003, 449.
15. J. Weems, "A Proposal for a Federal Genetic Privacy Act", 24 *Journal of Legal Medicine*, 2003, at 109.
16. M.J. Lin, "Conferring a Federal Property Right in Genetic Material: Stepping into the Future with the Genetic Privacy Act", 22 *American Journal of Law and Medicine*, 1996, at 109.
17. G. Annas, L. Glantz, and P. Roche, "Genetic Privacy Act, 1995", available at: *http://www.bushp.bu.edu/Depts/Healthlaw.*
18. Weems, *supra* n. 15.

Oregon's Genetic Privacy Act, 1999 declared that genetic information was an individual's personal property. The Oregon legislature saw proprietary rights as the key to securing privacy protection when it enacted that landmark legislation. But researchers and scientists complained that the assignment of a proprietary right to each individual's genetic information (including their genetic code) would be a major obstacle to genetic research. As a result, the law was modified in 2001—the property interest was removed, though criminal penalties would still be imposed for the misappropriation of genetic data. Some privacy advocates, however, were quick to find fault with Oregon's reversal: "By removing the property interest that had been given to individuals with regard to genetic information, Oregon has decreased the strength of privacy associated with their genes."[19]

To be sure, a proprietary right would be a highly efficacious means of preserving one's privacy. As Miller indicated a "property right vested in the subject" is the surest way to give someone autonomous control over that information whether it be financial data or one's genetic code.[20] Such a solution also seems to serve the end of distributive justice since people would share in the benefits of research in a way that is proportionate to their contribution. In Branscomb's terms, if this genetic information is a valuable asset, why should not individuals be compensated for its commercial utilization by a third party? This ownership right and the subsequent negotiations might also endanger trust between researchers and donors, especially if the nature of the research on this genetic material became more transparent in that process.[21] Rule and Hunter,[22] who also advocate property rights in personal data, describe how the granting of such rights will "generate a new balance of power," since owners will now be able to collect royalties for use of their information. According to this classic market-based solution, then, each individual would have exclusive ownership rights over his or her genetic information and source material, and be entitled to compensation for its usage by third parties. That compensation would be determined through "a direct market between buyer and seller with prices based on what people are willing to pay and accept."[23]

The core argument stipulates the necessity of granting property rights in genetic source material, that is, recognizing self-ownership of tissues and organs and the

19. D. McLochlin, "Whose Genetic Information Is It Anyway", 19 *John Marshall Journal of Computer and Information Law*, 2001, at 609.
20. Miller, *supra* n. 4.
21. Branscomb, *supra* n. 3.
22. J. Rule and L. Hunter, "Towards Property Rights in Personal Data", in C. Bennet and R. Grant (eds.), *Visions of Privacy* (Toronto: University of Toronto Press, 1999) pp.168-181.
23. L. Andrews, *My Body, My Property,* Hastings Center Report, October 28, 1986.

genetic information derived from those substances. The implication is that the gene or gene sequence derived from this raw material is not eligible for patent protection by the third parties that excise these cells and then isolate and purify the gene. Nor is the genetic data correlated and stored in a data base eligible for a proprietary claim by the company or researcher who has aggregated genetic test results. The problem is that these claims contradict the prior "rights" of those sources who provide this material.

According to Boyle, the general rights of sources argument might go something like this: "You can't own this gene because I owned it first. My genetic information is my property. Your gene sequences came originally from a source and source's claims should be recognized, either instead of or as well as, the person seeking the patent."[24] Boyle notes that this claim often comes from those who have provided genetic material to a research project from which a valuable genetic sequence was derived or from families with a particular genetic disorder who want "to ensure that the development of tests and treatments for the disorder protects the interests of the patients involved."[25]

IV. PROPERTY RIGHTS DISCOURSE WITH RESPECT TO GENETIC MATERIAL

Human person is not a commodity subject to property rights. Thus, in general terms, the legal status of human material may be negatively defined as being neither the person nor a commodity that can be appropriated, but rather a part of a person. It is this relation it maintains with the person from whom it originated that warrants that the integrity of the person still apply to the material once removed from the body. In a personal rights approach, an individual right to integrity includes respect for bodily material once removed from the body and still identifiable to that person. Strong arguments have also been made in favor of recognition of proprietary interests in extracorporeal material. It has been submitted that a property framework may be the most efficient way of protecting rights of patients and of research subjects since property law provides precise rights of control and thus would recognize people's interest in controlling what happens to their body parts.

In another way, property rights are required as a return for the laborers' painful and strenuous work. As Locke[26] maintains, one who takes the laborer's property "desire(s) the benefit of another's pains, which he has no right." In the case of gene

24. J. Boyle, "Enclosing the Genome: What the Squabbles over Genetic Patents Could Teach Us", 2003, available at: *http://www.creativecommons.org/licenses/by-sa/1.0.*

25. *Ibid*.

26. *See generally,* J. Locke, *The Second Treatise of Government* (Bobbs-Merrill, Indianapolis, 1952).

fragments the labor desert view provides no support since little labor is involved in sequencing these fragments.[27] On the other hand, sequencing the entire gene is more labor intensive so a patent for a full length gene appears to be on firmer ground. But Locke calls for limits on the acquisition of property even when a property right seems to be commensurate with the labor performed. According to Locke, the bestowal of a property right should be denied unless there is "enough, and as good left for others.[28]

It is argued that gene patents have negative effects on healthcare researches. As Shaw[29] indicates, there is compelling evidence that gene patents are having ill-effects on research: "With genetic patents staking private claims to huge chunks of (genetic) code, researchers and clinicians are finding their genetic research and diagnostic efforts thwarted by various restrictions imposed by commercial, and in some instances, academic, patent holders." Arguably, a modified property right that requires access at a reasonable cost (for example, some form of compulsory licensing) will resolve this problem and be more consistent with Locke's liberal philosophy of property rights. Given the high social costs of strong and broad patent rights, they are also hard to justify from a utilitarian perspective. The American Medical Association advocates patents on processes used to isolate and purify gene sequences, substance patents on purified proteins, and gene patents "only if the inventor has demonstrated a practical, real world, specific and substantial use (credible utility) for the (gene) sequence."[30]

Principles of equity and fairness would be better served and unjust enrichment prevented. Characterizing body parts as property does not mean however, that they must be completely transferable as restrictions on alienability may be imposed. In this line of thought, a study paper presented to the Royal Commission on New Reproductive Technologies, maintains that rejection of the property approach to control over one's extracorporeal material stems from misconception of the modern concept of property. The legal concept of property refers not to material objects but to a bundle of rights, the "rights of control and domination over both tangible and intangible things or spheres of activity." Viewed in terms of control over one's body, property rights enhance personal dignity rather than diminish it.

Finally, a report presented to the Royal Commission on New Reproductive Technologies proposed unique, *sui generis* regime for the qualification of the juridical

27. M. Holman and S. Munzer, "Intellectual Property Rights in Genes and Gene Fragments", 85 *Iowa Law Review*, 2000, at 735.

28. Locke, *supra* n. 26.

29. G. Shaw, "Does the Gene Stampede Threaten Science", *AAMC Reporter*, February, 2000.

30. "Report 9 of the Council of Scientific Affairs (1-00)", available at: *http://ama-assn.org/ama/*

character of an object. A *sui generis* interest need not have any particular characteristics as the utility of this category is precisely that courts may develop the law relating to a particular object on a case-by-case basis, "without the fetter of proprietary or other preconceptions." However, "in practice ... *sui generis* interests, as they relate to objects, will always have proprietary characteristics. Some degree of control will be conferred on someone." Maintaining that a property rights discourse should not be used with respect to human genetic material for symbolic as well as political reasons, the *sui generis* regime was submitted since it does not reject property principles, some of which are useful in defining the type of control over human material, and would afford courts latitude in interpretation without "evoking an unwarranted and unnecessary emotional debate."

There are significant impediments to amending the patent law to exclude genetic materials from patentability, including the long history of patenting such inventions, international treaty obligations, and a biotechnology industry dependent on patents and inventions. The Australian Law Reform Commission (ALRC) recommended that the *Patents Act* should *not* be amended to exclude genetic materials or technologies from patentability; or to provide a new medical treatment exclusion; or to expand the existing circumstances in which social and ethical considerations may be taken into account in decisions about granting patents.[31]

V. FLAWS WITH THE PROPERTY-RIGHTS APPROACH

Property rights are seen as a means of protecting the privacy rights and autonomy of individuals whose genetic information or material is sought for purposes of research, identification, or as part of a personal profile. Those rights can also ensure that compensation is paid to donors in those situations where it is warranted. With property rights each individual donor will have maximum control. That individual can restrict the flow of genetic information as he/she sees fit, or even charge licensing fees for the use of such data. By relying on a legally enforceable property claim the person donating the genetic material can demand a share in the revenues of the downstream products derived from that material such as diagnostic tests or treatments. It is axiomatic; therefore, that a property right will efficiently protect the interests of patients and donors. But, despite the laudable intentions embodied in

31. The Australian Law Reform Commission (ALRC) and the Australian Health Ethics Committee (AHEC) of the National Health and Medical Research Council are currently conducting a joint inquiry into whether, and if so to what extent, Australia requires a regulatory framework to: (a) protect privacy of human genetic samples and information; (b) provide protection from inappropriate discriminatory use of human genetic samples and information; and (c) reflect on ethical considerations relevant to use and collection of genetic samples and information.

this property rights approach to genetic source material, there are notable disadvantages and externalities. The major problem with the adoption of a property rights regime for genetic information is economic inefficiency. Fragmented property rights in the genetic data coming from multiple sources would require a substantial integration effort if that data were needed for a particular research project. The higher transaction costs imposed by a property regime would almost certainly constitute an obstacle for biomedical research.

A market which recognizes these "upstream" property rights, such as monopolistic patents for genes or proprietary rights in genetic data, would function by licensing this "property" to downstream researchers and biotech firms which are working to develop treatments of genetically based diseases and diagnostic tools. Consider the impediments to that dwnstream research such as the negotiations with multiple owners required by this property regime, the payment of licensing fees to these owners, the likelihood that some of the owners will act opportunistically and hold up the project. All of this will greatly inhibit research and increase the cost of important end products. Thus, the adverse social and economic effects of recognizing these rights seem beyond dispute. But what does the law have to say about the property rights of sources?

In the most pertinent legal case of *Moore* v. *Regents of California*[32] the California Supreme Court rejected *Moore's* claim that his property right had been violated when doctors did not share the commercial gains they had obtained through the use of his surgically excised spleen cells. A key issue in this case was whether or not *Moore* owned his human tissue source along with the genetic information coded into his cells, but the court concluded that he did not have a valid ownership claim. The court's rationale was that the bestowal of such a property right would hinder scientific research: "this exchange of scientific materials, which is still relatively free and efficient, will surely be compromised if each cell sample becomes the potential subject matter of a lawsuit."[33]

The court was worried that the nascent biotechnology industry would be irreparably harmed if researchers were forced to "investigate the consensual pedigree of each human cell sample used in research."[34] In making its decision the *Moore* court at least implicitly rejected the claim that researchers were bound to share the sometimes ample rewards of that research with those who contribute human tissue (or other samples) like *Mr. Moore*. As Harrison[35] observes, progress in

32. *Moore* v. *Regentsof California* 793 F 2d 479 (Cal.) 1990; cert denied 111 S. Ct. 1388 (1991).

33. *Ibid*.

34. *Ibid*.

35. C. Harrison, "Neither Moore nor the Market: Alternative Models for Compensating Contributors of Human Tissue", 28 *American Journal of Law and Medicine*, 2002, at 77.

biotechnology research will become "unduly burdened by the existence of too many intellectual property rights in basic research tools." Property held in common is subject to a "tragedy of the commons," since individual incentives are often at variance with the collective good. Each individual's marginal exploitation of some common property (such as a fertile track of land) ultimately destroys that property. But if we effectively remove valuable scientific data from the intellectual commons through the assignment of proprietary rights we get the opposite of a tragedy of the commons, that is, a tragedy of the anti-commons.[36]

VI. SELF-DETERMINATION AND PROPRIETARY RIGHTS

There is considerable risk, therefore, that excessive ownership of information inputs, such as genetic data, and other source material will impose high costs and formidable burdens on the flow of critical scientific information. Biomedical research depends upon the open availability of genetic data resources so long as privacy is ensured. High transaction costs and perverse anti-commons effects, however, will undermine that availability if property rights are granted. Also, while ownership might result in some compensation for those individuals who license their genetic sequences or sell their genetic information, that compensation will be trivial in most cases, and it will be far offset by the social good of better healthcare that will be realized by research efforts unencumbered by these transaction costs.

The U.S. Patent Act does not cover "the gene as it occurs in nature,"[37] but when a gene has been isolated and purified it is considered to have been modified. This makes it a "new composition of matter" eligible for patent protection. This conclusion seems consistent with the U.S. Congress's apparent intention that the patent statute covers "anything under the sun that is made by man."[38] Three types of patents are possible: structure patents, covering the isolated and purified gene; function patents, covering a new use for the DNA in question (such as a diagnostic test or gene therapy); and process patents which cover a new method of isolating, purifying, or synthesizing this DNA material.[39]

The patentability of genetic material such as DNA sequences is an intricate and complex issue. Supporters of those patents argue that without the incentive of patents the genome will not be adequately exploited by researchers. Opponents

36. M.A. Heller and R. Eisenberg, "Can Patents Deter Biomedical Research? The Anti-commons in Biomedical Research", 280 *Science*, 1998, at 698.
37. Utility Examination Guidelines, 66 Fed. Reg. 1092 (2001).
38. *Diamond* v. *Chakrabarty* 447 U.S. 303 (1980).
39. D. Resnik, "DNA Patents and Human Dignity", 29 *Journal of Legal and Medical Ethics*, 2001, at 52.

such as Hettinger[40] argue against patents out of respect for life, which should not be the subject of patents. The source or raw material for the gene patents is human tissue, and some ethicists claim that patents should not be given for human material.

In USA, the validity and scope of patent protection in the human genome is a question we cannot settle here. But the issue of gene patentability is analogous to the question of ownership of an individual's genetic information and deserves some treatment. What is particularly significant in the *Moore* decision is the claim that "private ownership of genetic materials could dull the pace of medical innovation."[41] We have argued that this principle should apply to the ultimate sources, that is, patients and donors supplying genetic information and raw material (such as human tissue). But it should also apply to a limited extent to third party researchers and their claims for human gene patents.

As we have observed, the problem is that substances which are upstream in the research cycle must be made easily accessible for downstream research. According to Horn,[42] "This kind of information is considered basic research and provides the data that is necessary for making end products such as drugs, diagnostic tests, and other treatments based on genes and their products." The gene is a basic tool of research, and according to some critics, seeking an exclusive right to a gene by means of a patent is like "trying to gain ownership of the alphabet."[43] As Horn points out, "if the licensing and transaction costs are too high, these valuable downstream innovations (such as therapeutic and diagnostic products) will never take place." It is a mistake, therefore, to award proprietary rights too far upstream in the research and development value chain for biotech products. This includes patents for genes and gene fragments and it also includes providing property rights in the ultimate source material: human tissue and the genetic information that it contains.[44] According to Pollack, about 14% of the cost of gene therapies is attributable to the royalties that must be paid to gene patent holders. Those costs will surely increase even further if donors of DNA samples or participants in genetic studies also demand royalties for therapeutic products based on their genetic information.[45]

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40. N. Hettinger, "Patenting Life: Biotechnology, Intellectual Property and Environmental Ethics", 22 *Boston College Environmental Affairs Law Review*, 1995, at 267.
41. R.A. Epstein, *Steady the Course: Property Rights in Genetic Material,* The Chicago Working Paper Series, 2003, available at: *http://www.law.uchicago.edu/Lawecon.*
42. M.E. Horn, "DNA Patenting and Access to Healthcare: Achieving the Balance among Competing Interests", 50 *Cleveland State Law Review*, 2002, at 253.
43. A. Pollack, "U.S. Hopes to Stem Rush Toward Patenting Genes", *The Patriot Ledger*, June 28, 2002.
44. Horn, *supran*. 42.
45. Pollack, *supran*. 43.

VII. SHOULD HUMAN GENETIC MATERIAL BE PATENTABLE?

To issue a patent for a new type of living organism does not mean the holder of the patent owns organisms of that type that exist or that might come into existence. The owner does, however, have the right, for a limited time, to prevent other people from making, using or reproducing that organism. The property rights in question are perhaps best understood by analogy with copyright in written works, films or sound recordings: even if someone were granted a patent for "mule," or for a genetically modified mule or mouse, that person would not have rights of ownership over all creatures whose distinctive genome is covered by the patent. But that person would have the right to exclude others from using the distinctive version of the genetic code that constitutes the "program" for that particular creature, and the right to benefit financially from all such uses by way of licensing, royalties and the like. For example, a farmer might own a herd of cattle, but be prohibited from selling the calves to other farmers (at least without a contractual provision requiring sterilization to prevent the possibility of further breeding) because the genotype of the cattle is patented.

The fact, however, is that human genetic material has been granted a patent in numerous cases. In *diamond* v. *Chakrabarty*,[46] the United States Supreme Court held that a genetically engineered bacterium was patentable as a new and useful manufacture on composition of matter, thereby opening the floodgates for gene patenting in the USA. A patent claim on human genetic material, DNA was made for the first time in *Amgen* v. *Chugai*[47] in 1991. Similar claims were made in *ReBell*[48] and *ReDeul*.[49] These reiterated the stand that human genetic material was patentable.

In its 1991 *Guiding Principles on Human Organ Transplantation*,[50] the World Health Organization adopted the position that the human body and its parts could not be subject to commercial transactions. Therefore, any giving or receiving of payments for organs as well as any other commercial dealings in human tissues and cells should be prohibited by member states. With regard to human material used for genetic research, several other international bodies[51] have endorsed the spirit of a personal rights approach in one's bodily material and information derived therefrom by asserting the importance of respecting the will of persons participating and their right to decide on the extent of participation.

46. 447 US 303 (1980).
47. 18 US PQ 2d 1016 (Fed Cir 1991).
48. 991 F 2d 781 (Fed Cir 1993).
49. 51 F 3d 1552 (Fed Cir 1995).
50. World Health Organization, *Human Organ Transplantation, A Report on Developments Under the Auspices of WHO* (Geneva: WHO, 1991) Guiding Principle 5.
51. World Medical Association, Declaration on the Human Genome Project (1992), 44:1 *International Digest of Health Legislation,* 150(1993).

Recently, the International Bioethics Committee of UNESCO reiterated that "the human genome is a fundamental component of the common heritage of humanity"[52] but did not include a specific statement on commercialization in its proposed *Outline of a Declaration on the Human Genome and its Protection in Relation to Human Dignity and Human Rights.* The preamble, however, incorporates a reference to general patent law principles and thus seemingly, does not exclude eventual commercial applications.

The Working Group on the ethical, social, and legal aspects of the European Commission's Programme on Human Genome Analysis,[53] briefly addressed the more specific issue of ownership of materials collected for human genome analysis recommending that the issue be solved at the international level. Its 1991 report enunciated the guiding principle that "data and materials must be readily available to *bona fide* researchers" and that material be available at a nominal charge to cover the cost of distribution.[54] Here it may be noted that the distinction between patenting genetic information and patenting life forms is not quite as clear-cut as claimed by some. The importance of this issue stretches beyond patents on portions of the human genome because the same questions arise in discussions of how ownership of portions of an animal's genotype, or of the genotype of a transgenic animal, differs from more familiar forms of property rights in specific individuals of the species.

What troubles many critics of patenting is the extension of rights of ownership, in a new way, over living things. For instance, although we have a long tradition of regarding animals as property, we do not have a tradition of considering them as patentable *types*. It is said that a defense of patenting based on the widely accepted practice of owning particular animals or organisms confuses the concept of physical property, the buying and selling of individual animals, with the very different concept of intellectual property and the extension of that idea that vests exclusive rights of exploitation and all its progeny to an 'inventor' who has 'modified' that organism. Although we might be comfortable with owning particular living things, that is not the same as granting property rights over a type of living thing or to the information comprising even a portion of the distinctive genome of that living thing.

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52. UNESCO, *Outline of a Declaration on the Human Genome and its Protection in Relation to Human Dignity and Human Rights* (UNESCO, IBC Subcommittee, September 1995), Section 1.
53. European Commission, Working Group on the Ethical, Social and Legal Aspects of Human Genome Analysis, *Report of 31 December 1991*, (WG-ESLA), also in (June 1993) *Bulletin of Medical Ethics* 19.
54. *Id.*,*pp.*10-11.

Whether patenting portions of the human genome should be permissible depends, in large part, upon a determination of what it is that would be patented. Craig Venter, who supports the granting of patents on portions of the human genome, sees a sharp distinction between genes and human or animal life.[55] Such general concerns are, quite understandably, magnified when the subject of a patent is a portion of the human genome. Among the merits of the decision-making framework and procedural approach it is said that it would provide a context within which an informed public debate about the ethics of human gene patenting could occur.

European patents shall not be granted in respect of: (a) inventions the publication or exploitation of which would be contrary to "*ordre public*" or morality, provided that the exploitation shall not be deemed to be contrary merely because it is prohibited by law or regulation in some or all of the Contracting States.[56] The most widely sought protection for genetic material has been that of patent rights, although strong arguments have been made in favour of copyright protection[57] and a hybrid or *sui generis* protection.[58] The potential commercial exploitation of research in human genetics adds a certain urgency to the need to find a suitable means of protecting research results and stimulating such research while considering industrial and academic interests as well as the attendant controversial moral and ethical concerns surrounding the use(s) of human genetic material.

During a 1995 UNESCO international workshop on legal systems of protection of research results in genetics, consensus seems to have been reached by the international commentators in favour of patent protection[59] for the results of human genetic research. Opting for protection through the patent system, appears to be in accordance with growing practice.[60] In fact, under current European and US patent

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55. J. Craig Venter Institute successfully constructed a bacterial genome including unmistakably artificial sequences. Dr. *Craig Venter* and team have developed the first self-replicating cell to be made from synthesized DNA.
56. G. Paterson, *The European Patent System* (London: Sweet & Maxwell, 1992) at 68.
57. D.M. Hogle, "Copyright for Innovative Biotechnological Research: An Attractive Alternative to Patent or Trade Secret Protection", 5(1)*High Technology Law Journal,* 1990, at 75.
58. P. Gannon, T. Guthrie and G. Laurie, "Patents, Morality and DNA: Should There Be Intellectual Property Protection of Human Genome Project?", 1(4)*Medical Law International*, 1995, pp.338-9.
59. UNESCO, *International Workshop on Legal Systems of Protection of Research Result in Genetics*, Paris 30-31 January 1995. Also to this effect *see*, R.L. Baechtold, "Property Rights in Living Matter: Is New Law Required?", 68 *Denver University Law Review,* 1991, at 141.
60. *See,* D. Butler, "Patent System Gets Vote of Support from Gene Workers", 374 *Nature,* 1995, at 376. *See also*, M. Sun, "Part of AIDS Virus Is Patented", 239 *Science,* 1988, at 970.

laws, inventions derived from or containing human genetic material are generally considered as patentable subject matter by patent offices. In addition, human genes and DNA sequences of demonstrated purpose as well as related processes are patentable.[61]

Those who favour the dissemination of knowledge are strongly against patenting human cells, tissues, organs or any animal. There is, however, a major difference between the patenting of genetic information and the patenting of animals or other life forms. Genetic reductionists argue that genes are life forms or equivalent to life. European patent laws explicitly provide a criterion for exclusion from patentability for *ordre public* (public order) or morality motives, an ethical criterion that falls under the evaluation of the patent office.[62] In contrast, under US patent law, the subject matter for patent protection must be any machine, article of manufacturer, process or composition of matter. Exclusions cover, for example, products of nature. However, US patent law has been interpreted in a way that there will be patents on products of nature if the invention is new, useful and falls into categories of patentable subject matter as set forth in section 101 of the Patent Act. US patent law only has provisions with specific exclusions from patentable subject matter and no such ethical criterion.

VIII. ISSUE OF INFORMED CONSENT

More often matters of informed consent are involved in determining whether the collection and development of human genetic material is morally permissible. Four distinct questions need to be asked. First, should human biological material be patentable under any circumstances at all? Second, should human biological material be patentable in the absence of evidence of informed consent to both the collection and the subsequent commercial use of those materials? Third, how meaningful is informed consent when there are wide disparities of wealth and power, such as exists between scientists from industrialized countries and less developed countries? Fourth, assuming that the answers to the first three questions do not preclude patenting human cell lines or other biological materials, what constitutes an equitable arrangement for sharing the returns from the commercialization of human cell lines or other biological materials? All these questions are relevant to answer in the context commercial use of genetic materials.

The principle of informed consent is widely accepted and deeply entrenched

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61. *See,* UNESCO, *Bioethics and Human Population Genetics Research* (1995). *See also*, Nuffield Council on Bioethics, *Human Tissue: Ethical and Legal Issues* (London: Nuffield Council on Bioethics, April 1995) at 86.
62. The European Patent Convention, Article 53 (a).

in scientific research and medical interventions involving human subjects and there seems no justification for departing from it here. To implement the principle of informed consent in this context, however, requires new institutional mechanisms because the procedures used to collect genetic materials might not have undergone the ethics review normally conducted in clinical setting. An institutional mechanism is needed to ensure that minimum ethical standards have been adhered to in situations involving patents on human genetic material. There should, however, be a basic presumption that free and fully informed consent and clearly equitable arrangements are essential conditions for the acceptability of any scheme involving commercialization or patenting of materials of human origin. It is important to note that neither requisite was present in the landmark *Moore case*. In Canada the first question has been answered affirmatively, at least with respect to cell lines although in specific cases there is still room for debate about whether enough human ingenuity or intervention has been exercised to justify conferring intellectual property rights.

IX. ETHICAL CONCERNS

Opposition to the patenting of human genetic material is often based on the recognition of rights of ownership, that is, exclusive rights of exploitation, over human biological material that are an intrinsic part of human beings.[63] Strong ethical arguments against patenting genes are also based upon the premise that genes are the common heritage of mankind[64] and as such, may not be appropriated. Further arguments of privacy[65] and distributive justice[66] have also been raised. Interestingly, ethical concerns in favour of patenting have also been raised. "The ability to identify gene sequences has been made possible by the scientific and financial contributions of peoples around the world, all of whom are entitled to benefits from these advances" ... "Distributive justice requires that less developed countries not be excluded from the benefits of gene research. ... Gene patenting is ethically suspect if it concentrates genome benefits in those few countries fortunate enough to have

63. Westminster Institute for Ethics and Human Values & McGill Centre for Medicine, Ethics and Law, *Ethical Issues Associated with the Patenting of Higher Life Forms*, December, 1994, at 79ff.

64. B. Looney, "Should Genes be Patented? The Gene Patenting Controversy: Legal, Ethical, and Policy Foundations of an International Agreement," 26 *Law & Policy in International Business,* 1994, at 236.

65 *Id.,*at 238: "Patenting genes and gene sequences may interfere with privacy rights in that it permits an interference with a bodily part (Genes) are in a zone of privacy that may be violated by assignment of gene patent rights to others. A collective privacy right may also be patented by gene patenting."

66. *Id.,*at 239-40.

the resources to obtain gene patents, when all human should enjoy such benefits. Thus, under principles of distributive justice, all the world's citizens are entitled to genome research and its benefits, unencumbered by intellectual property rights."[67]

Based on concepts of fairness and efficiency,[68] not rewarding researchers for work, which eventually benefits society as a whole, is deemed unethical. Controversy may stem from different perceptions of what it is that is being patented[69]: life forms, genetic information, or an innovative process. In the event of genes of unknown function the distinction may be even harder to draw. However, the greatest challenge of the gene patent controversy is ensuring that these ethical concerns are considered.

In addressing whether genes are patentable subject matter, the differences between the U.S. and European patent laws are manifest. European patent laws explicitly provide a criterion for exclusion from patentability for *ordre public* (public order) or morality motives, an ethical criterion that falls under the evaluation of the patent office. In contrast, U.S. patent law only has provisions with specific exclusions from patentable subject matter and no such ethical criterion. Ethical considerations are only implicitly considered and consequently, as has been noted in U.S. patent law, "the threshold test... fails as an ethical safeguard." While then, the role of ethical analysis differs, several commentators on both the European and U.S. patent systems believe this will have little effect on the issue of gene patenting. Indeed, several have concluded that under current legal threshold requirements, genes seemingly constitute patentable subject matter in both Europe and the U.S. Furthermore, it has been suggested that the public order exclusion in the European Patent Convention was not designed for the resolution of such controversial issues and that the European Patent Office may in fact not be the appropriate body to undertake such complex universal pressing ethical analysis.

In short, as concerns human genetic material, the current literature holds that the patent law framework does not explicitly address important ethical concerns. A growing consensus seems to be that patent law is unable to serve as a tool to solve the controversy because of the limited attention paid to the underlying ethical and policy concerns. Indeed, governmental intervention on national and international levels has been called for in order to reach an international consensus that might take several forms. One suggestion is to establish an international registry system, a "Human Genome Trust," to monitor genome progress and ensure collective "ownership" while permitting the co-existence of commercial development incentives. Other propositions call for international agreements on a range of issues such as

67. *Ibid*.

68. *Id.,* at 240-243.

69. Westminster Institute for Ethics and Human Values, *supra* n. 63.

data sharing or limiting protection to the "moral" recognition of scientists who "discover" gene sequences. As early as 1992, it was suggested that international agreements affirm that any rights to patented sequences be enforced only when the biologic function becomes known.

In India, existing legislation does not sufficiently address the ethical implications of different biotechnology inventions. There is no specific legislation regulating biomedical research on human subjects. The guidelines issued by the ICMR which are in consonance with international ethical guidelines for biomedical research involving human subjects, issued by CIOMS in 1993 and the principles of the World Medical Association's Declaration of Helsinki, first issued in 1964[70] and revised a number of times since then, hold good in the absence of any definite legislation.

X. CONCLUSION

As a general principle, proprietary rights in source material such as cells and genetic information can better protect privacy and ensure some compensation for donors. But privacy rights might be in some jeopardy and data subjects will have no ability to recover any benefits from the commercial exploitation of their genetic data. There is a compelling need, therefore, to find some reasonable middle course of action, a proper balance between data protection and access. While that middle course may be hard to discern, we must resist the impulse to propertise genetic information and the DNA samples from which it is derived, despite legitimate concerns about the need to safeguard privacy rights. A property regime for genetic information is an overreaction and a misguided solution to this problem.

Here, it may be noted that upstream property rights are not conducive to the advancement of scientific research and must be replaced by an ethos of information sharing. Those rights include patents for genes and gene fragments, which should be awarded on a more limited basis. Instead of relying on property rights, privacy and autonomy should be safeguarded by strongly enforced laws that protect genetic information by informed consent and tight regulations governing the disclosure of such information (including genetic test results). In fact, under current European and US patent laws, inventions derived from or containing human genetic material are generally considered as patentable subject matter by patent offices. In addition, human genes and DNA sequences of demonstrated purpose as well as related processes are patentable.

In discussing possible reforms to the present system of intellectual property protection for genetic inventions, there is a need of new balance between the

70. World Medical Association, Declaration of Helsinki (1964).

protection of inventions and the promotion of greater legal access to information and technology. Achieving this balance is the essence of all negotiations between patent holders and general public and is at the core of most intellectual property disputes. There is considerable risk, therefore, that excessive ownership of information inputs, such as genetic data, and other source material will impose high costs and formidable burdens on the flow of critical scientific information.

The biomedical research depends so long as privacy is ensured. High transaction costs and perverse anti-commons effects, however, will undermine that availability if property rights are granted. Also, while ownership might result in some compensation for those individuals who license their genetic sequences or sell their genetic information, that compensation will be trivial in most cases, and it will be far offset by the social good of better healthcare that will be realized by research efforts unencumbered by these transaction costs. Beyond any doubt, there is a need to better allocate the financial benefits of genetic research that takes into account the donor's interests when that donor makes a contribution that has material value. But this should be accomplished through revised public policy rather than the introduction of new property rights.

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FORUM COMPETITION IN CONVERSION CASES: A REVIEW OF *PATHMANATHAN V.INDIRA GHANDI* (COURT OF APPEAL DECISION, MALAYSIAN CHAPTER)

ARUN KASI*

ABSTRACT: The jurisdiction of shariah court and the civil court has been contentions particulary is such issues where convension into Islam or from Islam to another religion. An attempt has been made in this peper to analyse issuas arising out of convension into Islam and declaration of father that the children have also embraced Islam. The law recating to convescion and issues relating to jurisdiction have been discussed.

KEY WORDS: Conversion-Perak enactment- Affirmation of faith- conversion of minors- Parent's Declaration- challanging conversion.

I. INTRODUCTION

The Court of Appeal penned down on 30 December 2015 its decision in the much publicised conversion case of *Pathmanathan A/L Krishnan* v. *Indira GhandiA/P Mutho,* which was heard together with two other appeals before the same panel. The two other appeals were brought against Indira GhandiA/P Mutho respectively by the Director of the Islamic Religious Affairs of Perak and by Ministry of Education Malaysia. All the three appeals arose from the decision of Lee Swee Seng J made in the matter of one judicial review application made by Indira Ghandi against six respondents includingPathmanathan, the Director of the Islamic Religious Affairs of Perak and Ministry of Education.

II. BACKGROUND FACTS

Indira Ghandi was married to Pathmanathan in1993. The couple had three children. In March 2009, the husband converted to Islam. At this time, the children were respectively aged 12 years, 11 years and 11 months. Immediately after his conversion, he procured from the Islamic Religious Affairs of Perak certificates of

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conversion of the three children purportedly under the Administration of the Religion of Islam (Perak) Enactment 2004, which is a state legislation ("the Perak Enactment").

Indira Ghandi had no knowledge of the purported conversion of the children. At the material time, the two elder children were with Indira Ghandi and the youngest with Pathmanathan. It is apparent that, at the material time, the two elder children had no knowledge of their conversion, and the youngest aged 11 months only could not have had any knowledge of his conversion.Upon coming to know of the certificates of conversion, Indira Ghandi instituted an action before the High Court by way of judicial review to challenge the issuance of the certificates of conversion. In the judicial review application, she named as respondents Pathmanathan, the Director of Islamic Affairs of Perak, the Ministry of Education and three others. The High Court allowed the application and quashed the certificates. All the six respondents appealed to the Court of Appeal through a total of three appeals.

Decision of the Court of Appeal

The panel in the Court of Appeal comprised BaliaYusof bin HjWahi JCA, BadariahbintiSahamid JCA and Hamid Sultan bin Abu Backer JCA. The panel heard all the appeals together. The panel was divided in its decision. BaliaYusof JCA, with whom Badariah JCA concurred, found in favour of the Pathmanathan and other five appellants ("the Appellants"). Hamid Sultan JCA found in favour of Indira Ghandi. The result was a decision by majority, with Hamid Sultan JCA dissenting, allowing all the three appeals with no order as to costs.This paper will analyse the case from the perspectives both of the majority decision and of the dissenting judgment. In undertaking this task, it will be helpful first to set out the judgment of BaliaYusof JCA and then of Hamid Sultan JCA, followed by the author's view of them.

III. JUDGMENT OF BALIA YUSOF JCA

BaliaYusof JCA first proposed to resolve the issue of jurisdiction of the High Court to entertain the judicial review application in question. His Lordship framed the question as whether the High Court had "jurisdiction to deal with the issue of conversion to the religion of Islam".His Lordship adopted an approach what his Lordship called "subject matter approach". Taking this approach, his Lordship came to the following conclusion in two sentences… whether a person is a Muslim or not is a matter falling under the exclusive jurisdiction of the Syariah Court.

The determination of the validity of the conversion of any person to the religion of Islam is strictly a religious issue and it falls within the exclusive jurisdiction of the SyariahCourt.(emphasis added). In coming to the above conclusion, his Lordship relied on the Federal Court decision in *HjRaimi bin Abdullah* v. *Siti Hasnah Vangaramabt. Abdullah*[1] particularly the following passage:

1. [2014] 3 MLJ 757

> "Article 121 of the Federal Constitution clearly provided that the civil court shall have no jurisdiction on any matter falling within the jurisdiction of the Syariah Court. Whether a person was a Muslim or not was a matter falling under the exclusive jurisdiction of the Syariah Court."

It would be highly inappropriate for the civil court, which lacks jurisdiction pursuant to Art 121, to determine the validity of the conversion of any person to the religion of Islam as this is strictly a religious issue. Therefore, the question of the plaintiff's conversion in 1983 fell within the exclusive jurisdiction of the Syariah Court.(Emphasis added). His Lordship further relied on section 50(2)(b) (x) and (xi) of the Perak Enactment which confers the following subject matter jurisdiction, subject to the general limitation that the section applies only when all parties to the action are Muslims(x) a declaration that a person is *no longer* a Muslim;(xi) a declaration that a *deceased* person was a Muslim or otherwise at the time of his death(Emphasis added)

On that basis, his Lordship stressfully repeated his Lordship's conclusion in the following words:A plain reading of the aforesaid provisions puts it beyond doubt that the power to declare the status of a Muslim person is within the exclusive jurisdiction of the Syariah High Court.It followed that on that ground alone, his Lordship would allow the appeal, i.e. disallow the challenge by Indira Ghandi to the conversion certificates. However, his Lordship felt impelled to proceed to deal with the merits of the challenge by Indira Ghandi, *i.e.* whether the conversion certificates were issued contrary to the law and thus a nullity *ab initio*.

In dealing with the merits of the challenge, his Lordship considered sections 96 and 106 and sections 100 and 101 of the Perak Enactment, which are reproduced below:

96. Requirement for conversion to the religion of Islam.

1) The following requirements shall be complied with for a valid conversion of a person to the religion of Islam: (a) the person must utter in reasonably intelligible Arabic the two clauses of the Affirmation of Faith; (b) at the time of uttering the two clauses of the Affirmation of Faith the person must be aware that they mean I bear witness that there is no God but Allah and I bear witness that the Prophet Muhammad S.A.W. is the Messenger of Allah; and (c) the utterance must be made of the person's own free will.
2) A person who is incapable of speech may, for the purpose of fulfilling the requirement of paragraph (1)(a), utter the two clauses of the Affirmation of Faith by means of signs that convey the meaning specified in paragraph (i)(b).

106. Capacity to convert to the religion of Islam.

For the purpose of this Part, a person who is not a Muslim may convert to the religion of Islam if he is of mind and (a) has attained the age of eighteen years; or (b) if he has not attained the age of eighteen years, his parent or guardian consents in writing to his conversion.

100. Registration of Muallafs.

1) A person who has converted to the religion of Islam may apply to the Registrar in the prescribed form for registration as a muallaf.
2) If the Registrar is satisfied that the requirements of section 96 have been fulfilled in respect of the applicant, the Registrar may register the applicant's conversion to the religion of Islam by entering in the Register of *Muallafs* the name of the applicant and other particulars as indicated in the Register of *Muallafs*.

101. Certificate of Conversion to the Religion of Islam.

1) The Registrar shall furnish every person whose conversion to the religion of Islam has been registered a Certificate of Conversion to the Religion of Islam in the prescribed form.
2) A certificate of Conversion to Religion of Islam shall be conclusive proof of the facts stated in the Certificate.

The merits of the challenge, as framed by Indira Ghandi was twofold. Firstly, section 96 was not complied with because the children did not utter the two clauses of the Affirmation of Faith ("the Affirmation of Faith"). Secondly, section 106 was not satisfied because she did not give her consent for the purported conversion.It was not disputed that the three children (the youngest of which was only 11-month old) did not utter the Affirmation of Faith, and therefore the "requirements for conversion to the religion of Islam" set out in the section 96 were not complied with. However, the issue of whether section 106 was contravened was a disputed one. It was Indira Ghandi's argument that the consent of "parent or guardian" required in the section 106 meant the consent of the "parents" in this case. To the contrary, the Appellants argued that it meant either parent.

Before addressing sections 96 and 106, his Lordship directed his Lordship's mind to section 101(2) of the Perak Enactment and relied on it to say that a certificate of conversion was not challengeable because pursuant to the section,the facts stated in the certificates of conversion are conclusive proof thereof. His Lordship pointed out that the conversion certificates stated "the fact of conversion" and "the fact that the persons named therein has been registered in the Registrar of Muallafs."Having held that, by virtue of the section 101(2), the conversion certificates are not open to challenge, his Lordship however also said that any challenge to the certificates must be made at the Syariah court.

In dealing with the issue of conclusiveness of conversion certificates, his Lordship also relied on the decision in *Saravanan Thangatoray*v. *Subashini Rajasingam*[2] made by the Court of Appeal by majority (which was affirmed by the Federal Court again by majority*. In *Saravanan's* case, a husband converted to Islam and subsequently the wife petitioned for divorce under section 51(1) of the Law Reform (Marriage and Divorce) Act 1976. Under this section, when a spouse converts to Islam, the other spouse who has not so converted may petition for divorce. The section also imposes a limitation that a petition under this section may only be presented after expiry of three months from the date of the conversion.

In opposition the petition, the husband contended that the petition was filed within the period of three months after conversion, but the wife argued otherwise. The date of conversion was disputed. In resolving the issue as to the date of conversion, the Court of Appeal (by majority) held that the date stated in the certificate of conversion was conclusive proof thereof, by virtue of section 112(2) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ("the Selangor Enactment") which is in *parimateria* with section 101(2) of the Perak Enactment.

Relying on the above, Balia Yusof JCA in the instant appeal was of the view that the certificate of conversion is not open to challenge and said that "the High Court has to accept the facts stated [in the conversion certificates] and it is beyond the powers of the [High Court] to question the same."Having so discounted the challenge at the outset, his Lordship however dwelled into the question of whether a single parent can give the requisite consent in the section 106, and answered this question in the affirmative. In so answering, his Lordship relied on the remarks made by the Federal Court, by majority, in *Subashini a/p Rajasingam*v and *Saravanan a/l Thangathoray and Other Appeals*[3] with regard to the meaning of "parent" appearing in Article 12(4) of the Federal Constitution. The remark made by the Federal Court in relation to the article 12(4) in that case was that "[e]ither husband or wife has the right to convert a child of the marriage to Islam".

The Article 12 reads as follows:

12. Rights in respect of education

1) Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth—

a) in the administration of any educational institution maintained

2. [2007] 2 CLJ 451.

* [2008] 2 CLJ 1.

3. Ibid.

by a public authority, and, in particular, the admission of pupils or students or the payment of fees; or

2) Every religious group has the right to establish and maintain institutions for the education of children in its own religion …
3) No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.
4) For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian.

His Lordship relied on *Subashini's* case to say that there was no violation in the case before his Lordship of article 11(1) of the Federal Constitution, which reads as follows:

11. Freedom of religion

1) Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.

The decision of his Lordship can now be conveniently summarised as follows:

1) The jurisdiction to decide the issue of validity of conversion is exclusively vested in theSyariah courts, and as such by virtue of article 121(1A) of the Federal Constitution, the matter is outside the jurisdiction of the High Court.
2) Section 101(2) of the Perak Enactment renders the certificates of conversion unchallengeable.
3) Any challenge to the certificates of conversion must be taken before the Syariah court.
4) The right of either parent to consent for conversion is entrenched in article 12(4) of the Federal Constitution and it does not run contrary to article 11 of the Federal Constitution.

IV. JUDGMENT OF HAMID SULTANJCA

Hamid Sultan JCA, the dissenting judge in this appeal, started off by visiting the framework of thePerak Enactment, which contained 113 sections in 11 parts. His Lordship opined that not all the provisions in the Enactment are protected by article 121(1A) of the Federal Constitution so as to be out of the realm of civil courts. His Lordship emphasised the meaning of the article 121(1A), which reads as follows:(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

His Lordship identified that the article 121(1A) is largely applicable to Part IV entitled "Syariah Jurisdiction", which contains 23 sections numbered from sections 44 to 66. His Lordship said that it is only to some of these sections that the Article

121(1A) applies. His Lordship simplified this in two sentences by sayingthat"the civil courts' judicial review powers in the administrative decision of the state or its agencies and/or its officers" are not excluded by the article 121(1A); and "[w]hat the civil courts cannot do is to intervene in the lawful decision of the Syariah Courts made within its jurisdiction and not in excess of its jurisdiction."His Lordship framed the questions in the appeal as whether the matter of exercise of the powers of the Pendaftar Muallaf came within the jurisdiction of the Syariahcourt. If the answer is in the negative, then any decision made by the PendaftarMuallaf is subject to the judicial review powers of the civil courts.

In determining the jurisdiction of the Syariah court, his Lordship visited section 50(3)(b) of the Perak Enactment which set out the civil jurisdiction of the Syariah High Court and read as follows:

(3) The Syariah High Court shall—

(a) in its criminal jurisdiction, …

(b) in its civil jurisdiction, hear and determine all actions and proceedings if all the parties to the actions or proceedings are Muslims and the action or proceedings relate to –

(i) bethoral, marriage, ruju', divorce, annulment of marriage (fasakh), nusyuz, or judicial separation (faraq) or any other matter relating to the relationship between husband and wife.

(ii) any disposition of or claim to property arising out of any of the matters set out in subparagraph (i);

(iii) the maintenance of dependants, legitimacy, or guardianship or custody (hadhanah) of infants;

(iv) the division of, or claims to, hartasepencarian;

(v) wills or gifts made while in a state of marad-al-maut;

(vi) gifts intervivos; or settlements made without adequate consideration in money or money's worth by a Muslim;

(vii) wakaf or nazr;

(viii) division and inheritance of testate or intestate property;

(ix) the determination of the persons entitled to share in the estate of a deceased Muslim or the shares to which such persons are respectively entitled;

(x) a declaration that a person is no longer a Muslim;

(xi) a declaration that a deceased person was a Muslim or otherwise at the time of his death; and

(xii) other matters in respect of which jurisdiction is conferred by any written law.

In dealing with the subject-matter jurisdiction of the Syariah court, his Lordship

discounted in particular the subsections (x) and (xi), which were relied on by BaliaYusofJCA, because (x) empowers the Syariahcourt to declare that a person is no longer a Muslim and (xi) to declare that a deceased person was Muslim or otherwise at the time of his death. The case has nothing to do with the matters covered in either of these subsections.

His Lordship seemed to have in his Lordship's forefront of mind the following:

i) None of the limbs of section 50(3)(b) of the Perak Enactment conferred the jurisdiction on the Syariah court to determine any question as to conversion.
ii) None of the limbs of section 50(3)(b) of the Perak Enactment clothed the Syariahcourt with any jurisdiction to judicially review any administrative action including the one by the Registrar of Muallaf in issuing a certificate of conversion.
iii) To the contrary, the civil courts are conferred the jurisdiction to judicial review any administrative action (see paragraph 1 of the Schedule to the Courts of Judicature Act 1964).
iv) Accordingly, the subject-matter jurisdiction to decide an issue of conversion or an application to judicially review the administrative action of the Registrar of Muallaf was vested in the civil courts.

His Lordship put his foot down and concluded that "[i]n the instant case, the PendaftarMuallaf certificate of conversion has nothing to do with the jurisdiction of the Syariah Court and/or decision of the Syariah Court as asserted in Article 121 (1A) of the Federal Constitution". This will answer the pivotal issue in the case, i.e. the jurisdictional issue. However, answering the question as to jurisdiction does not answer the appeal in its entirety, as the next issue, if the High Court had the requisite jurisdiction to judicially review the matter of issuance of the conversion certificates, is whether the High Court rightly quashed the conversion certificates by exercise of that jurisdiction.

Before moving on to the next issue, leaving aside the question of subject-matter jurisdiction of the Syariah courts, his Lordship was mindful of the limitation to the *personam* jurisdiction in the section 50(3)(b), i.e. the Syariah court has jurisdiction only when all parties to the action are Muslims, which was not the case in the appeal before his Lordship.Now moving on to the next issue, it was not disputed that the requirements for conversion set out in section 96 of the Perak Enactment was not complied with, i.e. none of the children uttered the Affirmation of Faith, particularly the youngest of them being only 11-month old and the other two being with the mother, Indira Ghandi. His Lordship was also of the view that the parental consent required in section 106 was not complied with, although this was a controversial issue in this appeal.

It followed that his Lordship answered the next issue (whether the conversion certificates should be quashed) in the affirmative and concluded that "the administration order of the Pendaftar Muallaf is nullity ab initio and ought to be set aside of right for non-compliance of section 96 and 106 of the [Perak Enactment]". In so concluding, his Lordship reminded that the principle enunciated in *Badiaddin bin MohdMahidin&Anor* v. *Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 ("the *Badiaddin* principle") equally applies in judicial review matters.

Before concluding his judgment, his Lordship helpfully observed that article 12(4) of the Federal Constitution "has nothing to do with conversion" and that "[i]t only permits a parent or guardian from deciding the religion of the child for purpose of worship of a religion other than his own" and thereby put an end to the anathema of applying the article 12 to conversion cases as was done in *Subashini's* case.

It is recalled that the article 12 is entitled "Rights in respect of education" and the articles 12(3) and (4), which must be read together, provide as follows:

3) No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.

4) For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian.(emphasis added)

V. THE AUTHOR'S REVIEW

The issues for determination in the appeal were as follows:

i) Whether the High Court had the jurisdiction to hear the judicial review application which mounted a challenge to the conversion certificates?

ii) If the above question is answered in the affirmative, whether the conversion certificates were issued in non-compliance with the provisions of the Perak Enactment and thus a nullity and liable to be quashed?

Each of the issues will in turn be addressed at length below. That will be followed by discussion of a few other matters arising in the course of the respective judgments of Balia Yusof JCA and Hamid Sultan JCA and finally conclusion.

(i). THE FIRST ISSUE

Before moving on, at the outset, it must be noted that the "civil courts", meaning High Court, Court of Appeal and the Federal Court are the only courts constituted by the Federal Constitution (in Part IX entitled "Judiciary"). At face, if a matter is within the jurisdiction of the Syariah courts, then the civil courts will have no jurisdiction over it. This is the result of article 121(1A) of the Federal Constitution, which was inserted into the Federal Constitution by Constitution (Amendment) Act 1988. Accordingly, the question is whether the issue brought by Indira Ghandi is one falling within the Syariah court jurisdiction. In order to rightly understand the

jurisdiction of the Syariah courts, it is important to understand the legislative power of States to legislate in matters broadly relating to Islamic law, because the jurisdiction of the Syariah courts is tied to the said legislative power. This is explained below.Article 74(2) of the Federal Constitution provides that a State may legislate only in respect of matters falling within the State List (Second List) or Concurrent List (Third List) in the Ninth Schedule to the Federal Constitution. The article 74(2) reads as follows:

> … the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

Only paragraph 1 of the State List contains matters relating to Islamic law and Syariah courts. Accordingly, that is the only part that one has to look at to determine the boundaries both of the legislative power of States in matters connected to Islamic law and of the jurisdiction of Syariah courts.The paragraph 1 is reproduced below*:

Ninth Schedule – State List

1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya:

a) Islamic law and personal and family law of *persons professing the religion of Islam*, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts;
b) Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State;
c) Malay customs;
d) Zakat, Fitrah and Baitulmal or similar Islamic religious revenue;
e) mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List;
f) the constitution, organization and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islamandin respect only of any of the matters included

* the splitting and alphabetical sub-numbering of the paragraph, which is not so done in the actual text, is added by the author for ease of reading):

in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law;

g) the control of propagating doctrines and beliefs among persons professing the religion of Islam;

h) the determination of matters of Islamic law and doctrine and Malay custom.

At this juncture, it must be pointed out that there are two schools of thoughts. One school looks at State legislations (such as the Perak Enactment) for the jurisdiction of Syariah courts. The other looks at the Federal Constitution, more particularly paragraph 1 of the Ninth Schedule thereto. With due respect, it is erroneous to look at State legislations for jurisdiction of Syariah courts and the correct approach is to look at the paragraph 1. The sub-paragraph marked as (f) above provides that "Syariah courts … *shall have jurisdiction* only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph". This is the jurisdictional boundary of the Syariah courts, and their jurisdiction is neither more nor less than that.

In fact, even apart from the sub-paragraph (f), if one starts looking at State legislations for the jurisdiction, an anomaly will be created. Different States may purportedly confer, in fact as they have done, jurisdiction of different scopes on their Syariah courts. When a controversial matter comes before a civil court, it has to hypothetically decide whether the matter is within the jurisdiction of Syariah court. If every Syariah court has a different jurisdiction, then which Syariah court jurisdiction is the civil court to look at? This is what was said as the 'anomaly' that will result if one looks at State legislations for Syariah court jurisdiction.

As far as civil matters are concerned, a plain reading of the sub-paragraph (f) above tells that in order for theSyariah courts to gain jurisdiction over a cause, two aspects must be satisfied. The first aspect is that all parties to the cause profess the religion of Islam (which the author will call "*personam* jurisdiction").The second is that the subject matter is one included within the paragraph, i.e. included in any of sub-paragraphs as (a) through (h)above (which the author will call "subject-matter" jurisdiction). Logically, sub-paragraph (f) would be excluded from the list of subject-matter jurisdiction as it defines the jurisdiction of theSyariah courts rather than providing any subject matter which would fall within the jurisdiction.

At the outset, it must be observed that, in matters broadly of Islamic law, the power of States to legislate and the subject-matter jurisdiction of the Syariah courts coincide. They are all in the paragraph 1 and are the same.Under the paragraph 1, if a State has authority to legislate on a matter, then it is also necessarily within the subject-matter jurisdiction of the Syariah courts. However, this does not mean that the Syariah court automatically gains its jurisdiction over any cause involving such a

matter, as there is an additional caveat before it gains jurisdiction, i.e. the parties to the cause must all profess the religion of Islam (the *personam* jurisdiction aspect).

***(a) Personam* jurisdiction aspect**

In the instant case, one of the parties (properly a party) to the cause was a non-Muslim and hence the Syariah court did not have any *personam* jurisdiction over the matter. This fact has already caught the attention of many, but what has not caught their attention is the fact that most of the respondents in the High Court (the Appellants in the instant appeal) were also not "persons professing the religion of Islam" within the paragraph 1.

Is the Ministry of Education one professing the religion of Islam? Is the office of the Director of the Islamic Religious Affairs of Perak one professing the religion of Islam? The answer is 'no'. In the context of the paragraph 1, religion attaches to an individual and not to an institution. Ordinarily, in any judicial review application, as it was so in the present case, the primary respondent will be an administrative authority. An administrative authority is not person professing any religion in the context of the paragraph 1. Hence, ordinarily a judicial review application will necessarily be outside the jurisdictional boundary of Syariah courts, i.e. the *personam* jurisdiction aspect will not ordinarily be satisfied in cases of judicial review applications.

Leaving that aside, to approach the matter most simply, Indira Ghandi cannot brings an action before the Syariah court. This suffices to say that the matter was outside the jurisdiction of the Syariahcourt. It must be borne in mind that if she is not allowed to go to the civil courts, she has no place within our land to go to for justice. That is not the law of our land and that is not what the article 121(1A) says. All that the article 121(1A) says is that that the civil courts shall have no jurisdiction if it is a cause over which the Syariah courts have jurisdiction, as stressed by Hamid Sultan JCA.

It must be added that it was not disputed that Indira Ghandi was properly a party to the action and had the requisite *locus standi* to bring the action. Any parent has certain responsibilities towards and rights in matters affecting his or her child. A reference to section 5 of the Guardianship Act 1961 may help those who will look for authority to support this proposition. Section 5 reads as follows:

5. Equality of parental rights

(1) In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal.

(2) The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father.

As the *personam* jurisdiction aspect is not satisfied, it is not necessary to analyse whether the cause is within the subject-matter jurisdiction of the Syariah courts. However purely for academic purposes, it will be analysed whether the matter falls within the subject-matter jurisdiction of the Syariah courts.

(b) Subject matter jurisdiction aspect

The subject matter in issue in the instant case is 'conversion'. Under what sub-paragraph of the paragraph 1 does it fall under? This is a difficult question to answer. Read at face, none of the sub-paragraphs cover conversion. It must be borne in mind that conversion is a matter that is transitional in nature, which the author will call a 'transreligional' matter. The sub-paragraph (a)does not cover conversion because it only applies to persons already professing the religion of Islam. Equally sub-paragraph (c) will not help as *Malay* custom cannot have anything to do with conversion to the *religion of Islam*, which is a transreligional matter. Possibly sub-paragraph (h) may be wide enough to cover conversion as it includes "determination of *matters of Islamic law or doctrine*". It is not proposed to dwell into this question further but it will be taken that the sub-paragraph (h) covers conversion for the purposes of this paper, although it is a subject that requires research on its own right.

Assuming sub-paragraph (h) covers conversion, then it is a matter falling within the authority of a State to legislate and hence within the subject-matter jurisdiction of the Syariah courts. This does not mean that in such cases, the cause is within the jurisdiction of the Syariah courts. This is because, apart from the fact that the respondent is usually an authority and thus not professing any religion within the paragraph 1, when a purported convert challenges the conversion, the underlying dispute is whether he is a Muslim / a person professing the religion of Islam. If a court finds that the conversion is a nullity *ab initio*, then it follows that he has not been, at any time, a Muslim / a person professing the religion of Islam. In fact if a Syariah court were to try a conversion case and at the end find that the purported conversion is a nullity *ab initio*,then it would only have wasted its time as it would have had no jurisdiction to hear the case in the first place and will have no jurisdiction to make any decision at the end.

A civil court can only decline jurisdiction if the cause is within the jurisdiction of Syariah courts. When a claimant raises an issue as to validity of his own conversion *ab initio* before a civil court, how can the court decide that it does not have jurisdiction until it decides whether the conversion is valid or void *ab initio*? If it is void *ab initio*, then the claimant was not a Muslim / a person professing the religion of Islam, and hence would properly be before the civil court. Whenever an issue as to jurisdiction is raised before a civil court, it must positively decide the issue (in one way or another) and not decline to decide.

Analysis of BaliaYusof JCA's grounds

The author reached a conclusion that the matter brought by Indira Ghandi was outside the jurisdiction of Syariah courts, as much as the conclusion reached by Hamid Sultan JCA. However, BaliaYusof JCA arrived at a conclusion that is the straight opposite. For a proper understanding of the subject, the grounds of BaliaYusof JCA must finely be analysed.In concluding that the matter was within the Syariah court jurisdiction and hence outside the jurisdiction of civil courts, BaliaYusof JCA substantially relied on the case of*Hj. Raimi bin Abdullah* v. *SitiHasnahVangaramabt Abdullah* decided by the Federal Court. In that case, the Federal Court dealt with an appeal arising from an application made by the respondent *SitiHasnahVangaramabt Abdullah*. The respondent's application was in effect for a declaration that her conversion to Islam was null and void *ab initio*.

The respondent was born in Aug 1982. When she was one year and three months old, in Nov 1983, both her parents converted to the religion of Islam at Pahang. As part of the conversion process, the father made a statutory declaration saying that he had voluntarily embraced Islam together with his five children (which included the respondent). However, the Registrar of Muallaf at Pahang issued conversion certificates only to the parents and not to any of the children. By 1989, the whole family moved from Pahang to Penang. In 1989, the family was in desperate straits. The respondent and two of her siblings were sent to Ramakrishna orphanage in Penang (a Hindu organisation). By end of 1989, the mother passed away.

That was immediately followed by the Director of Islamic Religious Department of Penang, through its enforcement officers, removing the respondent (along with her two siblings) from the orphanage. On the very day, the Director got the respondent, then aged seven years only, to go through the process of conversion and to sign the certificate of conversion and had the certificate of conversion issued to the respondent by the relevant authority in Penang.

The Director placed three children in an Islamic religious school. The respondent ran away and was subsequently returned to the Director. The Director then placed the respondent under the charge of an officer called PuanSabariah. Then the respondent was transferred to a Children Home in Penang, and then back to the Director and finally returned to the Children Home in Penang by an order of Juvenile Court. The respondent again ran away from the Children Home.Hence, the respondent applied to the High Court in essence for a declaration that the purported conversion made at Penang in 1989 was a nullity *ab initio*.

The Federal Court visited paragraph 1 of the Ninth Schedule to the Federal Constitution, in particular the sub-paragraph (a), namely "Islamic law, personal and family law of persons professing the religion of Islam", and said in the peculiar

context of the case that "whether a person is a Muslim or not is a matter falling under the exclusive jurisdiction of the Syariah Court."

It was said that the factual context was peculiar because the Federal Court concluded that on the date of the alleged conversion in 1989, the respondent was already a Muslim, because the respondent was already converted to the religion of Islam in 1983 when her father made the statutory declaration not only covering himself but also his five children including the respondent. In the absence of challenge to the 1983 conversion, the respondent was already a Muslim by 1989 and hence the question of validity of the conversion in 1989, if any, should only be decided by theSyariah court. In fact any decision as to validity of the 1989 conversion by whichever court will not affect the status of the respondent if she was already Muslim since 1983.

The Federal Court took particular note that the respondent did not challenge the 1983 conversion. The court also acknowledged that if the Syariah court were to decide that the 1983 conversion was not valid, then the civil courts would have the jurisdiction to decide the *disputed conversion* in 1989. The passage of the Federal Court must be repeated in verbatim below:

> [31] … We hold that the matter of conversion of the plaintiff together with her father in 1983 ought to be determined first by the SyariahCourt, then only the issue of the alleged conversion in 1989 could appropriately be determined by the civil court.

The resultant true understanding from the case is that any dispute as to conversion is a matter falling within the jurisdiction of civil courts. BaliaYusof JCA, with due respect, misunderstood the *HjRaimi's* case and applied it contrary to its true meaning. If *HjRaimi's* case was correctly applied, the result would have been the opposite.It is not within the scope of this paper to analyse whether the Federal Court was correct in holding that there was a conversion in 1983. Considering such a question will involve questions as to right of parents to convert their child without the consent of the child and whether such a conversion would be contrary to article 11(1) of the Federal Constitution, which is only lightly discussed near to the end of this paper.

For completeness, it must be said that not only the factual matrix was peculiar in *HjRaimi's*case with two purported conversions, but the State enactment was equally so. The State enactment applicable to the 1983 conversion was the Administration of the Religion of Islam and the Malay Custom of Pahang Enactment 1982. Unlike the Perak Enactment, it did not require children to utter the Affirmation of Faith for conversion but merely required the consent of a parent who himself or herself converts. The relevant section was section 101 of the Pahang Enactment, which read as follows:

101. Minor converted to the Religion of Islam.

No person under the age of eighteen years shall be registered as having been converted to the Religion of Islam otherwise than with the approval of his parents or guardian:Provided that if his mother, father or guardian is converted to the Religion of Islam …, he may be registered as having been converted to the Religion of Islam.

Having held as above, the Federal Court little confusingly made a further remark on passing that "it would be highly inappropriate for the civil court to determine the validity of the conversion of any person to the religion of Islam as this is strictly a religious issue. As such the civil court shall have no jurisdiction by reason of art 121(1A)." Does the article 121(1A) say that the civil court shall have no jurisdiction if it is a strictly a religious issue? No.

The question is not whether conversion is strictly a religious issue, but whether it falls within one of the sub-paragraphs within the paragraph 1 of the Ninth Schedule to the Federal Constitution so that the matter will be within the subject-matter jurisdiction of the Syariah courts. If so, the jurisdiction of the civil courts would be ousted by the article 121(1A) provided that all parties to the action profess the religion of Islam.

Even without reference to the paragraph 1, why it is 'inappropriate' for the civil courts to decide the validity of conversion? What is the difficulty that a civil court may have in checking whether the process of conversion was duly complied with, such as uttering the Affirmation of Faith by the purported convert, etc? With due respect, it is neither inappropriate nor poses any difficulty for the civil courts to decide the issue at hand.

In making the above discussed remark, the Federal Court referred to its previous decision in *Soon Singh A/L Bikar Singh* v.*Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah*.[4] That was a case where the question was whether the applicant had converted out of Islam and not any dispute over his original conversion to Islam. What the applicant asked for in that case was "a declaration that the plaintiff, having renounced the religion of Islam and re- embraced the Sikh faith, is no longer a Muslim; ...."

The Federal Court in that case held that the issue of conversion out of Islam was a matter within the jurisdiction of the Syariah courts. These are called apostasy or *murtad* cases. In the absence of 'conversion-out', the 'conversion-in' stood and he was a Muslim / a person professing the religion of Islam amenable to the jurisdiction of the Syariah courts. It is not within the ambit of this paper to analyse whether 'conversion-out' falls within the paragraph 1 of the Ninth Schedule to the Federal Constitution, and accordingly it is not proposed to dwell into that subject save for saying that that jurisprudence does not affect the analysis in respect of 'conversion-in' cases that is undertaken in this paper.

In the case of *Soon Singh*, the Federal Court referred to *Dalip Kaur* v.*Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam&Anor*[5] another apostasy case decided by the Supreme Court. In that case, Dalip Kaur, the mother of a deceased convert son applied to the court for a declaration that her deceased son was at the time of his death not a Muslim. The civil court assumed jurisdiction and tried the case at full length and found that the convert son had not converted out as a matter of fact. There was no dispute as to the original 'conversion-in', which was voluntarily done by the son a few months prior to his death with a view to marrying a Muslim girl.

The son converted to the religion of Islam on 1 June 1991. The convert son went through an engagement ceremony with his girlfriend, a Muslim girl, on 28 Sept 1991. The wedding was scheduled to take place on 25 Nov 1991. In the meantime, the convert son fetched his fiancé from home to work in the night of 2 Oct 1991, and he was found dead the next day on 3rd Oct 1991. The plaintiff, the mother of the convert son, claimed that his son had converted out by a deed poll signed by him on 9 Sept 1991. The handwriting expert who compared 10 signatures of the deceased opined that the signature on the deed poll did not belong to the deceased. The judge having heard the factual matrix of the case found that the deceased did not sign the deed poll and did not convert out, and hence remained a Muslim at the time of this death.

On appeal, it was agreed by consensus of parties that the question will be referred to fatwa committee. The fatwa committee returned its finding that the deceased was a Muslim at the time of his death. This concluded the matter and the plaintiff was not then allowed to re-open the case.It is repeated that it is not within the ambit of this paper to analyse 'conversion-out' cases.

This is an area of jurisprudence known for its controversy and plenitude of conflicting decisions. Any judge applying a precedent from this jurisprudence must be mindful of at least three principles, which follow:

1) The precedent is not *per in curium*.

2) The precedent is not contrary to the law rendering it of no effect (see the *Badiaddin* principle)

3) Applying the precedent does not compromise the constitutional oath taken by the judge by virtue of which he or she holds office.

The third principle above is what Hamid Sultan JCA calls "constitutional oath jurisprudence" and has often stressed at many instances including in the instant appeal. The foremost duty of the judge is to preserve, protect and defence Constitution.

4. [1999] 1 MLJ 489.
5. [1992] 1 MLJ 1.

Judges of the civil courts, unlike those of the Syariah Courts, take a constitutional oath under article 124 of the Federal Constitution materially in the format in the Sixth Schedule to the Federal Constitution, the essence of which is that his or her foremost duty is to preserve, protect and defend the Federal Constitution. The Sixth Schedule reads as follows:

> I, ..., having been elected (or appointed) to the office of .....do solemnly swear (or affirm) that I will faithfully discharge the duties of that office to the best of my ability, that I will bear true faith and allegiance to Malaysia, and will preserve, protect and defend its Constitution.... (emphasis added)

In this context, the article 121(1A) must be revisited. Under the article 121(1A), the civil courts have no jurisdiction if it is a matter falling within the jurisdiction of the Syariah courts. It must be remembered that the article 121(1A) was inserted by section 8(c) of the Constitution (Amendment) Act 1988, which itself has to be read subject to the Federal Constitution (see article 4(1) of the Federal Constitution), i.e. in the present context, subject to the Sixth Schedule to the Federal Constitution. Accordingly, if a Syariah court's decision infringes a constitutionally protected right of a party, then the civil courts, as guardians of the constitution, may question the same.

This will have to be done by way of a judicial review application. It must be noted that the judicial review powers of the High Court are conferred by paragraph 1 of the Schedule to the Courts of Judicature Act 1964. It must be observed that it is a jurisdiction without any fetter. To avoid any doubt, by section 4 of the Act, the provisions of the Act shall prevail in the event of any inconsistency or conflict between its provision and any other written law (other than the Federal Constitution only). In a judicial review, the court checks the process by which any authority or person in power reached its or his decision. Checking the 'process of decision making' does not involve any Islamic law or any matter spelled out in the paragraph 1 to the Ninth Schedule to the Federal Constitution.

It must be emphasized that at a plain reading of the paragraph 1 of the Ninth Schedule to the Federal Constitution, it contains no jurisdiction similar to that contained in the paragraph 1 of the Schedule to the Courts of Judicature Act 1964 (i.e. the judicial review jurisdiction). Accordingly, the judicial review jurisdiction of the civil courts is not in any way affected by the article 121(1A). Once this point is clear, the next question is whether the judicial review jurisdiction, as conferred by the paragraph 1 to the Schedule to the Courts of Judicature Act 1964, includes a power to so judicially review a decision of the Syariah court. As there is absolutely

no fetter to this jurisdiction conferred by the paragraph 1 of the Schedule to the Courts of Judicature Act 1964, a decision made by a Syariah court is no exception to this jurisdiction.Support for this proposition can in general be found in the judgment of Hamid Sultan JCA, when his Lordship said "[w]hat the civil courts cannot do is to intervene in the lawful decision of the Syariah Courts made within its jurisdiction and not in excess of its jurisdiction."

Having visited and discussed the plethora of laws, cases, principles and the grounds of Balia Yusof JCA in the instant appeal, with due respect, it is opined that any issue as to validity of conversion is a matter within the jurisdiction of the civil courts, whether the parties to the action are all Muslims / persons professing the religion of Islam or not, which Hamid Sultan JCA said with simplicity as this: "certificate of conversion has nothing to do with the jurisdiction of the Syariah Court".

(ii). THE SECOND ISSUE

The author having subscribed to the view that the first issue, namely whether the civil courts have jurisdiction to hear the challenge to conversion certificate, must be answered in the affirmative, now moves on to the second issue namely whether issuance of the conversion certificates contravened the provisions of the Perak Enactment and thus a nullity and liable to be quashed?It was contended by Indira Ghandi that sections 96 and 106 of the Perak Enactment were not complied with. It must be observed that the basic requirements for conversion are set out in the section 96. In the case of minor children, there are some additional requirements called for by the section 106.

In the instant case, section 96 issue must be considered first. If it is found that section 96 was not complied with, then it would not be necessary to decide if the section 106 additional requirements were satisfied.Under section 96, the intending convert must utter the Affirmation of Faith. He or she must do so understanding what it means. He or she must do so out of his or her own free will. A person incapable of speech may, instead of uttering, convey the Affirmation of Faith in sign language.

In the instant case, the two elder children were with Indira Ghandi and it is not disputed that they did not utter the Affirmation of Faith. As far as the youngest child is concerned, it was aged 11 months at the time of the alleged conversion and was with the father. It cannot be, and is not, disputed that the youngest too did not utter the Affirmation of Faith. In fact the conversion was documentarily done by their father and the children had no, and could not have had any, knowledge of it. This is not disputed.It follows that it is not doubted that the section 96, and hence the statutory requirements for conversion, were not complied with.Hence, it is not necessary to consider the additional requirements of parental consent in the section 106.

Under section 100 of the Perak Enactment, the convert must apply to the Registrar of Muallaf for registration as a muallaf. If the Registrar is satisfied that the section 96 requirements are satisfied, then he may register the conversion in the Register of Muallaf. Upon such registration, under section 101(1) of the Perak Enactment, the Registrar shall issue a certificate of conversion.In the instant appeal, it is not disputed that the requirements for registration under the section 100 was not satisfied. Accordingly, the Registrar acted in excess of authority and contravention of statute in registering the purported conversion and issuing the certificates of conversion, rendering the certificates thus issued a nullity *ab initio* (see *Badiaddin* principle).Hamid Sultan JCA so held. However Balia Yusof JCA felt restrained from so holding by section 101(2) of the Perak Enactment which provides that "a certificate of Conversion … shall be conclusive proof of the facts stated in the Certificate."

This calls for a detailed discussion of section 101(2) and its application to the facts of the instant case.At the outset, what did the conversion certificate say? All it said was that the applicants named in the schedule therein (the father and the three children) were registered in the Register of Muallaf. The "original names" of the purported converts. Their "Islamic names". The "Islamic date" next to each of their Islamic names. The file number next to each of the Islamic dates. The certificate was signed on behalf of the Registrar of Islamic Religious Department of Perak. That was all. The certificate is reproduced in Hamid Sultan JCA's judgment.

The certificates did not say that the children uttered the Affirmation of Faith. The fact that needed to be established by Indira Ghandi, in order to nullify the certificate, was only that the requirements of section 96 was not satisfied, i.e. essentially the three children did not utter the Affirmation of Faith and nothing else. This fact was not even disputed. This alone, without more, renders the certificate a nullity *ab initio*.Purely for academic purposes, hypothetically if the certificate had said (which the certificate did not do) that the purported converts named therein had uttered the Affirmation of Faith, can that fact be challenged? It is opined that even then it can be challenged for the following reasons.Firstly, when an applicant proves the facts necessary to establish that the certificate is a nullity *ab initio*, the certificate is legally non-existing. In such case, it does not matter what is stated in the certificate which is legally non-existing, i.e. a nullity.Secondly, in a judicial review application, if a Registrar can hide behind what he himself self-servingly said in the certificate, it will in effect bar any judicial review of the process by which he issued the certificate. Judicial review jurisdiction, conferred on the civil courts (who are guardians of the constitution – in Hamid Sultan JCA's language, the entrusted supreme policeman of the constitution by the Courts of Judicature Act 1964 (a federal legislation) cannot be ousted by S 101(2) of the Perak Enactment (a state

legislation). Reference is made to article 75 of the Federal Constitution which provides that in case of inconsistency between a State law and a Federal law, the latter shall prevail. Thirdly, the section 101(2) is inconsistent with section 5 of the Evidence Act 1950 (a Federal legislation) and thus cannot have any effect overriding the section 5. It must be explained why it is said that the section 101(2) is inconsistent with section 5 of the Evidence Act 1950.

The long title to the Evidence Act 1950 reads "An Act to define the law of evidence". Sections 2 and 3 of the Act read together delivers the effect that the Act applies to all judicial proceedings before any civil court. Having visited them at the outset, now sections 4 and 5 of the Act must be considered, which are reproduced below:

4. Presumption

(1) Whenever it is provided by this Act that the court may presume a fact, it may either regard the fact as proved unless and until it is disproved, or may call for proof of it.

(2) Whenever it is directed by this Act that the court shall presume a fact, it shall regard the fact as proved unless and until it is disproved.

(3) When one fact is declared by this Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

5. Evidence may be given of facts in issue and relevant facts.

Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

Explanation—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by the law relating to civil procedure.

The section 5 confers the right on a litigant to tender evidence of any fact in issue, subject only to a caveat that a litigant may be debarred from giving such evidence only if a law relating to 'civil procedure' disentitles him from so doing. Accordingly, section 101(2) cannot take away that right, unless the section 101(2) is a law relating to civil procedure. Section 101 entitled "Conversion Certificate of Conversion to the Religion of Islam" has nothing to do with civil procedure.

Another exception to the right conferred under the section 5 is found in section 4(3) of the Act. Under the section 4(3), when a litigant proves one fact and the Act (the Evidence Act 1950) declares that fact be conclusive proof of another fact, the other party is disallowed from *disproving* the latter fact deemed to be proved. The Act has so declared proof of one fact to be the conclusive proof of another fact only in two instances, respectively in section 41 in respect of certain judgments and

in section 111 in respect of legitimacy of children born during marriage when the couple was in access to each other. Section 101(2) of the Perak Enactment is out of place to gain any exception to the right conferred under section 5 of the Evidence Act.

With due respect, Balia Yusof JCA failed to make due observation of the facts stated in the certificate in holding that the section 101(2) rendered the conversion or the certificate unchallengeable. Had his Lordship made the due observations made herein above, again with due respect, the result must have been different. Before concluding the discussion on the section 101(2), it is pertinent to consider the majority decision of the Court of Appeal in *SaravananThangathoray* v. *SubshiniRajasingam& Another Appeal*[6] which was relied on by Balia Yusof JCA in holding as his Lordship did. In that case, in less than three months after the date of conversion of a husband as stated in the conversion certificate, the wife petitioned for divorce under section 51(1) of the Law Reform (Marriage and Divorce) Act 1976, which reads as follows:

51. Dissolution on ground of conversion to Islam

(1) Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce:

Provided that no petition under this section shall be presented before the expiration of the period of three months from the date of the conversion.(emphasis added)

The wife having so applied in less than three months after the date of conversion stated in the certificate challenged the 'date of conversion' therein. The court, by majority, through application of section 112(2) of the Selangor Enactment, which is *in parimateria* with section 101(2) of the Perak Enactment, held that the 'date of conversion' stated in the certificate was conclusive proof of the 'date' and accordingly the wife's petition was premature.

In that case, the certificate of conversion was not challenged, but only the date stated therein. It would have been different if the certificate itself was challenged with the result that the court cannot rely on anything stated in the certificate until the issue of validity of the certificate is first decided. With due respect, that case had no application or relevance to the case of Indira Ghandi, where the conversion itself was challenged from the root, and Balia Yusof JCA, again with due respect, misdirected himself in applying that case to the case before his Lordship.

In conclusion, it is opined that the section 101(2) cannot be any bar to Indira Ghandi proving the facts and the process by which the certificate was issued. In the absence of any hindrance by the section 101(2), it cannot be doubted that there

6. [2007] 2 CLJ 451.

was absolute non-compliance of the section 96, the statutory requirements for conversion, rendering the purported conversion and the certificate a nullity *ab initio* and liable to be quashed by the court, as did Lee Swee Seng J in the High Court and upheld by the dissenting judge in the Court of Appeal, Hamid Sultan JCA. By now, both the issues due for determination has been considered at length and the reasoned views and opinion have been expressed, namely the matter carried by Indira Ghandi was within the jurisdiction of the civil courts and that the conversion certificates were liable to be quashed. However, that would not suffice to complete this paper, but articles 11 and 12 of the Federal Constitution must be discussed, as Balia Yusof JCA also relied on the article 12 and discussed the article 11 in the course of arriving at the conclusion that his Lordship did.

VI. ARTICLES 11 AND 12 OF THE FEDERAL CONSTITUTION

Balia Yusof JCA referred to article 12(4) of the Federal Constitution and to the Federal Court decision in *Subashini A/P Rajasingam v Saravanan a/l Thangathoray and other appeals*[*] and make a remark on the passing that the article 12(4) allows either parent to convert his or her child to the religion of Islam. As rightly pointed out by Hamid Sultan JCA, article 12(4) is housed under the article entitled "Rights in respect of education". This section has nothing to do with conversion, and it is sad that some decisions have treated the 'education' related provision as a 'conversion' provision. The difference is not that of an apple and orange but a marble and pumpkin as Hamid Sultan JCA well said. It is hoped that the following distinct passage of Hamid Sultan JCA in the instant appeal will put an end to the anathema of misapplying the article 12(4) to conversion cases:

> … Article 12(3) and 12(4) of the Federal Constitution has nothing to do with conversion. It only permits a parent or guardian from deciding the religion of the child for purpose of worship of a religion ... Selecting the religion does not mean the child has been converted.

Balia Yusof JCA was of the view that the right of either parent to convert his or her without consent of his or her spouse was not contrary to article 11 of the Federal Constitution. With due respect, the view cannot be justified. The article 11 reads as follows:

11. Freedom of religion

(1) Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.

Every person, what it means? It is opined that "person" includes children and there is nothing in the constitution to discriminate against children nor to disregard

* [2008] 2 MLJ 147

the fact that children are humans with feelings and legitimate desires too. Although children are subject to parental control, it should not be taken to mean they are slaves (or something near to it) of parents.By virtue of the article 11, a child who is of mind has the right to practice his religion. It is the author's view that "his" religion here means the religion that he was born under or the religion that he has already been practicing. If either parent (or even both parents) can force a child, say aged 17 and thus still a minor, to any other religion, that would be a step nearer to treating the child as (or something near to it) of either parent (or both parents) as opposed to wards of parents or guardians.

This principle is well contained in the Perak Enactment, as like in most other State enactments, that requires not merely the parental consent in cases of conversion of children, but requires that the child himself or herself to voluntarily embrace the religion of Islam.Now returning to the other issue of one parent dealing with religion of the child without the consent of the other parent, a few words must be said. If one were to interpret any provision in the law as allowing either parent to decide the religion of their child, that will only create a battle of religions, as the father may select one and the mother another. Accordingly, any law allowing "a parent" to deal with the religion of a child must be construed as meaning "the parents" if they are both alive. Parliament must take due steps to amend the law for sake of clarity if necessary.Returning to the case at hand, article 12(4) has no application to it precisely for the reasons said by Hamid Sultan JCA and article 11 would be infringed if the child (a person) is disallowed from practicing "his" religion at the unilateral decision of his parent (or parents).Accordingly, it is opined that the act of the Registrar in issuing the certificates in the instant case, among other matters already discussed at length, also evidences an infringement of the article 11.

VII. CONCLUSION

Having reviewed the instant case at length thus far, it is time now for to write the conclusion to the paper.With due respect, the challenge to the conversion is a matter within the jurisdiction of the civil courts at least for the reason that Indira Ghandi, a legitimate party in the case, was a non-Muslim. The purported conversion was a nullity *ab initio* at least for non-compliance with section 96 of the Perak Enactment, which is an undisputed fact. Section 101(2) does not help the Appellants in this case in any way at least because the certificate nowhere said that the children uttered the Affirmation of Faith, which was the central fact in issue in this case.It will only be hoped that the precedents created by the majority decision in this case and in a few other similar cases will be corrected by due process of law.

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JURISDICTION OF CIVIL COURT AND PRESUMPTION AGAINST EXCLUSION

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ABSTRACT : The court is known to be the ultimate institution in the reign of constitutionalism to deliver justice by resolving the disputes amicably because of its century old known impartiality, openness and fairness. Though it had various form and features at times but the justice was a common thread streaming through the different stages strengthening and reinforcing the faith of the people in the system of court. Universal acceptance of the standard of justice by the Rule of Law based society has unimpeachable credit to the institution of court and procedure therein. Any departure from such ideal institution in pursuit of justice undoubtedly offers strict resistance in accepting any other forum for justice. Therefore, there is presumption against the exclusion of jurisdiction of the civil court. The paper attempts to highlight and appraise the situation and the circumstances entailing any other forum for delivery of justice as supplant for the ordinary civil court.

KEY WORDS : Jurisdiction of Civil and Criminal Courts, Justice delivery system, Jurisdiction of tribunals, and Presumption.

I. INTRODUCTION

Law works on accuracy and precision in recognition of rights of the individuals so that on its violation proper redress may be extended to the aggrieved. To find out the rights, means and mechanism by which the rights can be enforced for providing remedy, the statutes contain will of the legislatures[1] in various provisions. Ordinarily the court in order to reach out the will of the legislative body takes out meaning of the words used in the statute as a common man so that the meaning is universally acceptable to see what was in their contemplation, what actually they desire and mean. Unless the attempt is made to trace down the real spirit and meaning of the words of the Statutes the interpretation shall result into subjective appreciation and outcome will be discriminatory, disingenuous and capricious. The elements of the law are primarily determined by the court on the basis of primary meaning of the word which is substantiated with the practice of legislative drafting by incorporating definition or interpretation clause in the enactments and unless expressly required

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1. *Maxwell on Interpretation of Statutes*, 2004.

the appropriate forum to approach for remedy.

Since law is a dynamic- social science that keeps abreast with the socio-eco-political as well as scientific changes the connotations of law are also invoked to find out the true intent of the legislators in a given set of facts if the primary meaning falls short of the resolution required. Sometimes law provides a flexible device, where the facts addressed are closed and indoor to access the remedy. For more commonly with ordinary, prudent, well known and established practice or forum for the sake of avoiding inconvenience and procedural complexity law speaks for the ordinary courts and the procedure. An ordinary man understands by his prudence in case of distress to get relief from the court of law. Law favours and leans towards such conception of the common man and such long drawn practice have given rise to presumption against construction to oust the jurisdiction of the court.

Court has been considered to be an impartial institution to resolve the conflict of claims between the parties amicably. It is presided by a trained person in capacity of judge assisted by professional advocates that have knowledge of law in action, recording of statement of witnesses and its use, manner of analysis and ascertainment of facts as well as use of law as tool to do justice. The court has been credited to place the parties before it on equal footing irrespective of their position, power and pelf. Further in hierarchy there are multiple stages of rectifying the error if committed at the lower rung of the system. From a pedestrian to position holder court comes to his mind for disposal of the matter in dispute. Law ordinarily, therefore, also leans towards existence of jurisdiction in the court. That is why Dicey remarked, "courts of law are alone able to determine what breach of law is".[2]

I. JURISDICTION LINKED TO FEE

Resistance to ousting of jurisdiction of the court initially rests its logic dates back to the time when judges emoluments was derived from the fees charged from the party. Arbitration an alternative mode of resolving the dispute appears to have eroded the jurisdiction of the court as the reason was observed by Lord Campbell in *Scott* v. *Avery*[3]:

> [T] hat as formerly the emoluments of the judges depended mainly or almost entirely upon fees and they had no fixed salary, there was great competition to get as much as possible litigation...They had jealousy of arbitrations, where by West Minister Hall was robbed of those cases which came neither into the Queen's Bench nor the common pleas nor the Exchequer. Therefore they said that the courts ought not to be ousted of their jurisdiction and that it was contrary to

2. A.V. Dicey, *Introduction to the Study of the Law of Constitution*(10th ed) at cxviii.
3. (1856)5 HLC 811.

the policy of the law.

Some scope of ousting of jurisdiction of court may be possible if the parties themselves agree to resort to some other mode to resolve the future differences in the form of third party reference for a peaceful settlement. The court on jurisdiction observed, "While parties cannot by contract oust the jurisdiction of the court, they can agree that no right of action shall accrue in respect of any differences which may arise between them until such differences have been adjudicated upon by an arbitrator." Many claimants ignored the arbitration clause within the contract on dispute resorted to court proceedings. The court did not stay the arbitration proceeding and court relied upon the principle that a party cannot by contract oust the jurisdiction of the court.[4]

II. GROWTH OF THE JUSTICE DELIVERY SYSTEM

The public perception about the quality and status pertaining to jurisdiction of court, has been consistently maintained since ancient times though the foundationand the principles have been changing. At the very initial stage in ancient times it was the religious literatures and instructions that formed the basis of remedy and a class of persons enlightened with these religious tenets used to decide the matters without any scope of appeal. This was because justice was inextricably linked to religion and rooted in a socially stratified caste group. The concept of justice was based on the formulation of Dharma. The emphasis was on the duty of each individual towards the fellow citizens' rights as well as the society. A set of rules prescribed for imposition of duty upon the individuals that was to be performed according to the social structure based on the caste system. There was no place for argument for fair play, transparency or reasonableness in disposal of cases but the breach of duty was sufficient to attract the penalty. There was no other forum one could approach to ventilate his grievances. In the medieval time it was the King that used to be the fountain of justice and custodian of law. There was no separation between the executive and judiciary. King had the executive power to run the administration of empire and also to resolve the disputes between the people under his rule as the "king cannot do wrong".

The story of hierarchy of the court in Indian legal system begins with the royal charter of 1726, wherein the Mayor's Court was established equipped with the power to decide uniformly civil or criminal cases according to the law of the kingdom and to execute judgement accordingly. The Mayors Court established at the Presidency towns were of the Company but the English Law had to be applied at the Mayors Court. In the Judicial wings of the State it had the exclusive jurisdiction

4. *Thompson* v. *Charnock* (1799) 101 ER1310.

to try and dispose of civil and criminal cases. This system was also based on adversarial where advocate represent their parties' case or position before an impartial person, usually, a jury or judge who attempt to determine the truth and pass judgment accordingly. This inculcated a feeling of impartiality, fairness and transparency among the people. The institution of justice was recognised as an open court being accessible to all. Exclusion of jurisdiction of court was beyond the contemplation ofthe people. In *The Secretary of State* v. *Mask and Co.*[5] Thankerton, J. Observed- it is settled law that the exclusion of the jurisdiction of the civil courts is not to be readily inferred but that such exclusion must either be explicitly expressed or clearly implied. Even if jurisdiction is so excluded, the civil courts have jurisdiction to examine into cases where the provisions of the act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

In Modern India, the Procedural Laws particularly the Code of Civil Procedure,1908 and the Criminal Code Procedure, 1973 are the statutory source of establishment of Civil Courts which have jurisdiction at the trial level with facility of subsequent appeals before the higher courts. Apart from these Procedural Laws, Constitution of India establishes High courts in different states or for a group of some neighbouringstates and the Supreme Court as an apex judicial body to dispose of the matters and interpret the provisions of any law enforce in India.

Code of Civil Procedure

Section 9 of the code provides for the jurisdiction of Civil Courts in India. Itsays that the court shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognisance is either expressly or impliedly barred. This provision confers jurisdiction pertaining to civil matters on the civil court, the only requirement is that the suit must be of civil nature. The Suits of civil nature refers to the rights and interest of the parties vested to them under certain laws. It, however, also points out that the jurisdiction of the court is to be determined keeping in consideration the place of cause of action and the pecuniary value of such cause of action. Accordingly,there are various levels of Civil Courts with respective jurisdiction at the district level.

It is of great relevance to mention that parties have no rights to choose the place of proceeding of the case beyond the places mentioned in the Code. They,however, may agree upon to choose/select anyone of the places as provided in CPC. This arrangement embodies the principle that court jurisdiction is not at the hands of parties and this can't be excluded even by the agreements settled amicably.

5. AIR 1940 PC 105, para 15.

Parties' choice of place of the court having jurisdiction is controlled and restricted by the Statute. The jurisdiction is provided in the statute and therefore strict interpretation is done to the provisions to uphold and maintain the jurisdiction of a Civil Court. Any deviation from the principle stands in contradiction to the view that court is the only appropriate institution to settle the individual claims. Presumption leans in favour of status quo of the jurisdiction and rigid interpretation is given to the provision that appears to have excluded the jurisdiction. Existence of jurisdiction in civil courts to decide the question of civil nature is the general rule and exclusion is an exception.[6] The exclusion of jurisdiction of civil court is possible only by an express provision of the law or by an inference drawn from cogent interpretation of the provision as legislature is competent and capable to curtail the jurisdiction of the civil court. It depends upon the nature of the rights and liabilities described in the statutes and the remedy provided therein.

The statutes of regulatory nature do often provide for negation of jurisdiction of the civil court to facilitate the functioning of the regulatory bodies. The regulatory body, eg., the pollution control board under the environmental legislations have multiple powers in implementation of the pollution control laws against the polluting units.[7] The purpose of such laws is not to resolve the disputes inter-se but to focus on achieving the goal otherwise the issues might be entangled and the purpose is delayed on account of judicial niceties. But due attention has been given to satisfy the claims of the parties in the form of alternative quasi-judicial body. Such arrangement avoids delay and also provides a reasonably expert body on the matter connected thereto for efficient and expeditious disposal. The jurisdiction of the superior court, however, remains intact and one may approach for judicial review of the order passed by the regulatory authority.

Apart from the above types of situation, sometimes statutes contain clause providing for the finality of the decision taken by the authority named therein without excluding the jurisdiction of civil court. Rigid construction of the provisions presuming the jurisdiction is applied and attempt is to uphold the court's jurisdiction on the issue. The general rule of law is that when a legal right and an infringement thereof are alleged, a cause of action initiates the entertainment of a suit, the ordinary civil suits are bound to entertain the claim. In *Thakur Brij Raj Singh* v. *Thakur Laxman*

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6. *Ramayya* v. *Lakshminarayan* AIR 1934 PC 84.
7. The Environment (Protection) Act, 1986, Section 46 states that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an Appellate Authority constituted under this Act is empowered by or under this Act to determine, and no injunction shall be granted by any court to other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

Singh[8] maintainability of a suit was in issue arising out of facts- under the Ajmer Land and Revenue Regulations, 1877, section 23 provides that no adoption made by a widow shall be deemed valid unless confirmed by the Central Government and section 19 further provides that on confirmation the adoption shall be deemed to have been legally and rightly done. Supreme Court upheld the jurisdiction of the civil court to see whether the Central Government considered i) the right of the widow to adopt, and ii) the widow has in fact adopted the son. The court by majority observed that no suit should lie to challenge the determination of the Central Government. But the court has the jurisdiction to determine that the adoption was made or not and if yes, it might be examined for its validity.

The exclusion of jurisdiction in addition to express provision or by implication may also be determined on the basis of the source and nature of right in issue and the corresponding remedy. The category of cases has been summed up by Willes, J. In *Wolverhampton New Waterworks Co.* v. *Hawkesword*[9], reads as-

> One is where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statue gives the right to sue merely, but provides, no particular form of remedy : there, the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it..... The remedy provided by the statute must be followed and it is not competent to the party to pursue the course applicable to cases of the second class. *(Emphasis added)*

The above classic segregation of the cases covered in three different conditions helps to find out exclusion of jurisdiction of the civil court. If the statute simply affirms the right recognised under the common law rights for example the right over the property associated with the ownership, right to enforce for compensation against breach of common law rights in tort, consumer laws etc, the aggrieved person has the option to prefer the remedy before the court of law or follow the alternative forum to get the redress.[10] The jurisdiction of court is not barred and may be invoked.

8. AIR 1961 SC 149.
9. [1859] 6 CB (NS) 336, 356. This view was accepted by the House of Lords in *Neville* v. *London ExpressNewspaper Ltd* [1919] AC 368 and endorsed by the Supreme Court of India in *Dhulabhai and Ors* v. *State of M P.* AIR 1969 SC 78.
10. The Public Liability Insurance Act, 1991. Wherein the District Collector is empowered to order for compensation to the aggrieved victim.

The other situation speaks of the right only and no remedy indicated thereto. Statute recognises the right to sue merely[11] and remedy lies under some other statues for example, the private laws-Property, Contract and Family law etc. Jurisdiction is not excluded in such cases. The jurisdiction of the court, however, stands excluded where a statute creates a new right which has no existence apart from the statute creating it and also provides for a particular method of enforcing it. Statutes pertaining to labour welfare[12], Tax, Land reform, Election laws and other regulatory measures may be kept in this category, where some authority is created to resolve the dispute that may arise in course of implementation of the statutes.

Jurisdiction of court in criminal cases

Criminal Procedure Code lays down a hierarchy of courts to try and decide the criminal cases. But jurisdiction is restricted by the Statute in terms of place of offence and the quantum of punishment provided under the Penal laws. The place and quantum is the determining factor to find out the jurisdiction of the criminal courts. This jurisdiction can't be excluded unless there are some laws providing for another special court or a body to try the offences of special nature or some special types of cases like that of the Juveniles. There is no exclusion of jurisdiction of court as some court or tribunal is designated with same construction and under the same umbrella as the court to try the offence. The rights of accused for fair trial such designated court are well protected under the Constitution of India[13] as well as Protection of Human Rights Act, 1993.[14] Article 14 of the International Covenant on Civil and Political Rights, 1966 also ratified by India and supports for fair trial of the accused in criminal cases by the courts or agency with all requisites of the court and the procedure. The presumption against jurisdiction has no role in determining the jurisdiction of criminal court.

Law presupposes existence of jurisdiction in courts entertaining civil suits or trying the criminal cases but jurisdiction is deemed to have been excluded in civil court if there is alternative forum providing justice to the parties before it. The difference, however, in these two types of jurisdiction of court lies in the fact that courts deciding the criminal cases are equipped with the same types of skilled,

11. The Code of Civil Procedure, 1908, Section 9 CPC.
12. The Industrial Disputes Act, 1947, the Trade Union Act, 1926, and the Payment of Bonus Act, 1972.
13. The Constitution of India, 1950, Articles 20 and 21.
14. The Protection of Human Rights Act, 1993.Section 2(d) read with section 2(f) provides: 'In the determination of any criminal charge against him or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independence and impartial tribunal established by law.'

professional and experienced officers as in ordinary courts whereas in the matters of civil nature the body designated may not have the same quality as of the judges presiding the tribunal. This is because the civil matters relate to the rights and interest of the litigants and decisions of the civil court do not impute any stigma on the personality of the parties to the suit like the criminal courts whereby a person inflicted with punishment carries perpetual stigma to his career and life. The establishment of some special courts is supported with some special reasons and circumstances. But the standard procedure of the court in trial of the accused i.e, due opportunity, assistance by advocates is adhered to. Therefore, institution and designation of these courts is not taken as exclusion of the jurisdiction of the criminal court.

Tribunal

Due to complex administrative system, speciality of the cases and requirement of special knowledge to particular types of cases institution of a system comprising tribunal for disposal of claims have become almost a common practice of the day wherein such bodies are brought to existence by some special law keeping in view the background, circumstances and the objectives by different names such as Forum, Authority or the Tribunal. These institutions are required to follow due process of law, open proceedings presided by experienced personnel in disposal of the particular type of cases the law that has established it. But the difference lies in the fact that these fora owe their existence to special enactments and, therefore, their jurisdiction is strictly limited as mentioned under the mother statute. This categorically implies that its jurisdiction is specified and limited unlike the ordinary court. This dismisses the fact that other issues not expressly provided to the jurisdiction of such bodies may be included. Except the mentioned jurisdiction the remaining matter revert back to the domain of ordinary civil courts leaving no scope of any presumption towards existence of jurisdiction in the tribunal. Presumption of jurisdiction is only for the ordinary civil court not for the tribunal. These tribunals may have original[15], advisory or the appellate jurisdiction[16] over and from the administrative authority functioning in quasi-judicial capacity but not against the decision of a court. The provisions laying down such jurisdictions are interpreted keeping in view the purpose of the statute establishing it and the jurisdiction of the court is excluded on the specified matters. There is neither presumption nor impliedacceptance of conferment of jurisdiction on the tribunals other than what is expressly provided. Against the award of tribunals, judicial review by the High Court is permitted, howhighsoever, the tribunal may rank in its hierarchy[17] or by way of Special Leave Petition under

15. Election Tribunal, Income Tax Tribunal, Labour Tribunal and Administrative Tribunal *etc*.
16. National Green Tribunal.
17. *L. Chandra Kumar* v. *UOI* AIR 1997 SC 1125.

Article 136 of the Constitution before the Supreme Court. Universal acceptance of the jurisdiction of the court prevails whereas the tribunal supplanting the trial court for specific purposes has limited codified jurisdiction in the respective enabling statute.

III. CONCLUSION

Thus, the jurisdictions of the courts as well as the superior courts have been expressly laid down in the ordinary statutes as well as in the constitution. Law insist on the fair disposal of cases and, therefore, standard and features of the institution as well as the procedure have been provided in the statutes. Any departure from such institution or the procedure needs special indication of the will of the legislators and that too could be of the same standards so far fair procedure, transparency and impartiality is concerned. Presumption against the jurisdiction of the court is the core idea to uphold the inclusive jurisdiction of the court. The courts are the standard model for the rule of law-based society on which the people of the country have faith and takes credit. Inclusion of jurisdiction, therefore, is the rule of law and exclusion is exception that too needs strict construction. Earlier approach denying the exclusion of jurisdiction of court for fear of loss of revenue or source of income does not hold ground as department of judiciary being an organ of the State is mainly and absolutely maintained out of the government exchequer. The importance of court lies in its merit. The exclusion of jurisdiction should rest on reconciliation between the predominant positions of the traditional court, justice delivery and need and object entailing setting of the authorities or entrusting the authorities with some judicial function.

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FOREIGN POLICY ANALYSIS UNDER THE CONSTITUTION: A JURIDICAL TESTIMONIAL

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ABSTRACT: : Indeed imperative for law fraternity, foreign policy is so often than not put to backseat while the same formulates law in technical sense of the term. More than playing alongsideline, with creative construction, foreign policy has had potential to get included within the coverage of "law"as defined under Article 13(3) of the Constitutionof India provided that the trajectory of "notification" get extended to policy document notified by institutions defined as "State" under Article 12 of the Constitution. Not only so, policy constitutes law and such hypothesis finds endorsement in the Constitution with illustrations, e.g. Part IV of the Constitution in general and Article 39 of the same in particular to corroborate an otherwise avant-garde argument of the author. Beyond law, in its essence, foreign policy constitutes a genre of its original domain; albeit skewed-yet extended- patch of public policy meant for stakeholders ofinternational community running society of states in contemporary world. Even non-state actors possess minimal obligation not to offend the global commons bytheir respective foreign policymaking irrespective of diversity in their given political opinions. Besides, interface between foreign policy in practice and the making of international law- mediated by diplomatic discourse of states concerned- leaves contribution to sui generis jurisprudence of the impugned national foreign policy behind and the discourseappearsno less engaging than traditional jurisprudence with mainstream contents it refers to for the legal academicsin time ahead. Foreign policy of states, sub-state and non-state actors- taken together- adds on to metadata of international jurisprudence; thereby plays critical qualifier in the making of international law worldwide.With all these agenda mentioned above, the author hereby grapples withthe discursive world of foreign policy as the law and also as public policy to unfold newer cleavages of foreign policy from within the given domain of social science. Being subject(ed) to law and public policy, foreign policy cannot afford to offend public interest- either domestic or of foreign state- since the same may be construed global commons in a way or other through doctrine of ergaomnes, if not that of jus cogens, to put impugned practice to peril and thereby uphold the rule of international law.

KEY WORDS : Geopolitics, Good Governance, Public Policy, Foreign Policy and Constitution of India.

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> "We are being driven, in fact, to see the position of the nation-state in new proportions, as one only in the varied groupings of mankind.… They can attain their maturity only as the nation-state combines with others in an order at once more integrated and more various than we have thus far known. But combination means the sacrifice of primacy and its replacement by cooperation. Cooperation means principle, and principle in its turn means standards. We are evolving instruments which greatly add to our power of avoiding the delusions through which, in the past, we marched to war. Humble men are being led by education to dream of a life in which they realize beauty and the joy of living."
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> *Harold J. Laski*[1]

I. INTRODUCTION

Ninety years back, while Laski published the first edition of his treatise on politics in 1925, he thereby sensed a typical transition ahead; transition in the characteristics of statehood itself. Thereafter, bythe time fifth edition stood published in mid-1960s, major threads of transition went tangible enough to his readership.One among them being paradigm shift- from competition to cooperation and thereby transcend conflict of interest by peaceful means- to set aside war was sensed by him and got documented by his treatise mentioned above. What missed mention was the foreign policy of state, in technical sense of the term, that underwent metamorphosis to attain the given twist in the realm of international relations and the forthcoming effort is meant to explore gradual evolution in the world of foreign policy over a century in minute details. Thusstocktaking in foreign policy perspective worldwide-from outbreak of the World War in 1914,followed by another in 1939, to by and large peaceful world affairs till date- constitutes the argumentsof this effort.

At the outset, a prospective caveat is hereby cleared by the author about whether and how far the present world is peaceful than earlier. Indeed international armed conflict nowadays stands supplemented by non-international armed conflict. Besides, terrorism has emerged as add-on to put the world to peril. For convenience of focus, despite all these being issues of concern, this effort is not meant to grapple with the same at all. The foreign policy of modern statecraft toward maintenance of international relations alone is put to scanner to decipher the state as agent for change to attaina better world in time ahead. Since ancient antiquity, subject to get updated with the passage of time, the way inter-community equations used to get set toward other(s) by the principles vis-à-vis external affairs are together renamed

1. Vide Harold J. Laski, *A Grammar of Politics*(New Delhi: S. Chand & Co. Ltd., 2ndIndian Reprint 1984) at 665.

as those constituting discursive corpus of foreign policy in technical sense of the term with diplomatic methodology behind;along with the variables in cases of change of time and placefor the state concerned. The forthcoming paragraphs are meant to demystify foreign policy from thefolklore around and thereby engage a systematic study of the same.

Since ancient antiquity to date, policymaking process- on internal and external affairsalike- underwent a metamorphosis. In the earliest age of civilization, one head regime used to engage policymaking. The society, therefore, used to experience too frequent topsy-turvy in its policymaking as per whim and fancy of the ruler concerned. Thus, personalized policy resembled plaything of the mastermind rather than object of study. Similar is the case in case of oligarchy or all other varieties of group regime in vogue worldwide with little endorsement of the people. Immediately after such regime stands set aside by another, policy ought to takeu-turnand thereby comply with the agenda next generation regime provides for to run the statecraft. In its essence policy matter, external affairs are no exception to this end. The matter, however, initiated to move otherwise with liberal democracy while the state represents its people and its policy resembles the public opinion accordingly and the same is presumed to retain its stand irrespective of change in regime through peaceful means; like transfer of state power to next government, by courtesy electoral politics. Thus, liberal democracy initiated new domains of social science, e.g. governance, public administration, public policy, to name few of them. Foreign policy emerged as one such offshoot of public policy forthe state to grapple with all other stakeholders in the emerging society of states across the world including all non-state actors.

Reading the context of national foreign policy within the constitutional text deserves to get justified since the same constitutes avant-garde route to look into foreign policy. The author, however, finds support from prior literature to put his perspective in place. The legacy lies in every sundry constitution of the West, in the preamble in particular, to constitute national identity of the state as a political institution for rest of the world, WE, THE PEOPLE OF THE UNITED STATES, and the like, as something followed by post-colonies in South Asia alike, *e.g.* WE, THE PEOPLE OF INDIA. In its essence, preambles thereby declare their respective identity politics to the world.[2] Likewise, several other provisions of the Constitution

2. Constitutions serve as a form of public law that is particularly likely to be used to express, or help to constitute, or to influence, national identity. Constitutional preambles make this clear. … These are not claims about function and purpose; these are claims about identity and self-expression. The point here is the degree to which the expressive components of constitutions may complicate efforts to do comparative analysis, especially at the functional level. Whether a country sees religion as helping to constitute the state, or whether it sees government as instrumental to a specific social and economic

of India- taken together- act instrumental for policymaking on the given form of foreign policy. While statesmen are sovereign in formulation of core contents of their foreign policy, they are but driven by provisions of the Constitution; so far as broad-based agenda set by the Constitution are concerned. For instance, irrespective of their respective foreign policy preference, all statesmen in India- despite their poles apart position on international relations with neighbours, superpowers, internationally contested jurisdiction over valley of Kashmir-ought to get adhered to the state policy about foreign policy under Article 51 of the Constitution. Here lies potential of this effort to explore the constitutional discourse on its policy vis-à-vis foreign policy; thereby address the cleavage between foreign policy analysis with externality of the society of states and "internal law of fundamental importance" despite India not getting party to relevant conventional regime on the treaty law.[3] Since treaty provisions laid down therein are embodiment of existing international customs, they cover all sundry states irrespective of their consent to get bound by these customs. There lies primary purpose of this effort to fill in the discursive vacuum- if not void- between the law of nations and the internal law of their own.

The secondary purpose of this effort lies in the formulation of overarching principles operative behind the given foreign policy regime in practice. Taking cue from the law of the land ought to recalibrate foreign policy analysis from within the legal system; thereby get the discourse fortified by default with the potential of inter-disciplinarily, e.g. public law in general, international law and constitutional law in particular, jurisprudence, etc., besides international relations as parent discipline for the same. Thus, conceptual clarity with holistic probity is likely to enrich foreign policy analysis better than earlier in time ahead. Whether it is in real-life or in real-time practice, be the same regional or universal issues, bilateral or multilateral relations, mutual relations with neighbours or superpowers, diplomacy or geopolitics, policy thereby recalibrated is likely to resemble omniscient with foresight to grapple with unforeseen eventuality, if any. Consequently, engaging contemplation contributes to capacity-building process, thereby spearhead peaceful settlement of disputes better than earlier.

II. FOREIGN POLICY AS GEOPOLITICS

In its initial decades, during the early twentieth century in particular, foreign

vision, may be understood to influence both constitutional meaning and national identity. Vicki C. Jackson, "Comparative Constitutional Law: Methodologies", in Michel Rosenfield and AndrasSajo (eds.), *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford University Press, 2012) pp.10-11.

3. The Vienna Convention on the Law of the Treaties, 1969, Article 46.

policy was perceived as corollary to so called geopolitics and such a trend continues till date with newer facets in the age of so called cold war.[4]In particular, Kissinger- the then US diplomat during the Presidency of Nixon- indulged in practice of foreign policy as geopolitics. Besides practice, credit is due to him for development of the discourse underscoring foreign policymaking as geopolitics.[5] The way the then world mapping stood divided into three hemispheres, e.g. first, second and third world respectively, further subdivided within the mapping of such hemispheres, by courtesy polycentrism in the second world and diverse geopolitics of third world stakeholders from within their otherwise common umbrella on the basis of ideological orientation by and large revolves around cold war geopolitical tug of war between USA and Soviet Union, i.e. the erstwhile USSR, Also, the same geopolitics initiated fragmentation of USSR into the fifteen-member Commonwealth of Independent States (CIS); apart from Russia.In a way or other, so also is the case in case of partition of India in good old age and Yugoslavia in recent past. In reverse side, geopolitics also played otherwise toward defragmentation of Germany in the post-bipolar world.

More than fragmentation and defragmentation of states, foreign policy as geopolitics initiated spatial politics between and among states to extend the same to those areas otherwise considered as common heritage of mankind. For instance,

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4. Back in the early years of the twentieth century, Kjellen and other imperialist thinkers understood geopolitics as that part of Western imperial knowledge that dealt with the relationship between the physical earth and politics. Associated later with the notorious Nazi foreign policy goal of Lebensraum (the pursuit of more "living space" for the German nation), the term fell out of favour with many writers and commentators after World War II. During the later years of the Cold War, geopolitics was used to describe the global contest between the Soviet Union and the United States for influence and control over the states and strategic resources of the world. … Since then geopolitics has enjoyed a revival of interest across the world as foreign policy makers, strategic analysts, transnational managers and academics have struggled to make sense of the dynamics of the world political map.Gearoid O Tuatheil, "Thinking Critically about Geopolitics", in Gearoid O.Tuatheil*et al* (ed.), *The Geopolitics Reader*(New York: Routledge, 1998) at 1,*available at: https://frenndw.files.wordpress.com/2011/03/geopol-the-geopolitics-reader.pdf*

5. The subject was so esoteric that it multiplied the anxieties of both policymakers and the public at large. For one thing, it oversimplified the nature of the problem. The decision to initiate nuclear war would not be made by scientists, who were familiar with these weapons, but by harassed political leaders, aware that the slightest miscalculation would destroy their societies, if not civilization itself.Henry Kissinger, *Diplomacy* (New York: Simon & Schuster Rockefeller Center, 1994) at 715, available at: *https://politicainternacionalcontemporanea.files.wordpress.com/2014/08/05-henry_kissinger-diplomacy.pdf.*

deep/ high seas, polar regions, outer space and last but not least, cyber space with potential to receive similar status in time ahead, all these are subjected to politicking by the stakeholders of international community; more so by superpowers who are otherwise considered as the keepers of international peace and security and thereby given permanent position in the UN Security Council. Consequently, all these states are engaged in an exercise to attain the omnipresence within and even beyond the planet with national stake and thereby indulged in arms race to gross detriment of international peace and security they pledged to maintain in respective instruments of ratification/ accession to join the Charter of the United Nations, 1945. In a way or other, therefore, the trajectory of foreign policy as geopolitics is limited by discursive constraints of its own since the same cannot put foreign policy to place in every sundry occasions of politicking between and among states. There are other variables as well, apart from geopolitics, for determining the foreign policy of a(ny) state to ascertain rule of international law worldwide for better global governance.

Since the beginning of civilization, intercommunity relations (international relations the way we identify the same nowadays) does swing between realism and idealism as diverse, if not reverse, heads of ideological orientation sans leaning toward either.[6-7] Alliance with geopolitics strikes the realist version of foreign policy to mark such international preponderance to demonstrate highhandedness of states. Thus realist version, albeit arguably, in turn triggers hostility and culminates into conflict since the same cannot continue to push others to the wall sans resistance.

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6. There is no 'correct' theory of international politics, either to be discovered in the library or waiting to be written. As Gunnel has argued: 'what is "out there" is a function of theory, at least in an epistemological sense and it is fruitless to search for a transtheoretical datum and language in which what is "out there" can be represented'. Martin Griffiths, *Realism, Idealism and International Politics: A Reinterpretation* (London: Routledge, 1992) at 158, available at: *http://elibrary.kiu.ac.ug:8080/jspui/bitstream/1/134/1/Realism%20idealism%20and%20international%20politics.pdf*.

7. The problem of international relations theory has been posed habitually, but erroneously, in terms of epistemologically exclusive orientations. It is construed as either explanatory or historical, rationalist or reflectivist, positivist or interpretivist, scientific or non-scientific. Returning to the insights of Carr … helps to remind us that the problem of international relations theory can be reduced to a fundamental, age-old, and enduring antithesis between idealism and realism- between what is desirable normatively, and what is feasible politically. The gist of this argument is that international relations theory is inevitably an attempt to accommodate, rather than transcend, the perpetually contrasting ideas about utopia and reality. Robert M. A. *Crawford, Idealism and Realism in International Relations: Beyond the Discipline* (London: Routledge, 2000) at 176, available at: *http://elibrary.kiu.ac.ug:8080/jspui/bitstream/1/186/1/Idealism%20and%20realism%20international%20relations.pdf*.

Kissinger as one among forerunners in realism himself condemned 'diplomatic victory' by crude tricks as counterproductive and thereby self-defeating exercise for one indulging in tricks to win in diplomacy.[8] Rather than shortcut, tricksters risk the diplomatic mission itself to suffer short-circuit. Also, pseudo-realism put international relations in general and national interest in particular to real peril. Despite its potential toward formulation of foreign policy, resort to geopolitics ought to get limited to where the same suits. Geopolitics constitutes one but not only component of foreign policy.

III. FOREIGN POLICY AS PUBLIC POLICY

While geopolitics constitutes a component of foreign policy, the foreign policy itself constitutes a component of public policy to grapple with external affairs worldwide. Besides there are heads of internal policy as well and together these constitute policy as formal expression of state governmentality.[9] Whether external

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8. Like the classic writers on diplomacy he (Kissinger) counseled against yielding to the temptation to strive for a 'diplomatic victory' as counterproductive. A universal 'victory', he argued, cannot be maintained indefinitely, since no country will adhere for any prolonged period of time to an agreement that is against its interests. Ultimately, diplomatic victories 'mortgage the future' and ought therefore to be avoided in favour of 'quiet diplomacy'. Not surprisingly he also emphasized the importance of cultivating an impression of reliability in diplomatic negotiations as a major foreign policy asset. In words that echo Callieres's plea for honesty in diplomatic dealings, Kissinger observed that 'in foreign policy crude tricks are almost always self-defeating'.T. G. Otte, "Kissinger", in G. R. Berridge*et al* (ed.), *Diplomatic Theory from Machiavelli to Kissinger*(New York: Palgrave, 2001)at 198, available at: *http://drmarcjeanbernard.weebly.com/uploads/3/7/5/0/37501827/studies-in-diplomacy-geoff-berridge-h-m-a-keens-soper-thomas-g-otte-palgrave-connect-online-service-diplomatic-theory.pdf*.

9. We live in the era of a 'governmentality' first discovered in the eighteenth century. This governmentalization of the state is a singularly paradoxical phenomenon, since if in fact of the problems of governmentality and the techniques of government have become the only political issue, the only real space for political struggle and contestation, this is because the governmentalization of the state is at the same time what has permitted the state to survive, and it is possible to suppose that if the state is what it is today, this is so precisely thanks to this governmentality, which is at once internal and external to the state, since it is the tactics of government which make possible the continual definition and redefinition of what is within the competence of the state and what is not, the public versus the private, and so on; thus the state can only be understood in its survival and its limits on the basis of the general tactics of governmentality.Graham Burchell*et al* (ed.), *The Foucault Effect: Studies in Governmentality with Two Lectures by and an Interview with Michel Foucault* (The University of Chicago Press, 1991) at 103, available at: *https://laelectrodomestica.files.wordpress.com/2014/07/the-foucault-effect-studies-in-governmentality.pdf*.

counterpart reigns, or otherwise, is a question of fact that may and does vary with given time and place.[10]*Prima facie* seems tension between internal and external policymaking, the conundrum is set toexplore more fundamental issues, like the statemeta-policy of India to offer precedence to internal policyover its external counterpart.[11]Rather than preference to home front, most unlikely position for statesmen like Nehru to hold, the prudence lies in introduction of bottom-up approach to keep the people as source of state policy in course of their tryst with destiny.[12] While reading great policymakers, meta-policy behind their policy perspective is bound to attractattention.

By and large there lies strategic synergy between them to balance given statecraft better. Unlike earlier, in democratic system of governance, public opinion performscriticalrole in state policy formulation and foreign policy is no exception to this end. Not without reason that policy emerges as social science genre and stands customized as public policy in the contemporary age with methodological nitty-gritty of its own.Unlike erstwhile regime, therefore, the people-rather thanthose in government- own public policy since the same is considered as collective construct and thereby belongs to public domain; not too limited toelitecrowdand belongs to cabinet or ministry alone.Withthe sense of belongingness in its favour, foreign policy of the state does possess better legacy before the world. Also, broad-based consensus among subjects is bound to boost the confidence of policymakers, viz. minister and practitioner alike, and thereby facilitate the policy pursuit manifold to bring in laurels for foreign policy in time ahead.

From "body corporate"perspective, policy in a(ny) system stands attributed to state and not to government led by political teams with respective ideological orientations of their own. In case of democratic governance,along with universal adult franchise as characteristics, foreign policy stands construed as clear reflection

10. The internal policy and the foreign policy of a country always interact. There are occasions and situations where foreign policy exerts the dominant influence.Asoka Mehta, "India's Foreign Policy Examined", *The New International*, September-October 1951, pp.283-284,available at: *https://www.marxists.org/history/etol/newspape/ni/vol17/no05/v17n05-w150-sep-oct-1951-new-int.pdf*.

11. External affairs will follow internal affairs. Indeed, there is no basis for external affairs if internal affairs go wrong.Jawaharlal Nehru, in course of his speech in the Constituent Assembly Debates, March 8, 1948; as quoted in David Malone and Rohan Mukherjee, *Polity, Security and Foreign Policy in Contemporary India* (Canada: University of Montreal) available at: *http://archives.cerium.ca/IMG/pdf/POLITY_SECURITY_AND_FOREIGN_POLICY_IN_CONTEMPORARY_INDIA.pdf*.

12. For details on relevant discourse in law, refer to B. Rajagopal, "International Law from Below: Development, Social Movements, and Third World Resistance", *Cambridge University Press*, 2003.

of popular voice. Diplomats and all other policy practitioners, while taking part in policy formulation, ought to keep such axiom in conscience as meta-policy and prefer consensus policy so far as possible. In case of difference, opinionof the minister ought to prevail over since, albeit arguably, he but represents voice of the people. Even in case of his error, he may get educated by these practitioners around. They cannot formulate policy, nor prevail over the minister, even out of bona fide causesince accountability by default lies on the latter alone. In case of policy plunder, or any other blunder whatsoever, onus of impugned public policy ought to get left to those answerable to the electorate vis-à-vis transparency and accountability.[13] In final count, Nixon and not Kissinger, Monmohan Singh and not Montek Singh, need to pay the price with either resignation or electoral retreat for little fault on their part. In case of foreign policy, both minster and practitioner ought to take more caution since the same involves national position before the world at large.After all, unlike other heads of public policy, foreign policy seems one whose assessment is weighed with response from other(s).[14] Foreign policy devoid of prudence may and does culminate into conflict between and among statesincluding international armed conflictwith fateful aftermath worldwide.Clandestine foreign policy thwarts peaceful settlement of dispute for parties to get lostanyway and all are lost for the want prudence in foreign policy.Foreign policy- if prudent- maintains peace and security within and beyond the state alike.

In the postwar world in general, and in the post-bipolar world in particular, the genre of contemporary foreign policy underwent a metamorphosis to transcend beyond state institutional monopoly and thereby went increasingly less formal than

13. Within representative governments, ethics emphasizes fairness through the promotion of the general good ("the public interest"), open debate in decision-making (the principle of transparency), and accountability in terms of public service.Richard Nelson and FoadIzadi, "Ethics and Social Issues in Public Diplomacy", in Nancy Snow and Philip M. Taylor (eds.), *Routledge Handbook of Public Diplomacy*(New York: Routledge, 2009) at 337,available at: *http://bdinstitute.org/wp-content/uploads/2012/02/A1-handbookofpublicdiplomacy.pdf.*

14. Public reasons are among what Allen Buchanan calls "epistemic requirements for justified action". They are essential: social actors cannot operate without the resources with which to explain and understand their actions.This does not mean that the justification must be made publicly; diplomacy can be internal to the state, where the state deliberates within itself about the meaning of its interests and its behaviour. … One can therefore do public diplomacy all by oneself, though its effects in international politics depend very much on what others do in response.Ian Hurd, "Law and the Practice of Diplomacy", *Northwestern University International Journal*, 2011, pp.584-585, available at: *http://faculty.wcas.northwestern.edu/~ihu355/Home_files/practice%20of%20diplomacy.pdf.*

ever before.[15] By courtesy newer technology to facilitate access to official institutional information, constructive non-state actors initiated safeguard public interest from getting vitiated by either shrewd non-state actors with vested interest or the Leviathan state apparatus itself with pressure politics from within the given system with mala fide intention behind such subversion. Both the policy limbs, viz. transparency and accountability, being secured, foreign policy in democratic governance appears too fortified to get invaded anyway though there are flip sides of these otherwise beneficial postulates as well. Too much publicity of foreign policy is likely to facilitate others to dig into lacunae involved therein and thereby put the state concerned to jeopardy. Likewise, too much accountability is likely to prompt statesman and bureaucrat take backseat; at least not to risk their careerprospect anyway,andthereby safeguard self-interestrather than serve national interest which they are meant for. In a nutshell, balance- delicate balance-strikesthe heartbeat ofsteadyforeign policy.

In terms of foreign policy matter, human rights concern seems no less than others. If human rights get affected in consequence of policy, the latter ought to suffer setback through backlash from aggrieved citizenry to revive the former. Also, if not handled in time,such backlash poses potential threat to cause political topsy-turvy to topple the regime itself. The apprehension appears more tangible out of North-South divide[16] though other forms and contents of human rights aberration are plausible to this end. For instance, as foreign policy, practice of 'refoulmant' to

15. Governments and diplomats have progressively lost their monopoly over international relations. New ICT (information and communication revolution), by radically reducing the costs and increasing the speed of communication, has allowed a broad range of new actors to participate in the debate over, and implementation of, foreign policy, including sub-national governments, global NGOs and less formal groupings of citizens. Not only does new technology allow these new actors to communicate and collaborate more efficiently, but it has also opened up a treasury of sources of information through the World Wide Web, which means that they are frequently as well, if not better, informed on key policy issues and geopolitical developments than governments and their officials.Shaun Riordan, "Dialogue-based Public Diplomacy: A New Foreign Policy Paradigm?", in Jan Melissen (ed.), The New Public Diplomacy: Soft Power in International Relations, Palgrave Macmillan, New York, 2005, p. 190. Available at: *http://culturaldiplomacy.org/academy/pdf/research/books/soft_power/The_New_Public_Diplomacy.pdf.*

16. Just as Global South countries are becoming more assertive in their geopolitical thinking and acting, the same is happening with civil society in the South. In this context, civil society participation in the formulation of foreign policies is critical to ensure that the promotion and protection of human rights is a priority, as well as to demand accountability for a government's decisions and positions taken on the international stage.Camila Asano *et al*, *Foreign Policy and Human Rights: Strategies for Civil Society Action, Conectas Human Rights* (Sao Paolo, 2nd ed., 2014)at 8, available at: *http://conectas.org/arquivos/editor/files/CONECTAS%20ing_VERSAO04(1).pdf*.

resist the refugees penetrate within territorial jurisdiction offends human rights in vogue by international customs and thereby attract rule of *ergaomnes*, even if not *juscogens* as a peremptory norm of international law. Recent incidents of resistance perpetrated by the European states to optimize increasingly overwhelming flow ofthese West Asian refugees in millions raise widespreadcynicismthough no state knows policymaking to get rid of the samewith given international human rights jurisprudence worldwide.

IV. FOREIGN POLICY AS A SOURCE OF LAW

While the Statute of the International Court of Justice provides for diverse sources of international law, all these are but formal sources to be recognized by the Court. Besides there are informal sources as well and the same exert no less influence than their formal counterparts despite legal instruments observe stoic silence to this end. Foreign policy constitutes one among them.[17]There are few reasons behind silence: (i) foreign policy operates from behind, as meta-law,withcritical role in the process of lawmaking;[18] (ii) actors engaged in the process are hardly aware of interface between diverse sources in lawmaking;[19](iii) in the absence of cognizance

17. The political balance of power of a particular region is not a rule of international law, but it is one of the political and sociological bases of international law in the state system of a given region and at the same time a maxim of foreign policy.Rudolf L. Bindschedler*et al* (ed.), *North-Holland, Encyclopedia of Public International Law*, Volume 7 (Amsterdam, Elsevier Science Publishers, 1984)at 162, available at: *https://books.google.co.in/books?id=wza0BQAAQBAJ&printsec=frontcover#v=onepage&q&f=false*.

18. Apart from the rare cases of dictatorial interference there is not much state behaviour conceivable that could establish unlawful interference in external affairs. Comments as well as breaking off of diplomatic or commercial relations as a measure of disapproval of a foreign policy are common and have rarely been considered to contravene international law. Thus there is still much truth in the contention that the principle is concerned only with internal affairs of states.*Supra*, n. 15, at 359.

19. The relationship among social, political and legal internalization can be complex.Thus, the concept of transnational legal process has important implications, not just for international relations theories, but also for activists and political leaders. For activists, the constructive role of international law in the post-cold war era will be greatly enhanced if nongovernmental organizations seek self-consciously to participate in, influence, and ultimately enforce transnational legal process by promoting the internalization of international norms into domestic law. Nor can political leaders sensibly make foreign policy in a world bounded by global rules without understanding how legislative, judicial and executive branches can and should incorporate international legal rules into their decision-making.Harold HongjuKoh, *Why do Nations Obey International Law?* Review essay, Yale Law School Faculty Scholarship Series, 1-1-1997, pp.2657-2658, available at: *http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2897&context=fss_papers*.

of foreign policy, the samemay and does usurp superior positioning above law in an otherwise liberal democratic system of governance and thereby committed to the rule of law discourse since the judiciary prefers not to trespass into the domain of other powerhouses and thereby put the separation of powers in peril. Thus, foreign policy being policy choice ofthe executive, the same is not justiciable in the court; neitheranyway accountable otherwiseon the count of arbitrarinessdespite its critical role in lawmaking process, either for the state concerned or forthe international community, as the case may be.[20]The bottom-line statement hereby submitted lies here that foreign policy contributes to, if not constitutes in itself, law in ways of its own. This being the case in case of all in the international community, foreign policy may well be construed to formal source of international law- as "general principle of law recognized by civilized nations".[21]Likewise, at bottom, international law appears as the output of states' collective foreign policy initiatives. With these areas of overlap, at times, compartmentalization of law and public policy may offer more harm than help to appreciate the interface between them. Prudence, therefore, lies in reading international law and foreign policy together with holistic approach.

So far as national foreign policy toward International Court of Justice is concerned, there lies antinomy in the making of foreign policy in the sense that sometimes states are driven by messianic vision toward the Court while there are cases to prompt states turn chauvinistic and more so while core agenda of its national interest get defeated by the Court; albeit in course of its judicial process.[22]Indeed, USA appears to have been a classic illustration to this end, the same is more or less relevant to one and all except few, too few, across the world.[23]Driven by the same

20. Significant areas of foreign policy are excluded from judicial examination by such devices as the act of state doctrine, the principle of sovereign immunity, domestic jurisdiction clauses and self-judging reservations in treaties, and judicial deference to the executive on so-called political questions, furthermore, cases involving international law are often settled in national courts, or in international tribunals composed of representatives from various states; this undermines the credibility of the reasoning behind many international law decisions. As a result, few international disputes are adjudicated, and those that are may appear to have been decided politically rather than on the basis of international law.Terry Nardin, "Ethical Traditions in International Affairs", at 13, available at: *http://www.nyu.edu/classes/gmoran/NARDIN.pdf*.

21. The Charter of the United Nations, 1945, Article 38(1)(c).

22. Refer to Sean D. Murphy, "The United States and the International Court of Justice: Coping with Antinomies", George Washington Law Faculty Publications and Other Works, 2008, available at: *http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1902&context=faculty_publications*.

23. *Ibid*.,This antinomy is not unique to the United States; other states have similar lines of thinking in their foreign policy.

old realist foreign policy, there arebut poles apart illustrations vis-à-vis state behavior.Sometimes states strike amicable relations inter se and thereby rule out very possibility of the Court to meddle with their respective foreign policy affairs as is the case between China and Russia. On the contrary, by courtesy their experience in successive wars of 1914 and 1939 respectively, the European states prefer supranational institutional arrangement- court for peaceful settlement of disputes being one of them- to get rid of mutual relations at loggerheads.[24]An altogether different reasoning prompts developing states prefer institutionalism under the auspices of the Court to better safeguard their respective national interests from highhandedness of developed states while declining to submit before compulsory jurisdiction of the Court toward better safeguard of their vested national interests.[25]Thus, anunderlying opportunism in the making of foreign policy is clear on apparent face of the record. While USA played critical role in bringing in war criminals of the erstwhile Nazi regime under the Weimer Republic of Germany to justice before the International Military Tribunal at Nuremberg, the same state paid little heed to like jurisprudence while the same got caught by the International Court of Justice for its offences against Nicaragua.[26]A claim of victors' justice in the name

24. *Ibid*.,On one end of the spectrum- where realism dominates- lies China and Russia, where the institutionalism line of thinking has never taken hold. Those states see no national interest in being exposed to the jurisdiction of the Court and have succeeded in never appearing before the Court in a contentious case. In effect, China and Russia have no relationship with the Court, other than the presence of a judge of their nationality on the Court. A little further along the spectrum is the United States, whose relationship with the Court is dominated by realism but with a patina of institutionalism.Much further along the spectrum- moving into where institutionalism dominates- are the Europeans. For Europeans,As such, their attitude toward the International Court leans towards the institutionalist end of the spectrum.

25. *Ibid*.,Finally, also largely on the institutionalism side of the spectrum are many of the developing states … all of whom currently have cases pending at the Court. For them, the balance is also oriented toward the institutionalism approach because in most instances those states cannot rely on military or economic power to advance their national interests. By contrast, to the extent that embracing the Court provides a means for resolving intractable disputes among developing states, and a possible means for restricting the power of Western developed states, the World Court provides developing states with leverage that they would not have otherwise on their own. So while many developing nations have declined to expose themselves to the uncertainty of the Court's compulsory jurisdiction, they strongly favour the Court's existence, are quite interested in using it when possible to resolve disputes with neighbours, and are willing to use it on occasion against more powerful states.

26. For details, refer to judgment of the International Court of Justice on military and paramilitary activities in and against Nicaragua (*Nicaragua* v. *United States of America*), available at: *http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=nus&case=70&k=66&p3=0*.

of international justice- as alleged by the vanquished- is thereby fortified in practice. Likewise, developing states are no less dubious to this end. National foreign policy, with its given characteristics, constitutes a variable for international good governance toward a just and fair world.

V. FOREIGN POLICY UNDER THE CONSTITUTION

So far as constitutional governance in India is concerned, indeed, policy in general- and foreign policy in particular-found *de minimis* space as "law" in technical sense of the term. A foreign policy may be construed to be the law if the same is notified; while a lion's share of national foreign policy keeps quiet in its existence by default. Thus, foreign policy resembles breeze that the international community may sense,yet cannot seize the same. By courtesy its inbuilt characteristics, unless and until notified, foreign policy cannot be cited, while the same constitutes a source of national law.[27]Still policy may be held as law since the Constituent Assembly of India itself indulged in such practice,[28]and more so since the principle laid down therein is "fundamental in the governance of the country". Further, it shall be the duty of the State to apply these principles"in making laws" [sic.].[29]Thus, the cliché of argumentation against the importance of policy falls too short to ignore the same asconstituent of law since the statement constitutes a proposition of the Constitution itself; as fundamental law of the land. The assumption of state policy as law stands corroborated by observation in the floor of the Constituent Assembly itself while KrishnaswamiIyer asserted state policy as a matter of accountability for any ministryresponsible to the people.[30]Lateron, his jurisprudence gotaccepted by the

27. The Constitution of India, 1950, Article 13(3)(a).

28. 'Directive Principles of State Policy' as nomenclature of Part IV of the Constitution of India; read with 'certain principles of policy to be followed by the State', as provided for in Article 39 of the Constitution of India.

29. The Constitution of India, 1950, second and third statements as riders over the first statement of Article 37.

30. Shri AlladiKrishnaswamiIyer: (Madras: General): Directive Principles of State Policy, I should think, are also an important feature of the Constitution. Having regard to the wide nature of the subjects dealt with in these articles and the obvious difficulty in making the subjects dealt with by these article justiciable, they have been classed as directive principles of state policy. The principles of (Irish) social policy have their basis in the Preamble to the Constitution and the Objectives Resolution. Article 37 in express terms lays down therein 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. No ministry responsible to the people can afford lightheartedly to ignore provisions in Part 5 of the (Draft) Constitution.*Constituent Assembly Debates (Proceedings)*- Volume IX, Wednesday, the 23rd November 1949. Available at: *http://164.100.47.132/LssNew/cadebatefiles/C23111949.pdf*.

Allahabad High Court and the same stands reiterated by the Supreme Court till date.[31-32]Thus, in constitutionalcontext-despite being policy-the impugned state policy "to respect international law and treaty obligations" constitutes the law in general, also a fundamental law of the land in particular, while the same stands as statutory foreign policy and,therefore, the law for the Republic of India. Thus, irrespective of executive policy choice in practice, the Constitution of India is but adhered to idealism; by courtesy its state policy while the same finds its position in the Constitution itself.[33]

The Constitution determined the legislative domain vis-à-vis foreign policy discourse in favour of Union of India[34] and detailed account on diverse heads of foreign policy may be traced from minute reading of 97 entries in List I under the Seventh Schedule to the Constitution, read with Article 246 of the Constitution.Already foreign policy issues within the cloak of law stood well understood, by courtesy the prior literature on allied areas of research.[35]Residual

31. It is an important case because it reveals that some departments of Government have not yet realized that in making applying, and interpreting rules governing the conditions of service of their employees it is the duty of State to apply the directive principles of state policy in Part IV of the Constitution.*Balwant Raj* v. *Union of India* [MANU/UP/0004/1968], at paragraph 1.

32. Part IV of the Constitution is as much a guiding light for the judicial organ of the State as the Executive and the legislative arms, all three being integral parts of "the State" within the meaning of Article 12 of the Constitution. A policy certainly cannot be axed for its alleged failure to comply with any of the provisions of Part IV. Neither can the courts charter a course, merely on the strength of the provisions of the said Part of the Constitution, if the effect thereof to lay down a policy. However, in a situation where the field is open and uncovered by any government policy, to guide and control everyday governmental action, surely, in the exercise of the jurisdiction under Article 142 of the Constitution, parameters can be laid down by this Court consistent with the objects enumerated by any of the provisions of Part IV. Such an exercise would be naturally time bound, i.e. till the Legislature or the Executive, as the case may be, steps in to fulfill its constitutional role and authority by framing an appropriate policy.Supreme Court of India judgment in *Common Cause* v. *Union of India* [MANU/SC/0604/2015], at paragraph 7.

33. The Constitution of India, 1950, Vide Article 51 of.

34. *Id.,* Article 246, read with relevant entries in List I (Union List) of Schedule VII to the Constitution of India.

35. It is the central government which, under the Seventh Schedule of the Constitution (which distributes functions between the central and state governments) is empowered to deal with or make laws on foreign policy. Article 246 of the Constitution says in its entry no. 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, that the Union or central government is responsible for foreign affairs: all matters which bring the union into relation with any foreign country, United Nations, international conferences/ associations, entering into treaties and agreements with foreign countries and implementing of treaties, agreements

bulk still remains least explored while the same constitute majority of the foreign policy discourse. As major constituent contributing to lawmaking, foreign policy beyond accountability net has had to two-fold flip sides: lack of credibility before the international community and lack of credibility before its own people. Assessment of both seems imperative for a(ny) liberal democratic state to uphold rule of law for better governance.

Lack of credibility before the world is bound to hit states hard; more so in the wake of globalization. For tourism purpose, the given brand "Incredible India" is sold well. The same is unlike to occur in case India turns incredible to international community out of its foreign policy sans accountability and the consequent price seems too dear to bear with; more so forIndian economy running behind the threshold of transition. Besides, internal legal regime is likely to suffer worse setback vis-à-vis rule of law since incredible India has had the potential to prompt already pampered powerhouses to take resort to highhandedness under the disguise of foreign policy and thereby take basic structure of the Constitution to real stake. As corollary proposition of aggressive foreign policy, for instance, the call of rightwing politics for nationalism culminated into catastrophic consequence in the Weimer Republic. In course of tryst with destiny, sooner India learnsthe lessonseems better for the Republic.

Indeed all nations, with the essence of nationalism, emerged as units of the so called international community in post-medieval occidental antiquity. At the same breath, there is parallel literature to prove thatthe same is not the case worldwide.[36]Rather, non-European states- that constitute majority of stakeholders- have never been nations in technical sense of the term the way linguistic and other ethnic characteristics did consolidation of peoples under the banner of similarity and thereby prompt Westerns treat outsiders as barbarians. To the then occidental foreign policy, thus, barbarians were equivalent to sub-humans and deserve treatment accordingly. The same cliché of parochialism, out of so called political realism, prompted otherwise foreign policy masterpieces elsewhere as well; like the Arthashastra in the South Asian subcontinent toward aggressive expansionism except an altogether different discourse encouraged by Ashoka after his metamorphosis in

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and conventions with foreign countries, power to make war and peace, and piracies 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 air, *etc*.Prakash Nanda, *Federalization of Indian Foreign Policy,* Occasional Paper Series, No. 13, Forum of Federations, Ottawa, at 5. Available at:

http://www.forumfed.org/en/pubs/OPS13_Federalisation_Indian_Foreign_Policy.pdf.

36. Rabindranath Tagore, *Nationalism* (1917). Also, refer to Partha Chatterjee, *The Nationalism and its Fragments* (1984).

post-Kalinga tenure. After Ashoka, however, all his sermons pour on deaf ears to prompt the then rulers return to status quo ante; along with same old realism and the fault lines involved therein.

In an increasingly globalized world, as is the experience in the contemporary world, crude political realism alone stands otiose since the same is bound to floor in no time even mighty states- e.g., USA, UK, and the like- to embarrassment before the world. A blend of idealism seems very need of the hour to attain credibility and, irrespective of its might, no state can and should afford to indulge in foreign policy sans idealism even if such a policy may turn trustworthy to none under the Sun. Likewise, despite being executive policy preference, foreign policy ought not to turn megalomaniac,overreach the law, and thereby offend rule of law discourse. In the given trajectory of global good governance, the same may at ease be (ab)used by predators to turn savages- albeit with diplomatic cloak of saviours- as were the consecutive occasions of US-led invasion on Iraq in theserecent decades.

VI. FOREIGN POLICY FOR GOOD GOVERNANCE

In final count, indeed foreign policy is subjected to the executive policy preference. Even the judiciary has hardly had jurisdiction to review foreign policy on the question of constitutionality. In practice, liberal democracy may and does allow other players in the making of foreign policy. Media play critical role in policymaking process.[37]As the Indian democracy matured, the media began to acquire greater visibility if not influence on policy making. The area of foreign and national security policies was no longer immune to the impact of the media. One of the unintended consequences of Indira Gandhi's short-lived Emergency Rule during 1975-77 was a palpable increase in the power of the print media and its new self-assurance. That the rulers of Delhi could be overthrown in elections helped generate

37. As the Indian democracy matured, the media began to acquire greater visibility if not influence on policy making. The area of foreign and national security policies was no longer immune to the impact of the media. One of the unintended consequences of Indira Gandhi's short-lived Emergency Rule during 1975-77 was a palpable increase in the power of the print media and its new self-assurance. That the rulers of Delhi could be overthrown in elections helped generate a more equal two-way relationship between the print media and the government. If the 1980s saw the steady accretion of the print media's power in the country, there has been a drastic surge in the power of the private electronic media since the late 1990s. This in turn has had a significant impact on the national security and foreign policy discourse within India.C. Raja Mohan, *The Making of Indian Foreign Policy: Role of Scholarship and Public Opinion*, Institute of South Asian Studies, Working Paper No. 73, National University of Singapore, at 7. Available at: *http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lang=en&id=103974*.

a more equal two-way relationship between the print media and the government. If the 1980s saw the steady accretion of the print media's power in the country, there has been a drastic surge in the power of the private electronic media since the late 1990s. This in turn has had a significant impact on the national security and foreign policy discourse within India.C. Raja Mohan, *The Making of Indian Foreign Policy: Role of Scholarship and Public Opinion* , Institute of South Asian Studies, Working Paper No. 73, National University of Singapore, at 7. Available at: Likewise, there are others to join their respective domains of policymaking.[38-39] Also, bureaucracy has had its own stake in formulation and continuation of foreign policy irrespective of political topsy-turvy in the seat of power through electoral politics.[40]Even intellectual think tanks nowadays attract attention out oftheir strategicpresence in given policy perspective.[41]Together these diverse stakeholders

38. The media is not the only new actor shaping India's foreign policy in the last two decades. Since the launch of the economic reforms, the business community has become an important influence in shaping relations with other nations as well as influencing the domestic public opinion and media on a range of political issues including those on foreign policy. Large individual business houses like the Tatas and Ambanis, as well as business associations like the Confederation of Indian Industry (CII) and the Federation of Indian Chambers of Commerce and Industry (FICCI) have become recognizably important in diplomacy as well as national discourse on foreign policy.*Supra*, n. 30, at 9.

39. Among the other forces that have emerged in recent years have been the military. After years of enduring the jack-boots of civilian control, the armed forces have begun to find their voice in national security. Organizations such as the United Services Institute have been revived, many retired members of the armed forces are now a regular fixture in the public discourse and have joined political parties. All three Indian services have now established their own think tanks that have begun to develop capabilities for research on foreign and national security issues and intervene in the public debates.*Supra*, n. 30, at 10.

40. *Ibid*.,Meanwhile, the strongest force in the making of Indian foreign policy, the bureaucracy, has had to adapt to the rising power and influence of the new institutions. … Given the extraordinary task of managing a large and diverse country, the weight of the permanent bureaucracy in making national security policies seemed to steadily increase. … Many of the early civil servants retiring from the Foreign Service made their reputation as scholars and publicists profoundly influencing the national discourse on foreign policy. The writings of Sardar K.M. Panikkar and K. P. S. Menon Sr. readily come to mind. With his prolific writing after his retirement in the early 1990s, J. N. Dixit seemed to carry on that tradition until his death in 2005.

41. The marginalization of the international relations scholarship and the underdeveloped potential to the foreign affairs think tanks did not in any way mean that history would stop for India's international relations. Ever since India embarked on the path of globalization nearly two decades ago, New Delhi has found many new opportunities for improving its standing in the regional and global stage. Nor can there be any doubt that

create their chorus to contribute toward pluralism; to voice their respective issues of concern to state. Whether and how far all these may get accommodated is a point apart. Competing, if not conflicting, interests pose newer challenges to this end. In spite of these hurdles, What matters is larger public participation in policymaking process toward progress.Thus, the archaicgenre of policymaking as classic expression of the governmentality finds its place in history. At least in liberal democracy, the policymaking resembles a popular construct and state alone can no longer have credit or discredit- as the case may be- for success or failure of whatever foreign policy operates in the international public domain. Tools and techniques of democratization in policymaking process thereby ease out such otherwise heavy burden on the statesmen toward formulation of foreign policy alone.

The policymaking process itself seems no less twisted than substance of the policy and plenty of players are engaged to score in ways of their own, e.g. media,[42]people in power and opposition, pressure groups, and the like.[43] Policymaking, in that sense, resembles not only wrestling between states, but also within those of the same state itself and not all of them win in the wrestling.[44] What

Indian diplomacy had demonstrated significant strategic imagination in recent decades. … I would argue that this was possible because of the existence of tiny, informal and consequential networks spanning the full spectrum of the Indian elite opinion and acting as vanguard of India's new foreign policy.*Supra*, n. 30, at 11.

42. Keep in mind, however, the relationship between decision makers and public opinion is complex: decision makers need public support for their policies, but their assessments of public opinion follow their own attempts to shape that opinion. Moreover, the media do not merely reflect the views of decision makers. They choose what to report and how to report. In doing so, they function as an intermediary that influences how the public frames or represents the issues.MarijkeBreuning, *Foreign Policy Analysis: A Comparative Introduction*(New York: Palgrave Macmillan, 2007)at 125.

43. The politics of many international negotiations can usefully be conceived as a two-level game. At the national level, domestic groups pursue their interests by pressuring the government to adopt favourable policies, and politicians seek power by constructing coalitions among those groups. At the international level, national governments seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments. Neither of the two games can be ignored by central decision-makers, so long as their countries remain interdependent, yet sovereign.Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-level Games,* Institute for US-China Issues, University of Oklahoma, USA, at 434. Available at: *http://www.ou.edu/uschina/texts/Putnam88Diplomacy.pdf*.

44. *Ibid*.,The political complexities for the players in this two-level game are staggering. Any key player at the international table who is dissatisfied with the outcome may upset the game board, and conversely, any leader who fails to satisfy his fellow players at the domestic table risks being evicted from his seat. On occasion, however, clever players will spot a move on one board that will trigger realignments on other boards, enabling them to achieve otherwise unachievable objectives.

the foreign policy practitioners attempt is balance of these rival pressure group interests to the best extent plausible. No team of negotiators sitting together to represent the same state is homogenous. Rather, on the contrary, negotiators themselves are so fragmentedwith group interests of their own that demonstration of integrated face for the team itself sometimes poses great hurdle for the state concerned. The way policymaking process is perceived as diversified with variables on the basis of international and domestic seems hyperbolic since both follow similar, if not the same, trajectory through series of negotiations, followed by adoption, of the final draft on the basis of broad consensus in both sides.[45]Astributaries to public policy, there is passage inter se for exchange between them.[46]After all, as mentioned above, both contribute to public policy.

Last but not least, morality plays great role in policymaking process and the same flows out of ancient antiquity; either out ofliterature[47] or from the pages of

45. Mutually beneficial interaction is also taking place between FPA (foreign policy analysis) and scholars in comparative politics. We are encouraged by the recent efforts to involve country and regional experts in explicating, testing and refining theories of foreign policy decision making. Foreign policy analysts have also begun to develop country and regional expertise for purposes of obtaining an empirical grounding for their theories. Such knowledge is particularly important because distinctions between foreign and domestic policy have blurred to the point that political science appears to require nothing less than an overall theory of human political choice. FPA theories seem to apply as much as to the explanation and projection of domestic policy choice as to foreign policy choice. Personal characteristics of leaders discourse, problem representation, creativity and learning, advisory processes, bureaucratic politics, legislative politics, societal groups, domestic political imperatives, and so on are as relevant to country and regional experts as to FPA analysts.Valerie M. Hudson and Christopher S. Vore, "Foreign Policy Analysis Yesterday, Today, and Tomorrow", 39(2) *Mershon International Studies Review*, 1995, at 228. Available at: *http://bev.berkeley.edu/fp/readings/ForeignPolicyAnalysisDomesticPolitics.pdf*.

46. The textual evidences of the Indian scholars provide very deep insight into foreign policy and diplomacy. Their views on the issues of war and peace, relevance of diplomacy, qualifications, duties, types and immunities of diplomats, reflect a sound principle of realism and their realism had a great bearing on domestic policy. Kautilya acknowledges in his 'Arthashastra' significance of foreign policy as extension of domestic policy. Foreign policy formed an important part in his statecraft. It exercised a deep impact on domestic policy and vice versa.Madhurendra Kumar, "Relevance of Ancient Indian Diplomatic Styles in Contemporary Era of Globalization", *Indian Political Science Association*, at 6. Available at: *http://paperroom.ipsa.org/papers/paper_37301.pdf*.

47. Vidura: The gods do not protect men, taking up clubs in their hands after the manner of herdsmen; unto those, however, they wish to protect, they grant intelligence. There is no doubt that one's objects meet with success in proportion to the attention he directs to righteousness and morality. The Vedas never rescue from sin a deceitful person living by falsehood. On the other hand, they forsake him while he is on his deathbed, like newly fledged birds forsaking their nests.Kisari Mohan Ganguli (tr.), *Vidura-niti, in The Mahabharata: UdyogaParva.* Available at: *http://www.hinduism.co.za/vidura-n.htm*.

history.[48] Even in the occident, in an otherwise masterpiece on realism, morality stood mooted as a strategy to safeguard the state from external threats and, as the Prince suggested, through minimizing the discontent of its subjects. In a way or other, good governance appears as prescription implicit in the narrative.[49] Otherwise conceived as a legacy for idealism, realists also took resort to good governance since the same is perceived as pragmaticsafeguards against threats from within the given system of governance. In recent history, for instance, Soviet Union collapsed from within its own system. The genre of RajadharmademonstratesSouth-Asian counterpart of good governance as corollary of its foreign policy to this end. Indeed crude realism in foreign policy put the subcontinent to the whirlpool of perennial conflict until the same got colonized by the British Empire. In most of these cases, historians witness reflection of the same in classic depiction, the victory often than not belongs to those who enjoyconfidence of their subjects.[50] The same stands subscribed by Apex Court of India.

Despite its variety, the key to success seems by and largeone- good governance.Be the same epic myth ofRamarajya- albeit sans religious rhetoric- or iconic rulers like Ashoka and Akbar, all of them did possess typical characteristics of good governance. Despite scriptures like the Manusmriti and the Arthashastra pleaded for crude realism in foreign policy, both of them pleaded for justice to prevail in domestic governance and with much more emphasis [sic.] than aggressive

48. The timeless relevance of Panchsheel is based on its firm roots in the cultural traditions of its originators, two of the world's most ancient civilizations. The linkage that was established by the spread of Buddhism in China laid the historical basis for the formulation of the principles by India and China.Vide information released on the formal occasion of fiftieth anniversary of Panchsheel, External Publicity Division, Ministry of External Affairs, Government of India, New Delhi, 2004, p. 3. Available at: *http://www.mea.gov.in/Uploads/PublicationDocs/191_panchsheel.pdf*.

49. Fortress, therefore, are useful or not according to circumstances; if they do you good in one way they injure you in another. And this question can be reasoned thus: the prince who has more to fear from the people than from foreigners ought to build fortresses, but he who has more to fear from foreigners than from the people ought to leave them alone. … For this reason the best possible fortress is- not to be hated by the people, because, although you may hold the fortresses, yet they will not save you if the people hate you, for there will never be wanting foreigners to assist people who have taken arms against you. … All these things considered then, I shall praise him who builds fortresses as well as him who does not, and I shall blame whoever, trusting in them, cares little about being hated by the people.W. K. Marriott (tr.), Nicolo Machiavelli, *The Prince* (1515), Constitution Society, 1908, at 106. Available at: *http://www.constitution.org/mac/prince20.htm*.

50. "Yato Dharma TatoJayah", refers to wisdom of ancient Indian antiquity- "truth alone is uphold"; as the same stands inscribed in dharma chakra logo of the Supreme Court of India. Available at: *http://supremecourtofindia.nic.in/supct/scm/m2.pdf*.

foreign policy since the former corresponds the latter with causal connectivity inter se;and all thesebeing insignia of public policyas instrumentality for good governance. Failure of one ought to hurt another and there lies reasoning for foreign policy to be moral and thereby legitimize not only domestic policy as its counterpart but also the given statecraft.Like statutes, regimes are readacross the worldin its entirety. In comprehensive context, therefore, the text of either foreign policy or domestic policy looks alike.[51] As mentioned earlier, all these are operative under larger umbrella of public policy.

VII. CONCLUSION

By now, out of these preceding paragraphs, some points may reasonably be drawn- albeit arguably- as derivative observations on the basis of arguments advanced above toconclude that: (i) initiated by geopolitics, foreign policy no longer remains limited to strategic studies alone; (ii) in modern liberal democracy, foreign policy is inbuilt in the larger public policy domain; (iii) foreign policy constitutes international law and laws of the land concernedalike, withits widely diversified means andmethods-either explicit or implicit- as the case may be; (iv) being instrumentality to statecraft, foreign policy is meant to attain whatever appearsimperative in larger public interest and accommodate whatever emerges afresh to address changing needs of the society for better governance.In other words, foreign policy appears as tentative embodiment of the governmentality either expressed through its policy documentation or implied through behaviouralblueprint of the state concerned(ex)posed in given circumstance. No state claims its foreign policy inimical to good governance.

Last but not least, who's good theforeign policy is meant for appears a moot point and the same ought to get clarified to the extent possible. To attempt the given polemics, the readership ought to put focus to the dicey chessboard of hitherto foreign affairs. There is a broad consensus with little dissent- if at all- that, as one among civilized stakeholders of the international community- by courtesy UN membership-any state foreign policy ought not to offendthe basic purpose of international public interest and thereby attain whatever is instrumental towardglobal good governance in general and universal human cause in particular.Indeed state foreign policy ought to serve national cause, but the same stands subject to regional and larger causes of humanity across the world and cannot turn inimical to sovereignty of all other(s) in given society of states. The way court of law turns blind eye towardscynicism- if not cannibalism-in foreign policy, therefore, deserves contemplation in time ahead since such a policy tends to aberration- and therefore

51. *Supra*, n. 39.

anathema- for the rule of law genre. The court, therefore, ought to take cognizance of the same lest the societysuccumb to lawlessness and get reduced to free-for-allone to gross detriment of morality that holds the humanity. After all, the rule of law genre and the principles involved themselves constitute public policy. Law-policy divide is more discursive in its essence than the same operates in practice. Neither there is face-off between realism and idealism as per popular perception since idealist foreign policy practitioner is in pursuit of national interest; with due diligence toward larger interest of international community. At times, in practice, the so called idealist policy proves its ideas more realist than hardcore realist practice per se in the contemporary world. At bottom, irrespective of discursive divergence, all these foreign policy practitioners ought to play their respective parts for larger project named civilization to move ahead toward "a just world under law"; to quote Prof. B. S. Chimni.

In lieu of conclusion, a conundrum of international law, with its given nomenclature, deserves restatement. National identity politics of respective states getting cornerstone of the term "International (sic.) Law", the same cannot afford to do away with states as individual units of the given society. Thus, statesemerge as systemic constituents; they are left with no other option but to engage foreign policy for the sake of survival. In final count, international law is meant to strike balance between two binary opposites, national sovereignty and its compromise. While the prevalence of national sovereignty ought to indulge in a free-for-all for states and thereby culminate into aggressive war inter se, prevalence of compromise vis-à-vis national sovereignty beyond threshold ought to put consequent end of international law since individual nations thereby get replaced by one confederation across the world; perhaps destination of the given trend of globalization if the same is stretched too far. The interplay of realism and idealism as inbuilt drivers of foreign policy of states as stakeholders of international community strives to attain the balance between national sovereignty and its compromise; albeit occasions of aberration apart. Despite discursive polemics, therefore, both have had potential in spearheadinga functional synergy of associationwithcommunity of states and assertion of state sovereignty; compromise with either ought to costthe errant state and the society too dear to bear with. As a responsible stakeholder of the society, India cannot afford to act otherwise in its given tryst with foreign policy.

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MEASURES FOR PROTECTION OFWOMEN FROM SEXUAL HARASSMENT AT WORKPLACEIN INDIA

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ABSTRACT : 'Sexual Harassment' has only recently become the matter of serious acknowledgement and study. It was late 1970s and early 1980s that proved to be a watershed in awareness and concern about the existence, prevalence and consequences of sexual harassment. International instruments cast an obligation on the countries to gender sensitize the laws and the Courts are under an obligation to see that the message of instruments is not allowed to be drowned. It is in this context that the present paper examines the framework of law on the subject in India. The constitutional mandate in the form of various provisions of fundamental rights, directive principles and fundamental duties has been discussed. The landmark decision of the Supreme Court in *Vishaka* case and followed by the enactment of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 have been discussed to bring to fore the existing framework on the subject. The paper also discussed provisions in other laws related to the issue.

KEY WORDS : Sexual harassment at work place, gender discrimination, Convention on the Elimination of All Forms of Discrimination against Women, Vishaka Guidelines, Fundamental rights.

I. INTRODUCTION

The very biology that enables women to bear children and to be worshiped as mother Goddess, condemns them to be constantly abused and considered good only for sex[1] and inspired for various sex crimes against women. 'Eve- teasing' and its aggravated form 'sexual harassment' are species of crime against women which are the symbol of exploitation and the greatest indignation of women. Sexual harassment of women and particularly working women at work place by their male counterparts is one of the evils of the modern society. Sexual harassment at workplace and educational institutions spells out loss of professional and academic

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1. Sobha Saxena, *Crimes against Women and Protective Laws*(New Delhi: Deep & Deep Publications, 1995)at 213.

self-confidence, discrimination, demoralization and also unemployment. Sexual harassment can range from lampooning and abuse to accidental jostling against women. This is one of the few crimes committed in broad day light. It has been completely ignored by public, Legislature and thereby police also. Work place harassment is in fact a display of power which is meant to coerce and degrade women. Supervisors, professors, bosses or co-workers make sexual advances mainly to women working under them in organizational hierarchy. If refused, they either make their life difficult or find excuses to fire them.[2] This menace keeps women in a state of dilemma, tension, uncertainty and the feeling of insecurity and helplessness wherever they are. This situation poses real problems for the working women to work freely at their workplaces.

'Sexual Harassment' has only recently become the matter of serious acknowledgement and study. However, sexual harassment had been identified in the 19thCentury when the 'Poor Law Commission' investigated working conditions.[3] Reports outlined sexual abuse of women and children workers by their employers. Incidents were also being reported in the United States by the early 20thCentury illustrate to main components of sexual harassment; that the perpetrator was invariably male, and that sex and power are integral aspects of sexual harassment.[4] It was late 1970s and early 1980s that proved to be a watershed in awareness and concern about the existence, prevalence and consequences of sexual harassment. The issues of power and sex had already become the subject of scrutiny regarding gender relations in respect of domestic violence in United Kingdom and rape in the United States, each country influencing other. Renewed interest in the behavior now known as sexual harassment arose initially in the United States.[5]

It is believed that LinFarley[6] first coined the phrase 'sexual harassment' while undertaking research into women's employment. Unexpected results that emerged during her investigation concerned the level and significance of unwanted sexual behavior. It became apparent during the three years project that men were viewing women workers as sexual objects rather than workers with specific tasks. Farley argued that the behavior was an assertion of male power as in the majority of incidents she uncovered the men in question held superior posts to the women they harassed, and, as the result of their actions, the men maintained and enhanced their

2. Shriniwas Gupta, "Sexual Harassment of Women at Workplace in India and Abroad", I *Amity Law Review*, 2000.
3. Nathalie *Hadjifotiou*, *Women and Harassment at Work*(London: Pluto Press, *1983*) at 7.
4. Hozel Houghton James, *Sexual Harassment*(London: Cavendish Publishing Ltd., 1995).
5. *Ibid.*
6. Lin Farley was an American author, ajournalist, feminist and she was a pioneer in calling attention to the problems of sexual harassment at workplace.

individual and group power.[7] But, the term can also be found in the index of a book published in 1975 by Susan Brownmiller entitled *Against our Will: Men, Women and Rape*. However, the expression does not have the same application as she applies it to general incidents of male behavior whereby they react to women in terms of their sexuality. While Farley and Brownmiller differ in the behavior they apply the term sexual harassment to, these two considerations of unwanted sexual behavior illustrate the fact that sexual harassment is behavior which is wide ranging and it can be experienced in any sphere of women's lives.[8] Definitions of sexual harassment have proliferated since the work of Farley and Brownmiller.[9]In common law the sexual harassment at work places is, generally, categorized into quid pro quo harassment and hostile environment harassment.[10]

*Quid pro quo*Sexual Harassmentrefers to sexual advances, requests for sexual favours and other verbal or physical conduct of a sexual nature when submission to such conduct is made explicitly a term or condition of an individual's employment or submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such an individual.[11]The key elements of *quid pro quo* sexual favour are the threat of adverse job consequence if the demand is refused and the perpetrator has to be in a position to create adverse job consequences for the women.[12] Adverse work consequences may be tangible such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, a decision to cause a significant change in benefits, a demotion evidence by decrease in way of salary or a less distinguished title and significantly diminished material responsibilities.[13] It is not necessary in an allegation of*quid pro quo* harassment that action have been carried out for the threat of adverse employment. It is sufficient that such a threat was made.[14]Hostile Environment Sexual Harassmentrefers to 'an unwelcome sexual advance, requests for sexual favour and other verbal or physical conduct of a sexual nature when such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.[15]

7. Heather Mclaughin, Christopher Uggen and Amy Blackstone, "Sexual Harassment, Workplace Authority and theParadox of Power", 77(4) *American Sociological Review,* 2012, at 4.
8. *Id.,*at 6.
9. *Ibid.*
10. Indira Jaisingh, *Law Relating to Sexual Harassment at the Workplace*(New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2004) at 4.
11. Hozel Houghton James, *supra* n. 4, at 7.
12. Indira Jaisingh,*supra* n. 10, at 5.
13. *Burlington* v. *Ellerth* 524 US 742 (1998).
14. *Ibid.*
15. 29 CFR Ch. XIV (January 7, 1993 Edn.) as quoted by Hazel Houghton James, *supra* n.4, at 7.

According to the Federal Equal Employment Opportunities Commission Guidelines on sexual harassment, the sex related misconduct which has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating hostile, or offensive environment; whether or not it is directly linked to an economic quid pro quo, constitutes sexual harassment. [16]Though the phrase 'hostile work environment' is not defined by the Supreme Court of India in *Vishaka*[17] and *Apparel Export*[18] but the phrase is found in *Vishaka*Guidelines where the Supreme Court relied on the statement in the relevant enquiry report that the perpetrator's conduct created an 'intimidating and hostile working environment'. The Court cited this as one of the reasons for reversing the finding of the High Court that there had been no sexual harassment.

II. INTERNATIONAL CONVENTIONSFOR PROTECTION OF WOMEN AGAINST SEXUAL HARASSMENT

The message of international instruments such as the Convention onthe Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) and the Beijing Declaration which directs all State parties to take appropriate measures to prevent discrimination of all forms against women besides takingsteps to protect the honour and dignity of women is loud and clear. The InternationalCovenant on Economic, Social and Cultural Rights containsseveral provisions particularly important for women. Article 7 recognizes herright to fair conditions for 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 instruments is not allowed to be drowned. While discussing constitutional requirements, Court and Counsels 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.[19] It may be pointed out that there is an important role of international conventions, covenants and declarations in protecting the women from the gender inequality and discrimination made out of sexual harassment at workplaces.

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16. *Mentor Saving Bank* v.*Vinson* 477 US 57(1986).
17. *Vishaka* v. *State of Rajasthan* (1997) 6 SCC 241.
18. *Apparel Export Promotion Council* v. *A.K. Chopra* (1999) 1 SCC 759.
19. *Ibid.*

III. CONSTITUTIONAL MEASURES FOR PROTECTION OF WOMEN AGAINST SEXUAL HARASSMENT

The Constitution of India guarantees to all Indian citizens certain fundamental rights including the right to equality and non-discrimination based on gender, right to work and the right to live withdignity.[20] Such constitutionally guaranteed rights go a long way in ensuring that women in India are protected from the problem of sexual harassment at the workplace.

Right to equality is one ofthe fundamental rights guaranteed by the Constitution of India and is contained in the 'equality code'. Sex discrimination is prohibited under the constitution through the combined scheme of Art.14, 15 and 16 of Indian Constitution. Supreme Court has in various cases held that gender equality enshrined in Art. 14 is one of the basic principles of the Constitution. Feminist critiques of violence again women suggested that the issue of sexual harassment at workplaces should be seen in the larger context of patriarchy and gender hierarchies which women are constantly subjected to. Therefore, the gender-based discrimination and the arbitrariness through sexual harassment at workplaces must be considered as violative of Art. 14 and the 'equality clause' of our Constitution. This linkage between right to equality and sexual harassment at workplaces (gender-based discrimination) has also been recognized by the Supreme Court in *Vishaka* case[21]. Art. 15 (3) enables the State to make special laws for the betterment and protection of women, thus Right to equality in Indian Constitution is a protective measure for the protection of women from all discriminations including sexual harassment.

Art. 19 (1)(g) of Indian Constitution provides a fundamental right to all the citizens to practice any profession and carry out any occupation, trade or business. Gender discrimination in employment adversely affects a women's freedom to carry out her occupation. The Supreme Court has struck down gender discrimination in employment in its several decisions. The service rules that placed an unfair burden on women were declared as discriminatory.[22] It has also been held by the Court that discriminationin employment arises when men and women are paid differently for the same work and the apex Court invoked the principles of the Equal Remuneration Act, 1976 to invalidate lower wages paid to the confidential female stenographers who were doing the same work as male stenographers working in the general pool under the category of clerical and subordinate staff.[23]The Supreme Court in *Vishaka*v.*State of Rajasthan*[24] held that one of the logical consequences

20. The Constitution of India, 1950, Arts. 14, 15 and 21.
21. *Supra* note 17
22. *C.B. Muthamma, I.F.S.* v. *Union of India* (1979)4 SCC 260.
23. *MacknnonMackenzi and Co.* v. *Audrey D'Costa*(1987) 2 SCC 469.
24. *Supra* note 17

of incidents of sexual harassment at workplaces is the violation of the woman's fundamental right under Art. 19(1)(g) to practice any profession or carry on any occupation, trade or business. The right depends on the availability of a safe working environment. Sexual harassment of women at their places of work exposes them to great risk and hazard and places them at an unfair position *vis-a-vis* other employee. This adversely affect their ability to realize their constitutionally guaranteed rights under Art. 19(1)(g).

Art. 21 provides for the protection of right to life and personal liberty. It has been observed by the Supreme Court in its several decisions that right to life under Art. 21 could not be equated to living out a mere animal existence. This right would necessarily imply the right to live with human dignity. It would include those aspects of life which made life meaningful, complete and worth living.[25] In *C.M.Mudaliar* v.*Idol of Sri Swaminath Swami Thirkoil*,[26]the Supreme Court has held that equality and dignity of person and the right to development are inherent rights in every human being. For the meaningful enjoyment of right to life under Art.21,every woman is entitled to the elimination of obstacles and discrimination based on gender. The Court further observed that the state has an obligation to eliminate gender-based discrimination and to create conditions and facilities conducive for women to realize the right to economic development including social and cultural rights.In *Vishaka* v. *State of Rajasthan*,[27]the Supreme Court observed that each incident of sexual harassment of women at workplace is a violation of the right to life under Art.21 which implies the right to dignity. According to the opinion of apex Court, the principle of gender equality includes protection from sexual harassment and the right to work with dignity which had also been reflected in international conventions and norms.Another facet of the right enshrined in Art. 21 is right to privacy and an act of sexual harassment is a violation of the right to privacy of a woman and therefore of the right to personal liberty under Art. 21. Supreme Court opined that any questions to a female candidate regarding personal problems such as pregnancy, menstruation etc. disclosure of which may affect the modesty or self-respect should be excluded from enquiry by the Employer.[28]It may, therefore, be pointed out that the right to life and personal liberty under Art. 21 is a protective measure against sexual harassment at workplace.

Directive Principles of State Policy in the part IV of the Indian Constitution are fundamental to the good governance of the country.Though these principles are

25. *DTC* v. *DTC Mazdoor Congress* (1991) 1 SCC 600;*Olga Tellis* v. *Bombay Municipal Corporation* (1985) 3 SCC 545, *State of Maharashtra* v.*Chandrabhan* (1983)3SCC 387.
26. (1996) 8 SCC 525.
27. *Supra* note 17
28. *NeeraMathur (Mrs.)* v. *LIC* (1992) 1 SCC 286.

not enforceable by the court, the State is expected to be guided by these considerations in making law and framing policy.[29] Supreme Court of India has opined that Directive Principles embodied in Part IV of the Constitution are asimportant as the rights of individuals.[30]The Directive Principles of State Policy under Articles 39[31] and 42[32] are relevant to the prevention of Sexual harassment of women at workplaces.

In addition to fundamental rights and directive principles of State Policy,the Constitution also consists of certain fundamental duties of every citizen of India.[33] It is the duty of every citizen to abide by the Constitution and to respect its ideal and institutions.[34] This fundamental duty of Indian citizens would,certainly, include the principle of gender equality and non-discrimination on the ground of sex and gender. It would also require respect for all the principlesand guidelines laid down in the *Vishaka Case* by the apex Indian Judiciary. There is further duty of every citizen of the country to renounce practicesderogatory to the dignity of women.[35] Therefore, it is meaningful to say that it isthe fundamental duty of Indian citizen not to harass the women at workplaces and to protect them from such sexual harassment.

Art. 32 of the Constitution of India establishes the right to move the Supreme Court through appropriate writ petitions for the enforcement of fundamental rights.

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29. The Constitution of India, 1950, Art.37: Application of the principles contained in this Part.-The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down 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.
30. *Keshavanand Bharti* v. *State of Kerala* (1973) 4 SCC 225.
31. The Constitution of India, 1950, Art. 39: Certain principles of policy to be followed by the State.- The State shall, in particular, direct its policy towards securing- (a) that the citizens, men and women equally, have the right to an adequate means of livelihood; (b) that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; (d) that there is equal pay for equal work for both men and women; (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.
32. *Id.,* Art. 42: Provision for just and humane conditions of work and maternity relief.-The State shall make provision for securing just and humane conditions of work and for maternity relief.
33. *Id.,* Art. 51A.
34. *Id.,* Art. 51A (a).
35. *Id.,* Art. 51A(e).

Similarly, Art. 226 provides for the right to move the appropriate High Court for the remedy for violation of fundamental rights and other legal rights. In recent times, the fundamental rights have been expandedelaborately through the interpretation by the courts and therefore, there has been an expansion in the jurisdiction of Art. 32 and 226. The interpretation made in *Vishaka*[36] case is itself an example of this expansive role undertaken by the Court. In this case the Supreme Court articulated the power of Court under Art. 32 to make fundamental rights meaningful. The Supreme Court has held that rape and sexual assault as violation of fundamental rights of women and awarded compensation.[37] The Court referred to Art. 38(1) of the Constitution to set up a Criminal Injuries Compensation Board. Since sexual harassment of women at workplace is a violation of fundamental rights in Art. 14, 15, 19 and 21 as established by *Vishaka*[38] and *Apparel Export Promotion Council* v. *A.K. Chopra*[39] therefore a woman who is the victim of sexual harassment atworkplace have legitimate claim for compensation also. The court in *Vishaka* referred to the International Covenant on Civil and Political Rights (ICCPR) and judgment like *NilabatiBehera*v. *State of Orissa*[40] to indicate anenforceable right to compensation. Therefore,it may be submitted that in case of sexual harassment at workplaces, women may seek compensation for violation of their fundamental rights. The discussion may be concluded with the observation of Supreme Court that the meaning and content of fundamental rights guaranteed in the Constitution of India are sufficient amplitude to encompass all the facets of gender equality including sexual harassment or abuse.[41] The elimination of discrimination based on genderhas been one of the founding stones of the Constitutional edifice of India. The principleof gender equality is sufficiently incorporated in Indian Constitution through its Preamble, fundamental rights, fundamental duties and Directive Principles of State Policy.

In the absence of domestic law occupying the field and existing protective mechanism, the Supreme Court evolved guidelines as the measure to protect the women from sexual harassment at workplace and to prevent this vice resulting in the violation of important fundamental rights of women workers. When evolving these Guidelines, the Court relied on the norms and principles contained in international conventions including the convention on the Elimination of all forms of Discrimination Against women (CEDAW). The Court observed that in theabsence of enacted law to provide for the effective enforcement of the basichuman right of

36. *Supra* note 17.
37. *Delhi Domestic Working Women's Forum* v. *Union of India* (1995) 1 SCC 14.
38. *Supra* note 17.
39. *Supra* note 18.
40. (1993) 2 SCC 746.
41. *Supra* note 18; *see alsoVishaka* Case*Supra* note 17.

gender equality any guarantee against Sexual harassment andabuse, more particularly sexual harassment at workplaces, the court lays downthe guidelines and norms specified hereinafter for due observance at all workplaces or other institutions until a legislation is enacted for the purpose. These guidelines were being followed by the employers until the enactment of The Sexual Harassment of Women at Workplace(Prevention, Prohibition, and Redressal) Act 2013.

IV. THE SEXUAL HARASSEMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013

After enacting the Act, India has now become part of a select group of countries to have prohibited sexual harassment at workplaces through national legislation. It is a unique legislation, having broad coverage which includes all working women from organized and unorganized sectors alike, as also public and private sectors, regardless of hierarchy.[42]The Act is enacted with an objective to prevent and protect women from all kind of sexual harassment at workplaces and for the redressal of complaints of sexual harassment.[43] It defines sexual harassment at the work place and creates a mechanism for redressal of complaints. It also provides safeguards against false or malicious charges.It covers concepts of *quid pro quo* harassment and hostile work environment as forms of sexual harassment if it occurs in connection with an act or behavior of sexual harassment.[44]The definition of aggrieved woman, who will get protection under the Act is extremely wide to cover all women, irrespective of her age or employment status, whether in the organized or unorganized sectors, public or private and covers clients, customers and domestic workers as

42. *Handbook on Sexual Harassment of Women at Workplace(Prevention, Prohibition and Redressal) Act, 2013* for Employees/Institutions/Organisations/InternalComplaint Committee/Local Complaint Committee, Ministry of Women and Child Development, Government of India, 2015.

43. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, Preamble.

44. *Id.,* Section 2(n) defines sexual harassment. Sexual harassment includes anyone or more of the following unwelcome acts or behaviour (whether directly or by implication), namely Physical contact and advances, or A demand or request for sexual favours, orMaking sexually coloured remarks, or Showing pornography, or Any other unwelcome physical, verbal, non-verbal conduct of sexual nature Section 3 (2) of the Act further elaborates that if any of the following circumstances occurs or is present in relation to or connected with any act or behavior of sexual harassment among other circumstances, it may amount to sexual harassment- Implied or explicit promise of preferential treatment in her employment, or Implied or explicit threat of detrimental treatment in her employment, or Implied or explicit threat about her present or future employment status, or Interference with her work or creating an intimidating or offensive or hostile work environment for her, or Humiliating treatment likely to affect her health or safety.

well.[45]While the workplace in the *Vishaka* Guidelines is confined to the traditional office set-up where there is a clear employer-employee relationship, the Act goes much further to include organizations, department, office, branch unit *etc*. in the public and private sector, organized and unorganized, hospitals, nursing homes, educational institutions, sports institutes, stadiums, sports complex and any place visited by the employee during the course of employment including the transportation. Even non-traditional workplaces which involve tele-commuting will get covered under this law.[46]

Constitution of Complaint Committee

The Act mandates the employer to constitute internal complaint committee at the workplace and requires to constitute the same at all units or offices if the offices or administrative units of the workplace are located at different places or divisional or sub-divisional level.[47]ICC shall consists of a presiding officer who shall be a woman employed at a senior level[48], at least two members from amongst employees preferably committed to the cause of women or who have had experience in social work or have legal knowledge and one member from amongst non-governmental

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45. *Id.,* Section 2(a), aggrieved woman means; In relation to a workplace, a woman of any age whether employed or not, who alleges to have been subjected to any act of sexual harassment by the respondent; In relation to a dwelling place or house, a woman of any age who is employed in such a dwelling or house.
46. *Id.,* Section 2(o), workplace includes any department, organization, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or acorporation or a cooperative society Any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organization, unit or service provider carrying on commercial , professional, vocational, educational, entertainment, industrial, health services or financial activities including production, supply, sale, distribution or service Hospital or nursing homes Any sports institute, stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating to it Any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such journey A dwelling or a house.
47. *Id.,* Section 4(1).
48. *Id.,* According to the proviso to sub-section 2(a) of Section 4 of the Act, in case senior level woman employee is not available, the presiding officer shall be nominated from other offices or administrative units of the workplace and further if other offices or administrative units do not have senior level woman employee, the presiding officer shall be nominated from any other workplace of the same employer or other department or organization.

organizations or associations committed to the cause of women or person familiar with the issue relating to sexual harassment.[49]Provisions of Section 4(2)(b) of Act does not require nomination of two Members amongst employees simpliciter but selection of two Members from amongst employees who are preferably be committed for cause of women or have experience or have legal knowledge and therefore the constitution of complaint committee was held illegal being contrary to the provisions of section 4(2)(b) where the respondent could not place on record any material to show that persons appointed as members of committee were committed to the cause of women or had experience in social work or had legal knowledge and could not establish that none of the employees working in the institution fulfilled relevant requirement.[50]

It is further Provided that at least one-half of the total members so nominated shall be women.[51] The Presiding Officer or any Member of ICC, shall be removed from the Committee and the vacancy so created or any casual vacancy shall be filled by fresh nomination in accordance with the provisions of section 4 if hecontravenes the provisions of section 16 or has been convicted for an offence or an inquiry into an offence under any lawfor the time being· in force is pending against him or he has been found guilty in anydisciplinary proceedings or a disciplinary proceeding is pending against him or has so abused his position as to render his continuance in office prejudicial to the public interest.[52] In the event of situation that the employer does not constitute ICC or the complaint is itself against the employer, the District Officer shall constitute in the district concerned, a committee to be known as the "Local Complaints Committee" to receive complaints of sexual harassmentfrom establishments.[53] The appropriate government is conferred the authority to notify a District Magistrate or Additional District Magistrate or the Collector or Deputy Collector as a District **Officer,for every District to exercise powers or discharge functions under this Act.[54]The District Officer shall designate one nodal officer in every block, taluka andtehsil rural or tribal area and ward or municipality in the urban area. The nodal officer shall receive complaints and forward the same to the concerned Local Complaints Committee within a period of seven days.[55]The Local Complaint Committee**

49. *Id.,*Section 4(2).
50. *Jaya Kodate* v.*Rashtrasant Tukdoji Maharaj Nagpur* MANU/MH/0912/2014.
51. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, Proviso to Section 4(2)(c).
52. *Id.,*Section 4(5).
53. *Id.,*Section 6(1).
54. *Id.,* Section 5.
55. *Id.,*Section 6(2).

shall consist of a Chairperson to be nominated from amongst the eminent women in the fieldof social work and committed to the cause of women, one Member to be nominated from amongst the women working in block, taluka or tehsil or ward or municipality in the district, two Members, of whom at least one shall be a woman, to be nominated from amongst such non-governmental organisations or associations committed to the cause of women or a person familiar with the issues relating to sexual harassment.[56] It is also the condition precedent that at least one of the nominees should, preferably, have a backgroundin law or legal knowledge and that at least one of the nominees shall be a woman belonging tothe Scheduled Castes or the Scheduled Tribes or the Other Backward Classes orminority community.[57] The concerned officer dealing with the social welfare or women and childdevelopment in the district, shall be a member *ex officio* to LCC.[58] The Chairman and anymember of LCC shall be removed from the office for the same reasons on which the members and chairman of ICC may be removed.[59]

Complaint

Any aggrieved woman may make, in writing, a complaint of sexual harassment at workplace to the Internal Committee if so constituted, or the Local Committee, in case it is notso constituted, within a period of three months from the date of incident and in case of a series of incidents, within a period of three months from the date of last incident.[60]In the contingency where such complaint cannot be made in writing, the Presiding Officer orany Member of the Internal Committee or the Chairperson or any Member of the LocalCommittee, as the case may be, is required to render all reasonable assistance to the woman formaking the complaint in writing.[61]Legal heir of the aggrieved woman or such other person as may be prescribed is entitled to make a complaint under this section in case if the aggrieved woman is unable to make complaint on account of her physical or mental incapacity or death or otherwise.[62]Internal Complaint Committee or the Local Complaint Committee can extend the time limit not exceeding threemonths, for filing the complaintif it is satisfied that the circumstances were such which prevented the woman from filing a complaint within the prescribed time period. This discretion of ICC and LCC is restricted by imposing the rider that ICC or LCC shall be obliged

56. *Id.,*Section 7(1).
57. *Id.,* Proviso to Section 7(1)(c).
58. *Id.,*Section 7(1)(d).
59. *Id.,*Section 7(3).
60. *Id.,*Section9(1).
61. *Id.,* Proviso to Section 9(1).
62. *Id.,*Section 9(2).

to record the reasons for such decision to extend the time period.[63]

Enquiry

Section 10 of the Act introduces the mechanism of Alternative Dispute Resolution by incorporating the process of Conciliation. According to the provision in section 10(1) at the request of aggrieved woman, the ICC or LCCmay take steps to settle the matter trough Conciliation before initiating the enquiry with the restriction that no monetary settlement shall be the basis for conciliation. If the settlement is arrived at in this process, the ICCor LCC shall record the settlement so arrived andforward the same to the employer or the District Officer to take action as specified in therecommendation. The ICC or LCC shall provide the copies of recorded settlement to aggrieved woman and respondent and there shall be no further enquiry if the settlement has arrived at in the process of conciliation.[64]If there was no request for conciliation by the aggrieved woman or the conciliation does not succeed or aggrieved woman informs the ICC or the LCC that any term or condition of the settlement arrived at has not been complied with by the respondent the ICC or LCC shall initiate enquiry. Where the respondent is an employee, the ICC or LCC shall proceed to make inquiry into the complaint in accordance with the provisions of the service rules applicable to the respondent and where no such rules exist, in such manner as may be prescribed. In case of a domestic worker, if prima facie case exists, the LCC shall forward the complaint to the police, within a period of seven days for registering the case under section509 of the Indian Penal Code, and any other relevant provisions of the said Code whereapplicable.[65]Where both the parties are employees, the parties shall, during the course of inquiry, be given an opportunity of being heard and a copy of the findings shall be furnished to both the parties enabling them to make representation against thefindings before the Committee.[66]

For the purpose of conducting enquiries under the Act, the Complaint Committees shall have the powers of civil courts under Code of Civil Procedure 1908.[67]Committees are required to complete the inquiry within a time period of 90 days.[68]During the pendency of enquiry on a written request made by the aggrievedwoman, the Complaint Committee may recommend to the employer to

63. *Id.,* Second Proviso to Section 9(1).
64. *Id.,* Section 10(2).
65. *Id.,* Section 11(1).
66. *Id.,* Second Proviso to Section 11(1).
67. *Id.,* Section 11(3).
68. *Id.,* Section 11(4).

transfer the aggrieved woman or the respondent to any other workplace or to grant leave to the aggrieved woman up to a period of three months or to grant such other relief to the aggrieved woman as may be prescribed.[69] It is relevant to mention that the leave so granted to the aggrieved woman shall be in addition to the leave she would be otherwise entitled.[70] On the completion of an inquiry under this Act, the Complaint Committee shall submit a report of its findings to the employer, or the District Officer with in a period of ten days from the date of completion of the inquiry and such report shall be made available to the concerned parties.[71] Where the Complaint Committee arrives at the conclusion that the allegation against the respondent has not been proved, it shall recommend to the employer or the District Officer, as the case may be,that no action is required to be taken in the matter and if it arrives at conclusion that the allegation against respondent has been proved, the Complaint Committee shall recommend to take action for sexual harassment as a misconduct in accordance with the provisions of service rules applicable to the respondent or where no such service rules have been made , in such manner as may be prescribed or to deduct from the salary or wages of the respondent such sum as it consider appropriate to be paid to the aggrieved woman or to her legal heirs. The Committee is required to determine such sum of money in accordance with section 15[72] of the Act.[73] The Delhi High Court has held that the contention of the petitioner that the employer had no jurisdiction to enquire into complaint and that ICC had no power to make recommendation for termination of service of petitioner is misconceived and is not acceptable in the view of the fact that as per provisions of the Act, ICC shall recommend the action which is to be taken against employee. Of course that action has to be in accordance with service rules and there shall be no violation of principles of natural justice.[74]

The employer or the District Officer shall take action on the recommendation

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69. *Id.,* Section 12(1).
70. *Id.,* Section 12(2).
71. *Id.,* Section 13(1).
72. *Id.,* Section 15. For the purpose of determining the sums to be paid to the aggrieved woman underclause *(ii)* of sub-section *(3)* of section 13. the Internal Committee or the Local Committee, asthe case may be, shall have regard to (a} the mental trauma, pain, suffering and emotional distress caused to theaggrieved woman; *(b)* the loss in the career opportunity due to the incident of sexual harassment; (c) medical expenses incurred by the victim for physical or psychiatric treatment; *(d)* the income and financial stah1s of the respondent; (e) feasibility of such payment in lump sum or in installments.
73. *Id.,* Section 13(2),(3).
74. *Gaurav Jain* v.*Hindustan Latex Family Planning Promotion Trust* 2015 SCC OnLine Del 11026.

within 60 days of its receipt by him.[75] During the enquiry if the ICC or LCC arrives at conclusion that allegation made against the respondent is malicious or the aggrieved woman or any other person knowingly made false complaint or has produced any forged or misleading document or any witness has given false evidence or produced any forged or misleading document, it may recommend the employer or the District Officer as the case may be, to take necessary action against the aggrieved woman or the person or the witness.[76]The legislature seems to be sufficiently sensitive towards the confidentiality of enquiry process and therefore lays down that the identity and address of aggrieved woman or respondent, information relating to conciliation, inquiry proceedings, recommendations by the committee or the action taken under the provisions of the Act shall not be published or made known to the public, press and media in any manner notwithstanding anything in the Right to Information Act 2005.[77]Section 17 imposes the Penalty for publication or making known contents of complaint and inquiry proceedings. Any person aggrieved from the recommendations made by the Complaint Committee or non-implementation of suchrecommendations by the employer or the District Officer may prefer an appeal to the court or tribunal in accordance with theprovisions of the service rules applicable to the said person or where no such service rulesexist then, without prejudice to provisions contained in any other law for the time being inforce within the period of 90 days of recommendation.[78] The question of maintainability of a petition filed before the High Court of Madhya Pradesh(Gwalior Bench) under Art. 226 of Indian Constitution to challenge the inquiry report of ICC was raised on the ground that the grievance of petitioner amounts to "service matter" and the proper forum is the Central Administrative Tribunal being the court of first instance for the purpose of adjudication of service matters. The court opines that section 3(q) within its ambit takes disciplinary matters. A conjoint reading of section 11, 13, 18, 19 of the Act makes it clear that incident of sexual harassment amounts to misconduct and the inquiry on the complaints has to be made as per service rules. The definition of "service matters" in the Administrative Tribunal Act 1985 includes the disciplinary matters. It is also clear that internal inquiry under the Act falls within the ambit of "service matters". Therefore the tribunal will have the jurisdiction to decide the said aspect. As the person aggrieved by the recommendation of the committee can challenge it before the court or tribunal in accordance with the provisions of service rules applicable to the said person on merit or on the constitution of the committee

75. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013,Section 13(4).
76. *Id.,*Section 14.
77. *Id.,*Section 16.
78. *Id.,* Section 18.

which has ultimately given the recommendation, hence in view of the above mentioned provisions and the decision of the Supreme Court of India in *L. Chandra Kumar* v *Union of India*,[79] the proper forum for any person aggrieved by the recommendation of complaint committee or the constitution of the committee under this Act shall be the Tribunal and not the court.[80]

The Act imposes the duty on employers to provide safe working environment at workplace, to display conspicuousplace in the workplace and penal consequences of sexual harassment, to monitor timely submission of reports by the ICC, to provide assistance to the woman if she chooses to file any complaint and to conduct education and sensitizationprogrammes and develop policies against sexual harassment, among other obligations.[81]The employers are put subject to the penalty for non-compliance of the provisions of the Act whichshall be punishable with a fine up to ₹ 50,000.[82] Repeated violations may lead to higher penalties and even cancellation of license or registration to conduct business. The nature of the offence under this Act is considered to be non-cognizable and the court[83] can take cognizance of any offence under the Act only on the complaint made by the aggrieved woman or any person authorized by ICC or LCC in this behalf.[84]

V. OTHER LAWS ON SEXUAL HARASSMENT AT WORK PLACE

The Industrial Employment (Standing Orders) Act, 1946 is a Parliamentary enactment with an objective to require employers to define and publish uniform conditions of employment in the form of standing orders.[85] According to the Act the standing orders should contain terms of employment including, hours of work, wage rates, shift working, attendance and late coming, provision for leaves and holidays and termination or suspension/dismissal of employees. This Act is applicable to 'industrial establishments employing a minimum of 100 workmen.[86] The Standing

79. AIR 1995 SC 1151.
80. *Ramesh Pal* v.*Union of India and Ors* MANU/MP/0121/2014.
81. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013,Section 19.
82. *Id.,* Section 26(1).
83. Not being the court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class.
84. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013,Section 27.
85. The Industrial Employment (Standing Orders) Act, 1946,Statement of object.
86. *Id.,* Section 1(3).
87. The Model Standing orders are prescribed under the Industrial Employment(Standing Orders) Rules, 1996.

Orders Act prescribes Model Standing Orders,[87] serving as guidelines for employers and in the event that an employer has not framed and certified its own standing orders, the provisions of the Model Standing Orders shall be applicable.[88] The Model Standing Orders prescribed under the Industrial Employment (Standing Orders) Central Rules, 1996 ("Standing Orders Rules") prescribe a list of acts constituting 'misconduct' and specifically includes sexual harassment. The Model Standing Orders not only defines 'sexual harassment' in line with the definition under the *Vishaka* Judgment, but also envisages the requirement to set up a complaint committee for redressal of grievances pertaining to workplace sexual harassment. Penalties are prescribed to be imposed over employers for non-compliance of the provisions of the Act.[89]

Conduct that may be construed as sexual harassment also constitute an offence under the IPC and therefore the provisions of Act are declared to be in addition to and not in derogation of the provisions of any other law in this regard.[90]The Criminal Law (Amendment) Act, 2013has amended Section 354, Indian Penal Code and inserted Ss 354-A, 354-B, 354-C, and 354-D to stipulate offence of sexual harassment and the penalties for the same. Offences stipulated by these provisions and section 509, IPC include Sexual harassment bya man[91], Assault or use of criminalforce to woman with intentto disrobe[92], Voyeurism[93], Stalking[94], and insulting

88. The Industrial Employment (Standing Orders) Act, 1946,Section 12A.
89. *Id.,*Section 13.
90. The Sexual Harassment of Women(Prevention, Prohibition and Redressal) Act, 2013, Section 28.
91. The Indian Penal Code, 1860, Section 354A: If a man makes any physical contact and advances involving unwelcome and explicit sexual overtures demand or request for sexual favours or shows pornography against the will of a woman or makes sexually coloured remarks shall be considered to have committed the offence of sexual harassment.
92. *Id.,*Section 354B; If a man assaults or uses criminal force to any woman or abets such an act with the intention of disrobing or compelling her to be naked shall be punished with Simple/Rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and fine.
93. *Id.,*Section 354C: If a man watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with simple/ rigorous imprisonment for a term which shall not be less than one year, but which may extend to three years, and fine and be punished on second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years and shall also be liable for fine.

the modesty ofa woman[95].

VI. CONCLUSION

The law on the subject is in its early stage and together with relevant provisions of IPC and other laws it proposes to bring change in the way we look at the issue of sexual harassment of women at work place. The Act tries to provide a balanced set of provisions in the sense that it discourages frivolous complaints. It is also relevant to note that special mechanism for employees has been provided which together with the aspect of conciliation makes the Act seemingly a practical piece of legislation. These provisions shall ensure effective implementation of the Act. The long standing demand for a legislation to fill the gap identified by the apex court is a welcome move and it is relevant here to mention that the role of the highest court ofthe country has been very instrumental in getting the Act in its present form. Some ofthe finer issues under the Act will surface with the passage of time, however, it may be mentioned that conferring jurisdiction of CAT and SAT without any change in the composition of these bodies may dilute the possible implications of the Act.

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94. *Id.,* Section 354D: If any man follows a woman and contacts or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or monitors the use by a woman of the internet, email or any other form of electronic communication shall be punished on first conviction with the simple/ rigorous imprisonment for a term which may extend to three years, and fine and on second or subsequent conviction with the simple/ Rigorous imprisonment for a term which may extend to five years and fine.

95. *Id.,* Section 509: If a personutters any word or makes anysound or gesture or exhibitsany object or intends that suchword or sound shall be heard,or that such gesture or objectshall be seen, by a woman, with an intention to insult hermodesty, or intrudes upon theprivacy of such woman shall be punished with simple imprisonment fora term which may extend tothree years, and fine.

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RIGHT TO FOOD AND FOOD SECURITY OF INDIA

ANJALI AGRAWAL*

ABSTRACT: India's experience in legislating state duties for food provisioning as social protection is located in a long history of public action around food since India's birth, through which the state gradually expanded programmes for food provisioning, from subsidized food rations to young child feeding, school meals, and pensions for the aged. These measures were further deepened through judicial intervention, which converted these programmes into rights and then expanded and universalized them. India's policy strategies for supplying food to its large population through a network of highly decentralized institutions is instructive, because it both shares common ground and departs from the experience of other countries which have adopted large food provisioning programmes. India's statute for a legal and enforceable right to food was encouraged in significant part by an activist Supreme Court. This marked the culmination of a journey of more than a decade in the courts and Parliament, beginning with the filing of a petition in India's Supreme Court in 2012 for recognizing the legal right to food. This process involved extensive civic organization, historic judicial rulings, progressive political manifestos (in the elections of 2009, parties promised to legislate food security), and wide debates in and outside government. In brief, what National Food Security Act guarantees is highly subsidized - indeed nearly free - monthly rations of rice, wheat or millets to 75 percent of rural and 50 percent of urban populations (a total of around 800 million people); universal feeding programmes for preschool and schoolchildren, and pregnant and lactating mothers; and universal maternity entitlements. It also mandates the creation of institutional mechanisms (among them, grievance redress systems) for the enforcement of the law at national, state and district levels.

KEY WORDS: National Food Security Act, Food Security, Right to Food

I. INTRODUCTION

The right to food can be seen as an implication of the fundamental "right to life", enshrined in Article 21 of the Indian Constitution. The right to food can also be linked with Articles 39(a) and 47 of the Constitution. Article 39(a) directs the State to ensure that all citizens have "the right to an adequate means of

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livelihood".[1] According to Article 47 "the State shall regard raising the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties."In the statement, dated 17th January 2003,the National Human Rights Commission's clearly stated that "there is a fundamental right to be free from hunger".Supreme Court recognized that the fundamental right to life was a positive in *Francis Coraliev. Administrator, Union Territory of Delhi and Ors.*[1]

Human right to all, and a requirement for a life with dignity.[2] This includes the right to food. The Court therefore converted the range of existing food provisioning and social protection programmes into legal entitlements.In 2001, the People's Union for Civil Liberties (PUCL) filed a writ petition in the Supreme Court contending that the "right to food" is essential to the right to life as provided in Article 21 of the Constitution. During the ongoing litigation, the Court has issued several interim orders; including the implementation of eight central schemes as legal entitlements.[3]These include PDS, Antyodaya Anna Yojana (AAY), the Mid-Day Meal Scheme, and Integrated Child Development Services (ICDS). In 2008, the Court ordered that Below Poverty Line (BPL) families be entitled to 35 kg of food grains per month at subsidised prices.[4]The Universal Declaration of Human Rights and International Covenant on Economic, Social and Cultural Rights, to which India is a signatory, also cast responsibilities on all State parties to recognize the right of everyone to adequate food. Eradicating extreme poverty and hunger is one of the goals under the Millennium Development Goals of the United Nations.[5]

II. FOOD SECURITY

In pursuance of the constitutional obligations and obligations under the international conventions, providing food security has been focus of the Government's planning and policy.According to FAO (1996) "Food security exists when all the people at all the times have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life."While M.S Swaminathan has added another dimension to food security,

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1 (1981) 1 SCC 608.

2 C. Gonsalvez, P.R.Kumar and A.K. Srivastava (eds.) *Right to Food* (New Delhi: Human Rights Law Network, 2005) pp.404-42.

3 Interim order dated November 28, 2001 in *PUCL* v. *Union of India and Ors.,* Supreme Court Writ Petition [Civil] No. 196 of 2001.

4 *Ibid.*

5. The National Food Security Bill, 2011, Twenty Seventh Report, Ministry of Consumer Affairs, Food And Public Distribution (Department of Food And Public Distribution.

he defines food security as Livelihood security for the households and all members within which ensures both physical and economic access to balanced diet, safe drinking water, environmental sanitation, primary education and basic health care.[6]Food security is conventionally viewed in terms of three components, Food availability, accessibility and utilization.

a) Food availability

The availability of sufficient quantities of food of appropriate qualities, supplied through domestic production or imports (including food aid).

b) Food access

Access by individuals to adequate resources (entitlements) to acquire appropriate foods for a nutritious diet. Nobel Laureate Amartya Sen famously wrote that "starvation is a matter of somepeople not having enough food to eat, and not a matter of there being not enough food to eat."The irony is that most of the food-insecure live in rural areas where food is produced, but are net food buyers rather than sellers.[7]

c) Food utilization

Food utilization relates to the capacity of an individual to absorb and utilize the nutrients in the food she consumers, and is determined by practice, beliefs, eating habits, hygiene, sanitation and health.

In 2013, the USDA estimates that there were 842 million people around the world suffering from food insecurity. Despite considerable progress in reducing poverty (a nearly 9% reduction was achieved between 2004 and 2010), 30% of people lives below poverty line live in India and about 190 million Indians remain undernourished. Food security remains a major problem for the country.[8]In 2012–2014, one in nine people in the world – over 800 million people – went to sleep hungry.[9] One in three people in the world who are denied enough to eat are found in India. Even after becoming the second fastest growing economy in the world in the first decade of this century, India's endemic hunger and malnutrition have persisted, with one child in two still malnourished, and according to some estimates 190 million

6. M.S Swaminathan,"Science and Technology Sustainable Food Security," XI(4) *Indian Journal of Agricultural Economics,* 1996.
7. Amartya Sen, "Ingredients of Famine Analysis: Availability and Entitlements",96(3) *Quarterly Journal of Economics*, 1981, pp.433–64.
8. M.W. Rosegrant, *International Model for Policy Analysis of Agricultural Commodities and Trade (IMPACT): Model Description,* International Food Policy Research Institute (IFPRI), Washington, D.C, available at: *http://www.ifpri.org/book-751/ourwork/program/impact-mode.*
9. "The State of Food Insecurity in the World", available at *http://www.fao.org/hunger/en.*

people going to sleep hungry every night.[10]Ensuring food security of the people, however, continues to be a challenge.

III. FOOD SECURITY BILL (FSB)

Since we have the Targeted Public Distribution System (TPDS), which provides food grains, sugar and oil at highly subsidized prices to the poor then the question is what is the need for the FSB? TPDS is an inefficient mode of transfer of subsidies, one that is prone to enormous leakages. Indeed, studies confirm very high leakages into the black market, gross mis-targeting, and high waste in the costs of transferring subsidies in the form of food transfers.[11]The main problem with the TPDS is that it does not effectively reach the poor. While the FSB aims at effectively reaching all the poor.So for establishing a universal right to food National Food Security Bill 2011 was introduced in the Lok Sabha on 22nd December, 2011 and the Hon'ble Speaker referred the Bill on 5th January, 2012 to the Standing Committee on Food, Consumer Affairs and Public Distribution for examination and report in terms of the Rule 331(E) of the Rules of Procedure and Conduct of Business in Lok Sabha.[12]

The Food Security Bill (FSB) passed by Lok Sabha provides for 5 Kg per person per month of cereals – rice, wheat and coarse grains at Rs. 3.00, Rs., 2.00 and Rs. 1.00 per kg respectively- to priority households and 35 kg per month to Antyodaya households. The persons covered may be as many as 75 percent of rural and 50 percent of urban population. The proposed legislation marks a paradigm shift in addressing the problem of food security – from the current welfare approach to a right based approach. About two thirds of the population will be entitled to receive subsidized food grains under Targeted Public Distribution System. It will also confer legal rights on women and children and other Special Groups such as destitute, homeless, disaster and emergency affected persons and persons living in starvation, to receive meal free of charge or at affordable price, as the case may be.[13]

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10. International Fund for Agricultural Development&World Food Programme,2014; the State of Food Insecurity in the World, 2014; and Strengthening the Enabling Environment for FoodSecurity and Nutrition.
11. A. Gulati, andS. Saini, *Leakages from the Public Distribution System and the way forward*, Working Paper No., Indian Council for Research on International Economic Relations, 2015,at 294, available at: *http://icrier.org/pdf/Working_Paper_294.pdf.*
12. Standing Committee on Food, Consumer Affairs and Public Distribution, 2012-13), Fifteenth Lok Sabha, Ministry of Consumer Affairs, Food and Public Distribution, Department of Food and Public Distribution, January 2013, The National Food Security Bill, 2011, Twenty Seventh Report.
13. Himanshu and Abhijit Sen, "Why Not a Universal Food Security Legislation?", XLVI(12) *Economic & PoliticalWeekly*, 2011.

IV. NATIONAL FOOD SECURITY ACT, 2013

After over a year of deliberations and consultations with various stakeholders, the Parliamentary Committee submitted its report to the Parliament on January 17, 2013, which was subsequently forwarded to the government. The government incorporated most of the proposed amendments of the parliamentary committee, and the revised National Food Security Bill 2013 was approved by the Union Cabinet Ministers. As passed by the Parliament, Government has notified the National Food Security Act, 2013 on 10th September, 2013 with the objective to provide for food and nutritional security in human life cycle approach, by ensuring access to adequate quantity of quality food at affordable prices to people to live a life with dignity. It aims to provide subsidized food grains to approximately two thirds of India's 1.2 billion people.[14]

The legislation is a landmark, and perhaps the largest food security program in the world. The Act is indeed an important effort to ensure that the majority of population in India has access to adequate quantity of food at affordable prices. The National Food Security Act gives statutory backing to the TPDS. This legislation marks a shift in the right to food as a legal right rather than a general entitlement. The Act classifies the population into three categories: excluded (i.e., no entitlement), priority (entitlement), and Antyodaya Anna Yojana (AAY; higher entitlement).

Salient Features of National Food Security Act

a) Coverage and entitlement under Targeted Public Distribution System (TPDS): Upto 75% of the rural population and 50% of the urban population will be covered under TPDS, with uniform entitlement of 5 kg per person per month. However, since Antyodaya Anna Yojana (AAY) households constitute poorest of the poor, and are presently entitled to 35 kg per household per month, entitlement of existing AAY households will be protected at 35 kg per household per month.

b) State-wise coverage: Corresponding to the all India coverage of 75% and 50% in the rural and urban areas, State-wise coverage will be determined by the Central Government. Planning Commission has determined the State-wise coverage by using the NSS Household Consumption Survey data for 2011-12.

c) Subsidised prices under TPDS and their revision: Food grains under TPDS will be made available at subsidised prices of Rs. 3/2/1 per kg for rice, wheat and coarse grains for a period of three years from the date of commencement of the Act. Thereafter prices will be suitably linked to Minimum Support Price (MSP). In case, any State's allocation under the Act is lower than their current

14. The National Food Security Bill, 2013 received the Assent of the President of India.

allocation, it will be protected upto the level of average off take under normal TPDS during last three years, at prices to be determined by the Central Government. Existing prices for APL households i.e. Rs. 6.10 per kg for wheat and Rs 8.30 per kg for rice has been determined as issue prices for the additional allocation to protect the average off take during last three years.

d) Identification of Households: Within the coverage under TPDS determined for each State, the work of identification of eligible households is to be done by States/UTs.

e) Nutritional Support to women and children: Pregnant women and lactating mothers and children in the age group of 6 months to 14 years will be entitled to meals as per prescribed nutritional norms under Integrated Child Development Services (ICDS) and Mid-Day Meal (MDM) schemes. Higher nutritional norms have been prescribed for malnourished children upto 6 years of age.

f) Maternity Benefit: Pregnant women and lactating mothers will also be entitled to receive maternity benefit of not less than Rs. 6,000.[15]

g) Women Empowerment: Eldest woman of the household of age 18 years or above to be the head of the household for the purpose of issuing of ration cards.

h) Grievance RedressalMechanism: Grievance redressal mechanism at the District and State levels. States will have the flexibility to use the existing machinery or set up separate mechanism.

i) Cost of intra-State transportation & handling of food grains and FPS Dealers' margin: Central Government will provide assistance to States in meeting the expenditure incurred by them on transportation of food grains within the State, its handling and FPS dealers' margin as per norms to be devised for this purpose.

j) Transparency and Accountability: Provisions have been made for disclosure of records relating to PDS, social audits and setting up of Vigilance Committees in order to ensure transparency and accountability.

k) Food Security Allowance: Provision for food security allowance to entitled beneficiaries in case of non-supply of entitled food grains or meals.[16]

l) Cash Transfers: The Indian system currently provides food grain supply through the Public Distribution System (PDS). The PDS is – inefficient, liable to high leakages; cash transfers are less prone to corruption and cheaper to deliver efficiently.

While National Food Security Act, 2013 includes cash transfers and food

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15. "Indian Cabinet Approves National Food Security Bill 2013", *Global Agriculture Information Report*, USDA Foreign Agricultural Service, Report No. IN3037, 2013.
16. Ministry of Food & Public Distribution, Ministry of Consumers Affairs Food & Public Distribution, Government of India.

coupons as possible alternative mechanisms to the PDS.[17]Beneficiaries would be given either cash or coupons by the state government, which they can exchange for food grains. Such programmes provide cash directly to a target group – usually poor households. Some potential advantages of these programmes include: (i) reduced administrative costs, (ii) expanded choices for beneficiaries, and (iii) competitive pricing among grocery stores.However, cash transfers may expose recipients to price fluctuation, if they are not frequently adjusted for inflation. Such programmes also do not address the issue of inclusion of ineligible beneficiaries and the exclusion of eligible ones. Additionally, since cash transfers include the transfer of money directly to the beneficiary, poor access to banks and post offices in some areas may reduce their effectiveness.[18]

V. GRAIN REQUIREMENTS FOR IMPLEMENTING NATIONAL FOOD SECURITY ACT

The annual requirement of foodgrains for implementation of NFSA has been estimated by several committees and studies. As per the Government of India's assessment, it is about 61 million tons. The methodology for this assessment is not clear though. A more scientific assessment is the one carried out by the Expert Group of the Prime Minister's Economic Advisory Council headed by Dr C. Rangarajan (henceforth called the Rangarajan Committee). This report makes use of the current population numbers to make projections of the requirements. According to these projections, 69 and 74 million tons of foodgrains will be required at current and 100% offtake respectively.

Table:1 Total Requirement for NFSA (in mill tons)

	At current off take	At 100% off take
Rangarajan Committee	69	74
Requirement for existing TPDS (from GOI statements)	61.43	-

Source: 1) Report of the Expert Committee on National Food Security Bill *http://eac.gov.in/reports/rep_NFSB.pdf.*
2) Minister of State for Food's reply to Indian Parliament *http://164.100.47.132/lssnew/psearch/qsearch15.aspx*.

17. The National Food Security Bill 2011, introduced inLok Sabha on December 22, 2011, clause 18 (2)(h).
18. ReetikaKhera, "Revival of the Public Distribution System: Evidence and Explanations", *Economic and Political Weekly*, November 5, 2011.

With coverage of 75% of the rural population and 50% of the urban population, two factors become important in the state-wise allocations under NFSA- number of beneficiary households and scale of issue per household. Since the scale of issue is virtually unchanged, the actual allocations will depend upon the number of beneficiary households. However, the NFSA also stipulates that the allocation should at least be equal to the last three years' average off take of a state. Therefore, the annual allocation under NFSA will be equal to or higher than the current allocations under the TPDS. As already stated above, the projected requirements for NFSA range from 61 million tons by the GOI to 74 million tons by the Rangarajan Committee (2012). Dreze et al. (2014) estimated the grain requirements for different states, using state-specific exclusion ratios based on state-specific food security lines. Their estimates show an aggregate grain requirement of about 55 million tons for 2013-14 at the national level, which is exactly equal to the allocation made under the NFSA.[19]Adding about 5 million tons for other welfare schemes (OWP) and emergency reserves, it is eshimated at a total requirement of about 60 million tons, which is roughly equal to the GOI assessment. Given the abovementioned assessments of requirements and projections of future supply, India may, at best, be able to meet the requirements of NFSA from domestic production, with very little exportable surplus. The country may even need to import food grains in some bad years of production shocks. Exports appear highly unlikely in future. With the huge level of stocks at present, this may not be imminent though. At the current levels of production and procurement of foodgrains, the requirements under NFSA are likely to be met domestically and no price distortion in international market is foreseen. However, with the demand outstripping production in future, as most of the studies seem to suggest, the drawdown of stocks may be inevitable. Therefore, the possibility of India distorting international trade through its public stockholding of food seems remote in the face of its growing population and the grain requirements under the National Food Security Act.

VI. FISCAL IMPLICATIONS OF NFSA

NFSA needs to be carefully evaluated to take into account not only the cost of food subsidy, but also the additional costs of setting up/running of new institutions

19. AnwarulHoda and Ashok Gulati, *India's Agricultural Trade Policy and Sustainable Development Goals*, ICTSD Programme on Agricultural Trade and Sustainable Development, Issue Paper No 49, International Centre for Trade and Sustainable Development, Geneva, Switzerland, 2013, available at: *www.ictsd.org*.

and bureaucracies, and the additional costs that are likely to arise if there are political pressures to protect the existing beneficiaries, many of whom are not grand fathered even after many revisions of the bill. When these are taken into account, the FSA may entail significantly higher burdens than currently envisaged. There are three additional dimensions, which can potentially magnify the fiscal implications. First, if the implementation of the FSA includes "grand-fathering" of existing beneficiaries, since not everyone will be better off in the new regime, the estimated fiscal cost could be higher. Second, if implementation of the act requires merging the current classification under the TPDS with new and more careful identification schemes, we should also consider the consequences of misclassification. Carrying over the currently misclassified into the new system may also entail additional fiscal implications. Third, the open-ended procurement policies of the government (whereby the government commits to buying unlimited quantities of wheat and rice at a "minimum support price" (MSP) have implied that procurement has typically been much higher than the required quantity of food grains). For example, on average over the last 10 years between 2002-03 and 2011-12, procurement has been 40 percent higher than the off-take from the public distribution system. If we add these costs of additional procurement to the Incremental food grain requirement in the FSA, the estimated fiscal cost can increase substantially.[20]

Subsidy Cost of FSA

We estimate the fiscal cost of the current version of the Act, which proposes to cover 75 percent of the rural population, and 50 percent of the urban population with an entitlement of 5 kg per person per month of foodgrains at issue prices of Rs. 2 and 3 per kg for wheat and rice respectively. This proposal has only two categories: covered and uncovered, rather than three (priority, general and uncovered) in the previous version of the bill. The AAY (Antyodaya AnnaYojana) households will receive an additional 10 kgs of food grains per household to protect their existing allocations. The food subsidy cost of implementing the FSA is estimated at Rs. 124,502 crores for 2013-14. The food subsidy is calculated as:[Economic cost-issue price]Food grain requirement. The "economic" cost computed by the FCI includes in addition to the MSP, handling, storage and distribution costs. The calculation assumes a total coverage of 75 percent of rural and 50 percent of the urban population. An additional allocation of food grains of 6.5 million tons for other welfare schemes (OWS) is also included in the final act. This includes provision of additional 5 kgs of grain per month to pregnant womenand new mothers and

20. Ministry of food & Public Distribution, Ministry of Consumers Affairs Food & Public Distribution, Government of India.

free mid-day meals in schools for children in the age group of 2-16 years. The total food grain requirement of the FSA is estimated at 61.2 million tons, this includes an additional 2.9 million tons to protect the allocation to states under the existing TPDS. These estimates are in line with those of Food Ministry (MOFPD). The "incremental" food subsidy over and above the existing TPDS is estimated at Rs. 23,951 crores. This is equivalent to 0.2 percent of GDP. The incremental subsidy is the difference between the estimated cost of the FSA discussed above, and the cost of existing TPDS at Rs. 100,551 crores (based on 2000 population and 1993/94 poverty definition). So far as Government of India is concerned, estimated annual expenditure on food subsidy for full implementation of NFSA in all the States/UTs is about Rs.27,300 crore more than the estimated annual expenditure on food subsidy for erstwhile TPDS and other foodgrain based welfare schemes.[21]

Other Financial Costs of FSA

A commonly ignored fact is that even after several amendments, the Act entails significant new financial implications in addition to the food subsidy. This includese.g. the setting up/running of State Food Commissions and District Grievance redressal Offices (DGROs); expenditures on intrastate transportation of food grains; and cash benefits to pregnant and lactating women. Most of these expenditures would be incremental and was estimated with inputs from the MOF& PD at roughly Rs. 20,760 crores annually (see Table 2for details). Rs.8,760 crores would be incurred by the state, and the remaining cost would be shared between the centre and state (based on a sharing arrangement to be determined.

Table-2 DITAdditional Annual Expenditures under FSA (Rs. Crores)

	State	**Shared b/w center and state**	**Total**
District Grievance Redressal Office (DGRO)	320		
State Food Commission	140		
Expenditure on intra-state transportation and handling ofFoodgrains	8300		
Maternity benefit		12000	
Total	**8760**	12000	**20760**

Source MOF&PO

The total incremental fiscal cost of implementing the FSA over and above the existing TPDS (including the quantifiable expenditures in addition to the food subsidy) was thus estimated for 2013-14 at Rs. 44,711 crores. The estimated total incremental

21. Press Information Bureau Government of India, Ministry of Consumer Affairs, Food & Public Distribution.

fiscal cost for 2014-15 and 2015-16 are estimated at Rs. 47,392 and Rs. 50,591crores respectively.

Distributional Implications of FSA

In addition to the aggregate fiscal costs of implementing the Act, there will be distributional implications as well; where some individuals may gain, some may lose, and others may have their food expenditures unchanged. Although the procedure for identification of beneficiaries will be left to the states and is not specified in the Act, if we assume a natural ordering, we can conduct some simple simulation exercises to see how the current TPDS in a typical state will map into the new regime (see Table 3).

Table-3 Distributionall Implications: Current TPDS vs FSA

DistributionAAY		Covered		difference in issue price (TPDSNFSB) (Rs./ton)
137495			Wheat	Rice
Other BPL persons in '000		Covered increased expenditure	difference in issue price (TPDSNFSB) (Rs./ton)	
			2150	2650
221,122	62%			
APL persons 452,151	71%	Covered reduced expenditure	4100	2650
Remaining APL		No Coverage		
181,312	29%	IncreasedExpenditure		

*Note. The estimates for TPDS are based on how it is currently operated (1993/ 94 poverty ratio and 2000 population).*Source: Ministry of Food & Public Distribution

From the above table it is clear that 1- AllAAYs can be relabeled as "covered". They will be as well off as under the current TPDS; their entitlement will be unchanged at 7kg per person per month, and they will pay the same issue price: Rs. 2 and Rs. 3 per kg for wheat and rice respectively. 2-The remaining BPL individuals (62 percent) will obtain 5 kg of foodgrains at a lower issue price than under the TPDS but their entitlement will also reduce by 2 kg. Assuming current prices of wheat and rice (in the north zone at Rs. 19 and Rs. 27 per kg for wheat and rice respectively) and assuming they will demand at least as much as under TPDS, they will be strictly worse off (the loss on the 2 kg entitlement will outweigh the gain on the 5 kg). 3-71 percent of APLs will move into "covered" category. They will

obtain 2 kgs of additional food grains and a lower issue price relative to TPDS; they will be strictly better off. 4-The remaining APLs will move into "uncovered" and will be strictly worse off. 5-Overall, out of the current population covered under the existing TPDS, 46 percent will be strictly better off, 14 percent will be equally better off and 40 percent will be strictly worse off.

Table 4 Incremental Cost of Food Security Act Relative to Targeted Public Distribution: 2013-14 (Rs. Crores)

1/Baseline	23,951
Additional Costs Relative to Baseline	
2/Grandfathering	20,474
3/Misclassification	11,301
4/Miscellaneous expenditures	20,760
1/+2/+3/+4/	76,486
% of GDP	0.67
5/40% additional procurement	4,925
1/+2+3/+4/+5/	81,411
% of GDP	0.72

Source: Ministry of Food & Public Distribution

It is clear from the above table that the total incremental costs of implementing the FSA over the above the TPDS could range from Rs. 44,711 to Rs. 76,486 crores in 2013-14. The\smaller estimate was the baseline incremental costs, while the larger estimate includes the costs of grand fathering the existing beneficiaries and subsidizing the BPLs who are currently misclassified. If we add to it the cost of procuring additional grains according to historical norms, this would take the incremental costs of FSA to Rs. 81,411 crores (0.7 percent of GDP).

Performance of NFSA

The NFSA came into force in July 2013. In the first ten months, 11 states/UTs had started implementation covering about 7 crore households, while 14 more states rolled out NFSA in the last six months. Tamil Nadu, Uttar Pradesh, Meghalaya,

Jammu & Kashmir, Andaman & Nicobar, Gujarat, Kerala, Arunachal Pradesh are among 11 states which are yet to implement the Act. 17 states/UTs gain in terms of quantity of food grains. For successful implementation of the Act, the government said stress is being laid on end-to end computerization for which states are being technically and financially assisted. The beneficiary database has been digitized in 33 states/ UTs, wherein, information is available right up to beneficiary level and is in the public domain. Online allocation of food grains in being done in 17 states / UTs, and the entire food grain supply chain has been computerized in nine states/ UTs. All States have set up grievance redressal systems, it added.

To ensure leakage-free distribution of food grains, food subsidy is being transferred in cash into the bank account of beneficiaries in Chandigarh and Pondicherry on a pilot basis. That apart, a fair price shops are being automated for distribution of food grains through a point of sale (POS) device which authenticates beneficiaries at the time of distribution and also electronically captures the quantum of food grains distributed to the family. The targeted coverage under the PDS and NFSA Act is shown in the table-

Table -5 The targeted coverage under the PDS and NFSA Act

DistributionAAY		Covered		difference in issue price (TPDSNFSB) (Rs./ton)
137495			Wheat	Rice
Other BPL persons in '000		Covered increased expenditure	difference in issue price (TPDSNFSB) (Rs./ton)	
			2150	2650
221,122	62%			
APL persons 452,151	71%	Covered reduced expenditure	4100	2650
Remaining APL		No Coverage		
181,312	29%	IncreasedExpenditure		

Source: NSS 66th round January 2013, NSS 68th round February 2014, RBI, CRISIL Research

From the above table it is clear that the targeted coverage under the Act is a significant increase from current levels. Today, only 37% of India's population purchases subsidised rice from the public distribution system (PDS), while 28% buy wheat. While The NFSA entitles 67% of India's population (75% rural and 50% urban) to 5 kg per person per month of Subsidised food grains.

Impacts of NFSA

a) Impact on Nutrition and Health

India has the dubious distinction of being at the top of the chart for malnourished children and at the bottom of the chart for health indicators. In the minds of many, this is a disgrace and why India needs a scheme to provide food security. What impact would the National Food Security Act (NFSA) have on malnourishment and health? Some components of the NFSA such as mid-day meals and maternity benefits (nutritional supplements and cash) are directly targeted at nutrition. What about the supply of cheap rice and wheat? Some people hope that subsidized food grains will reduce malnourishment by inducing beneficiaries to consume more food grains and thereby more calories. However, malnutrition stems from many things including micronutrient deficiency, being ill informed about nutrition, and poor sanitation .The fact that other things matter has led critics to dismiss the nutritional impacts of food subsidies. This is incorrect too. Poor households typically consume about 10 kg of grain while the subsidy will be offered on a fraction of this amount (5 to 7 kgs).

b) Rationale for Income Transfers

The subsidy releases resources that could be spent on the purchase of more food grains or other foods or even non-foods. That's why the scheme to subsidize food grains is essentially an income transfer programme denominated in terms of the price of food grains. Kaul (2013) gives estimates of the elasticities of per capita calorie intake from different food groups with respect to rice subsidy per capita: 0.123 for cereals, 0.151 for lentils, 0.237 for fruits and vegetables and 0.169 for meat. Therefore, the income effect through the subsidy will allow beneficiaries to buy more food grains and also more nutritious food. Since the additional income can be spent on non-foods as well, the impacts will not just be restricted to nutrition. People could use the extra income for medical or educational expenses; farmers could use it to supplement their expenses for farm inputs. Two third of Indian households are rather poor and living on the brink and an income transfer of even Rs. 3000 a year can be handy in avoiding it. It can allow them a chance to live a life with dignity. In addition to the welfarist argument above, there are some instrumental arguments as well. First, the Indian economy has grown relatively fast over the last few decades but the gains have gone disproportionately to the top layer. The envy and resentment caused by such a pattern of growth can be politically unhealthy. It tears the social fabric leading to deterioration in institutional performance and the functioning of society.

Second, it is indisputable that the direct nutritional interventions such as meals for lactating and pregnant mothers as well as mid-day meals for school children would have a positive impact on the human capital of the next generation and should

therefore be considered an investment. Third, an income transfer programme of this sort can also lead to greater output through its impact on human capital and on the risk-taking ability of the poor. Consumption can thus translate into investment. Of course, these schemes are different in scale and intent from the income transfer programme under the food security Act in India.But the relevant point is that a well –implemented income transfer programmecan enable the poor to overcome the constraints of poverty and become more productive. Implementation of NFSA likely to provide additional disposable income to the poor**.**

Limitations of NFSA

There are some limitations of NFSA which are as follows-

i. High fiscal burden- subsidy cost above 1.25 lakh crore rupees per year.

ii. Government will have to keep large stock of foodgrains but FCI storage capacity is insufficient.

iii. Clearly, identification of the right beneficiaries is of utmost importance for the success of the NFSA on the ground. This is not only necessary to ensure that the needy get the benefits but also important if the leakages in the PDS are to be reduced. Unfortunately, these issues of PDS reforms find only token mention in the NFSA.

iv. NFSA will run into its biggest challenge. While it does specify the overall percentage of households, it has neither provided any mechanism to identify the beneficiaries nor does it provide any clear guidelines on who should be excluded and who should be included. While the Act suggests that identification be done by the states, most state governments are not clear how and on what basis should the beneficiaries be identified.

v. If so much food grains kept out of open market (and under FCI godowns)it would lead to food inflation, middle class will suffer. Government may have to import food grain during drought years, this will lead to additional current account deficit.(CAD)

vi. An Adult needs about14kg food grain. While NFSA gives only 5 kg per person to Priority households, which is highly inadequate.

VII. CONCLUSION

In conclusion, unless there is political commitment, backed by financial resources, the Food Security Act will not lead to major changes in food insecurity in the country. As experience in different states of India and internationally shows, the more universal the coverage, not only is the administration better, but targeting errors are reduced, thereby ensuring that the really needy are not excluded from the system. In this way if Food Security Act will be implemented, then it claims to provide citizens to access adequate quantity of quality food at affordable prices to

"live a life with dignity," and to provide for food and nutritional security in human lifecycle approach.

There are some suggestions which are as follows:

* As the Act is implemented, the definition of the priority or targeted population needs to be kept flexible, to allow State governments and local governments, to identify food insecure population and give them access to a minimum quantity of subsidized food.

* Indian economy is under declining trend in recent years as GDP is growing at the rate of 4-5%, additional expenditure required for implementation of NFSA would impose extra burden on exchequer.

* Programs such as right to food cannot depend on food grain imports. India will need to do its level best to enhance its food grain production. Sustainability of food security could be ensured with huge public investment in these regions over irrigation, CAD and particularly flood control

* The institutions that are set up as a part of national strategy for the realization of the right to food should be sufficiently well resourced. The right to food will only be truly realized where victims have access to an independent judiciary or other complaints mechanisms to complain about violations of the right to food. Moreover, potential victims should be adequately informed about their rights. In this context, we have to learn from the experiences of Brazil where crisis of funds affected the efficiency of strategy to be implemented.

The Food Security Act should be implemented with the intention of ending malnutrition in India.

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PROTECTION OF WHISTLE BLOWERS IN CORPORATE INDIA: A COMPARATIVE ANALYSIS

PRIYA RAVI*

ABSTRACT: Corruption has become the norm of the day. New mechanisms have to be strengthened so as to curb this evil. One such mechanism in Indian corporate field is the whistle blowing system. But the recent incidents in India show that whistle blowers are at risks. Some of them have lost their life for reporting the corrupt practices. So, it's high time to give more teeth to the laws in India to protect those who serves the interest of Justice.

KEY WORDS: Corruption, Company, Whistle, Whistle blowers, Protection, Good governance.

I. INTRODUCTION

Transparency and accountability are the norms of good governance. The system of Corporate Governance acts as a means to good governance in corporate world. Corporate Governance can be defined as "the acceptance by management of the inalienable rights of shareholders as the true owners of the corporation and of their own role as trustees on behalf of the shareholders. It is about commitment to values, about ethical business conduct and about making a distinction between personal and corporate funds in the management of a company"[1] It is a process by which the companies are directed and controlled[2]. Whistle blowing is one of the top mechanisms to better corporate governance. Whistle blowers are considered as 'corporate conscience keepers'.[3]

The term whistle blowing is derived from the terms "blow" and "whistle", slang meaning of the word blow is to describe 'the act of informing' and the word

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1. *N.R. Narayana Murthy Committee on Corporate Governance, 2003*, available at: *http://sebi.com/commreport/corpgov.pdf.*
2. *Committee on the Financial Aspects of Corporate Governance, 1992,* available at: *http://www.eiod.org/uploads/Publications/Pdf/Corp.%20Governance-1.pdf.*
3. Shivam Goel, "Protection of Whistle blowers in India: A Corporate Perspective", available at: *https://www.academia.edu/6174619/ Protection_of_Whistle_Blowers_in_India.*

whistle can be interpreted as 'to give secret information or to turn informer'.[4] The blowing of whistle would alert both law enforcement officers and general public of danger. The practice of whistle blowing can be traced from the practice followed by English Bobbies to alert law enforcement officers and general public of danger.[5]Whistle blowing is defined as "the disclosure by organization members (former or current) of illegal, immoral, illegitimate practices under the control of their employers, to persons or organizations that may be able to affect action."[6] Whistleblower is a person who informs on another or makes public discloser of corruption or wrong doing. In the context of corporation, whistleblowers are those who expose malpractices, unethical and corrupt practices of their co-workers and seniors for the benefit of the company, stake holders and society at large[7].

Whistle blowing may be three types[8]-Internal to Internal, Internal to External and Extrinsic to External. In Internal to Internal , Internal people such as staff who report misconduct or non-compliance to internal people such as supervisors, managers, service and supply, procurement and purchasing, human resources, executives, directors, CEOs, CFOs, board of shareholders, investors and business owners[9]. In Internal to External, Internal people (staff) who report misconduct or non-compliance to external people such as the clients, the suppliers and sub-suppliers (companies contractors, consultants, lawyers) the competitors, government departments and agents and police[10]. In Extrinsic to External, Extrinsic people (those who have intimate knowledge of the business) who report misconduct or non-compliance to external people such as the clients, the suppliers, the consultants and government departments and agencies[11]. Characteristics of whistle blowing are:

1) It shall be made voluntary

2) It shall be made in public interest (public good),

3) It must be unauthorized reporting or disclosure of information in good faith.

Whistle blowing has many benefits like it foster good governance by encouraging employees to shoot up deceitful actions by colleagues, seniors and

4. Marek Arzulowicz, Wojciech W. Gasparski, *Whistle Blowing in Defence of Proper Action*, (Transaction Publishers, Vol.18,2011).
5. *Ibid.*
6. Marcia P. Miceli,*Blowing the Whistle: The Organisational and Legal Implications for Companies and Employees*(Lexington Books, 1992).
7. Iswarya Balakrishnan and Geetanjali Sharma, "Need for mandatory whistleblowers policy for companies", available at: *http://www.nseindia.com/content/press/JAN.pdf*.
8. A.C. Fernando, *Business Environment* (Pearson Education India, 2011).
9. *Ibid.*
10. *Ibid.*
11. *Ibid.*

third parties to appropriate authority;promote organizational transparency, alert that sever action will be taken against unethical and fraudulent acts; to discourage employees from committing fraud by instilling fear of unfavorable consequences when caught; helps to reduce mismanagement and maintenance of good will, protect the interest of society as a whole. Whistle-blowing can be extremely beneficial to the organization, its employees, shareholders and society and the general public at large. Violations, misconduct and malpractices which would affect the stakeholders can be mitigated and the transgressors be punished. Demerits are the issues like disclosing information for any personal gains like profit making , getting job promotion, transfers etc. Whistleblowers are at great risk as they have to face retaliations from senior officers and other colleagues such as harassment, suspension, threat, salary cut, termination, demotion , any other discrimination etc

I. LEGISLATIVE ATTEMPTS IN INDIA

The first step with regard to whistle blower protection in corporate field was stated in 1996, when the confederation of Indian Industries took a special initiative to develop a Code of Corporate Governance[12]. The Code focused mainly on listed companies as these are financed largely by public money and hence, need to follow policies that make them more accountable to their investing public. The code has no material provision as regards the Whistleblowers Policy. The Code deals with reporting of internal audit reports, including cases of theft and dishonesty of a material nature to the Board and an independent audit committee consisting of non-executive directors[13].

The 179th Law commission report 2001

The one hundred and seventy ninth report of the law commission deals with 'Eradication of Corruption and Whistle blowing'[14]. The Law Commission has proposed a Public Interest Disclosure (Protection of Informers) Bill to provide protection to whistleblowers. The Bill provides safeguards to the whistleblowers against victimization in the organization[15]. It is provided that the whistleblower can himself seek transfer in case he apprehends any victimization.

The N.R Narayana Murthi Committee Report 2003

12. "Desirable Corporate Governance Code", available at: *http://www.nfcgindia.org/desirable_corporate_governance_cii.pdf.*
13. *Ibid.*
14. *Law Commission Report, 2001,* available at: *http://lawcommissionofindia.nic.in/reports.htm*.
15. Public Interest Disclosure (Protection of Informers) Bill S.10 reads : "Safeguards against victimization as (1) The Central Government shall ensure that no person who has made a disclosure under this Act is victimized by initiation of any proceedings or otherwise

The Securities and Exchange Board of India constituted the N.R Narayana Murthi Committee on Corporate Governance in 2003[16]. The committee made mandatory recommendations with regard to whistle blower protection such asPersonnel who observe an unethical or improper practice should be able to approach the audit committee without informing their supervisors. Companies shall take measures to ensure that the right of access is communicated to all emploees. The employment and other personnel policies of the company shall contain provisions protecting whistle blowers from unfair termination and other unfair practices. The committee suggests that Companies shall affirm that they have not denied any personnel access to the audit committee of the company and that they have provided protection to whistleblowers. Such affirmation shall form part of the Board report on corporate governance.

Clause 49 of Securities Exchange Board of India

The recommendation of the N.R Narayana Murthi Committee led to the insertion of Clause 49 of the Listing agreement of stock exchange.[17] It came into force on 1st January 2006. It places a non-mandatory requirement for listed companies to adopt whistle blower policy. The Listing agreement states that 'The Company may establish a mechanism for employees to report to the management concerns about unethical behavior, actual or suspected fraud or violation of the company's code of conduct or ethics policy. This mechanism could also provide

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merely on the ground that such person had made a disclosure under this Act. (2) If any person other than the Minister, is aggrieved by any action on the ground that he is being victimized due to the fact that he had filed a complaint under section 3, he may file an application before the Competent Authority seeking redress in the matter. (3) On receipt of an application of under sub-section (2), the Competent Authority may, after making such inquiry as it deems fit, is of opinion that allegation of victimization- (a) is true and is relatable to the complaint or its subject matter, it may give appropriate directions as it may consider necessary, to the concerned public servant or public authority as the case may be; (b) is not true or is not maintainable for the reason that the alleged victimization is not relatable to the complaint or its subject matter, it may dismiss the application. (4) Notwithstanding anything contained in any other law for the time being in force, the power to give directions under sub-section (3), in relation to a public servant, shall include the power to direct the restoration of the public servant making the disclosure, to the status quo ante (5) The Competent Authority issuing directions under sub-section (3), shall take such action as is necessary and reasonable to prevent the victimization continuing or occurring in the future. (6) Every direction given by the Competent Authority shall be binding upon the public servant or the public authority against whom the allegation of victimization has been proved."

16. S*upra* n.2.
17. The Securities Exchange Board of India, Clause 49, available at: *http://www.nseindia.com/getting_listed/content/clause_49.pdf.*

for adequate safeguards against victimization of employees who avail of the mechanism. The mechanism must provide, where senior management is involved, direct access to the Chairman of the Audit committee in exceptional cases. Once established, the existence of the mechanism may be appropriately communicated within the organization[18].' The Listing Agreement also provides that the Audit Committee must periodically review the existence and functioning of the mechanism.

The Fourth Report of the 2nd Administrative Reforms Commission 2007

The second administrative reforms commission constituted in January 2007 deals with Ethics in Governance[19]. Chapter III of the report deals with "Protection of Whistle blowers". The report made some suggestions[20] like Whistleblowers exposing false claims, fraud or corruption should be protected by ensuring confidentiality and anonymity, protection from victimization in career, and other administrative measures to prevent bodily harm and harassment. It provides that the legislation should cover corporate whistleblowers unearthing fraud or serious damage to public interest by willful acts of omission or commission. Acts of harassment or victimization of or retaliation against, a whistleblower should be criminal offences with substantial penalty and sentence.

The Naresh Chandra Committee Report 2009

The Naresh Chandra Committee was constituted on November 2009 with Mr Naresh Chandra as the chairman. The committee deals with corporate governance – need for voluntary adoption[21]. Recommendation 17 of the report deals with institution of a mechanism for whistle blowing to report concerns about unethical behavior, actual or suspected fraud, or violation of the company's code of conduct or ethics policy. The committee also recommends that the mechanism shall also provide for adequate safeguards against victimization of employees who avail of the mechanism, and also allows direct access to the Chairperson of the audit committee in exceptional cases[22].

The Corporate Governance Voluntary Guidelines 2009

Based on the recommendations of the Naresh committee report, the ministry of corporate affairs has issued a Voluntary Code of Corporate Governance[23].

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18. *Ibid.*
19. *Second Administrative Reforms Commission, 2007*, available at: *arc.gov.in/2ndrep.pdf.*
20. *Id.,* at.77.
21. *The Naresh Chandra Committee Report,2009,* available at: *www.civilaviation.gov.in/cs/groups/public/documents/.../moca_000740.pdf.*
22. *Id.,* at.19.
23. *The Corporate Governance Voluntary Guidelines, 2009***,** available at: *http://www.mca.gov.in/Ministry/latestnews/ CG_Voluntary_Guidelines_2009_24dec2009.pdf.*

Chapter VI of the Code mentions about institution of mechanism for whistle blowing[24]. It suggests that the companies should ensure the institution of a mechanism for employees to report concerns about unethical behavior, actual or suspected fraud, or violation of the company's code of conduct or ethics policy and the companies should also provide for adequate safeguards against victimization of employees who avail of the mechanism, and also allow direct access to the Chairperson of the Audit Committee in exceptional cases.

The Whistle Blowers Protection Act, 2011

The death of whistleblower Satyendra Dubey, an engineer working with the National Highway Authority of India led to the initial attempt to protect whistleblowers. Dubey was killed after he wrote letter to the then Prime Minister, A.B Vajpayee about the corrupt practices in the construction of highways. The government issued notification laying down certain guidelines for whistle blowing and protection of whistleblowers. The Public Interest Disclosure and Protection of Persons Making the Disclosure Bill, 2010 was introduced in the Parliament. The Bill is now replaced by the Whistle Blowers Protection Act, 2013[25]. The main purpose of the Act is to establish a mechanism to receive complaints relating to disclosure on any allegation of corruption or willful misuse of power of discretion against any public servant; to inquire into such disclosure and to provide adequate safeguards against victimization of the person making such complaint and for matters connected with it.

a) Disclosures and its exceptions

The Act excludes armed forces of the union from its purview[26]. The Central Vigilance Commission is the competent authority to address complaints[27]. The Act defines disclosure[28] as "(I) an attempt to commit or commission of an offence under the Prevention of Corruption Act, 1988; (ii) willful misuse of power or willful misuse of discretion by virtue of which demonstrable loss is caused to the Government or demonstrable wrongful gain accrues to the public servant or to any third party; (iii) attempt to commit or commission of a criminal offence by a public servant, made in writing or by electronic mail or electronic mail message, against the public servant and includes public interest disclosures. The Act excludes matters such as which affect the sovereignty and integrity of India, the security, strategic, scientific

24. *Id.,* pp. 20.
25. The Whistle Blowers Protection Bill, 2011, available at: *http://www.prsindia.org/uploads/media/Public%20Disclosure/whistle%20blower%20as%20passed%20by%20LS.pdf.*
26. *Id.,* Section 2.
27. *Id.,* Section 3(b).
28. *Id.,* Section 3(d).

or economic interests of the state, relations with foreign state or lead to incitement of an offence; or (b) involves the disclosure of cabinet papers including records of deliberations of the council of Ministers , secretaries and other officers except that provided under Right to Information Act, 2005 from disclosure[29]. Any public servant or any other person including a non-governmental organization may make a public interest disclosure[30]. The Act specifies the requirements of Public Interest Disclosure such as it shall be made in good faith with a reasonable belief that the information is true, in writing or in electronic mail or electronic message and also protects the identity of the complainant.[31]

b) Protection to the persons making disclosures

The Act imposes an obligation on central government to ensure that no person or public servant who has made a disclosure is victimized by initiation of any proceedings[32]. If any person is been victimized on the ground that he has filed a complaint or a disclosure, he may file an application before the competent authority for redress[33]. The competent authority shall give an opportunity of hearing to the complaint and the public authority or public servant. Any person who willfully does not comply with the direction of the competent shall be liable to a penalty which may extend up to thirty thousand rupees[34]. If the witnesses and other persons needs protection, the competent authority shall issue appropriate directions to the concerned government[35]. The Act ensures the protection of identity of complainant and the document and information furnished by him[36]. False or frivolous disclosure shall be punished with imprisonment for a term of two years and also fine up to thirty thousand rupees[37]. Penalty of imprisonment for a term which may extent up to three years and also fine up to fifty thousand rupees is fixed for revealing the identity of complainant[38]

c) Role of CVC

The central vigilance commission will act as the competent authority in case of Government Company or company controlled by the state government[39].

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29. *Id.,* Section 8(1).
30. *Id.,* Chapter II, Section 4.
31. *Id.,* Section 4(2).
32. *Id.,* Section 11(1).
33. *Id.,* Section 11(2).
34. *Id.,* Chapter V.
35. *Id.,* Section 12.
36. *Id.,* Section 13.
37. *Id.,* Section 17.
38. *Id.,* Section 16.
39. *Id.,* Section 3(b).

The central vigilance commission is given powers of a civil court[40]. Any person aggrieved by the order of the central vigilance commission can make an appeal to the High Court within sixty days from the order[41]

The Companies Act, 2013

The companies Act 2013 makes its mandatory for every listed company and the companies which accepts deposits from the public and companies which have borrowed money from banks and public financial institutions in excess of Rs.5 crores to establish a vigil mechanism for their directors and employees to report genuine concerns[42].The company will operate vigil mechanism through the audit committee. Vigil mechanism will provide for adequate safeguards against victimization of employees who use it [43] but the Act is silent on whistle blowers protection.

II. WHISTLE BLOWERS PROTECTION IN DIFFERENT JURISDICTIONS

Legal protection for Whistle blowers has two major aspects[44] (1) a proactive part which attempts to change the culture of organizations by making it acceptable to come forward, facilitating the disclosure of information on negative activities in the organization such as corrupt practices and mismanagement, and (2) a second aspect consisting of a series of protections and incentives for people to come forward without fear of being sanctioned for their disclosures. Balance between the employers interest to not to have business interest hampered by malicious allegations or by risk of confidential information being disclosed unnecessarily to competitors or press shall be the aim of all whistle blowers protection laws[45]. As retaliations by employers stops whistle blowers from reporting the corrupt practices, effective

40. *Id.,*Section 7(2).
41. *Id.,*Section20.
42. The Companies Act, 2013**,**Sections 177(9) reads as "Every listed company or such class or classes of companies, as may be prescribed, shall establish a vigil mechanism for directors and employees to report genuine concerns in such manner as may be prescribed."
43. *Id.,*Section 177(10) reads as "The vigil mechanism under sub-section (9) shall provide for adequate safeguards against victimization of persons who use such mechanism and make provision for direct access to the chairperson of the Audit Committee in appropriate or exceptional cases: Provided that the details of establishment of such mechanism shall be disclosed by the company on its website, if any, and in the Board's report."
44. "Whistleblowing An employer's guide to global compliance", available at: *http://www.dlapiperuknow.com/export/sites/uknow/products/files/uknow/DLA-Piper-Whistleblowing-Report.pdf.*
45. *Ibid.*

laws are needed to boost up their confidence. Countries like US, UK, Australia, Canada, South Africa and Japan have express provisions to protect whistle blowers in corporations or companies.

Protection of whistle blowers in United States of America

In United States, the Sarbanes Oxley Act 2002[46] and the Dodd-Frank Wall Street Reform and Consumer Protection Act, 2010[47] deal with whistleblowers protection in companies or corporations. The Sarbanes Oxley Act, 2002 protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws. The Sarbanes-Oxley Act requires that all publicly traded corporations shall create internal and independent audit committees[48]. Each audit committee must establish procedures for employees to file internal whistleblower complaints, and procedures to protect the confidentiality of employees who file complaints[49].The Act prohibits any discrimination such as threat, suspension, etc by the company or any officer of such company against the employees who provide evidence of fraud[50]. The Act also penalizes retaliations of persons who give information regarding federal criminal offences[51]. Retaliated employees can file enforcement action[52] and claim compensatory damages[53]. The Dodd- Frank Act, 2010 provides for the payment of awards[54] to whistleblowers who voluntarily provides original information[55] to the Securities and Exchange Commission[56] The Act also mentions about denial of awards to whistle blowers in cases he acquired the original information in violation of grounds mention under the Act[57].The Act

46. The Sarbanes Oxley Act, 2002, available at: *https://www.sec.gov/about/laws/soa2002.pdf.*
47. Dodd-Frank Wall Street Reform and Consumer Protection Act, 2010, available at: *https://www.sec.gov/about/laws/wallstreetreform-cpa.pdf*ÿ.
48. *Id.,* Section 2(3) defines Audit Committees as" (A) a committee (or equivalent body) established by and amongst the board of directors of an issuer for the purpose of overseeing the accounting and financial reporting processes of the issuer and audits of the financial statements of the issuer; and (B) if no such committee exists with respect to an issuer, the entire board of directors of the issuer".
49. *Id.,*Section 301(4).
50. *Id.,* Section 806.
51. *Id.,* Section 1107
52. *Id*., Section 806.
53. *Id*., Section 802(2).
54. The Dodd- Frank Act, 2010s. 922 6(b)
55. *Id*., Section 922(3).
56. *Id.,* Section 922 6(c).
57. *Id.,* Section 922(6)(c)(2).

protects whistleblowers from retaliations[58]. Retaliated employees have remedies such enforcement actions from the district courts of United States[59] and compensatory reliefs such as pay back with interests, compensation such as litigation costs and attorney fees etc[60].

Protection in United Kingdom

The Employment Rights Act, 1996[61] provided protection to whistle blowers in the workplace. The Act explains disclosure[62] as any disclosure of information which the worker makes to show that a criminal offence has been committed, is being committed or is likely to be committed,that a person has failed or is likely to fail to comply with any legal obligation to which he is subject,that a miscarriage of justice has occurred, is occurring or is likely to occur,that the health or safety of any individual has been, is being or is likely to be endangered , that the environment has been, is being or is likely to be damaged. Disclosers can be made to an employer or other responsible person[63], to legal adviser[64], Minister of the crown[65] or to some prescribed persons[66] . This Act has been amended by the Enterprise and Regulatory Reform Act 2013.[67] The new Act replaced the scope of disclosures in the old Act from good faith requirement to public interest.[68] Under the new Act, the employment tribunal has the power to reduce any compensatory award it makes to the employee by 25% if it found that disclosures are not made in good faith.[69]Thus, this Act requires disclosures to be in public interest and in good faith. The Act imposes personal liability on employees and vicarious liability on employer for reprisals.[70]

Protection to whistle blowers in Canada

The Public Servants Disclosure Protection Act 2007[71]deals with protection

58. *Id.,* Section 922(h).
59. *Id.,* Section 922 (B).
60. *Id.,* Section 299(C).
61. The Employment Rights Act, 1996, available at: *www.ilo.org/dyn/travail/.../Employment%20Rights%20Act%201996.pdf.*
62. *Id*., Section 43B.
63. *Id.,* Section 43C.
64. *Id.,* Section 43D.
65. *Id.,* Section 43E.
66. *Id*., Section 43F.
67. The Enterprise and Regulatory Reform Act, 2013, available at: *http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted.*
68. *Id.,*Section 17 reads as "disclosures not protected unless believed to be made in the public interest."
69. *Id.,*Section 18(6A).
70. *Id.,*Section 19.
71. The Public Servants Disclosure Protection Act, 2007, available at: *http://laws-lois.justice.gc.ca/eng/acts/P-31.9/*

of persons who disclose wrongdoings[72] in the public sector. The Act defines protected disclosure as a disclosure by a public servant in good faith in accordance with this Act or in the course of a parliamentary proceeding or as per procedure established under any other Act of Parliament or when lawfully required to do so[73].Any person can blow the whistle about wrongdoings either to their own departments[74] or to the Public Sector Integrity Commissioner[75] or to the Public under limited circumstances[76] The Act requires all chief executives to establish an internal procedure to manage disclosures under the Act[77]. The Act protects whistle blowers from reprisals[78] and also takes care of their identity[79]. Retaliated employees can file complaints to Public Sector Integrity Commissioner[80]and the commissioner can refer the matter to the Public Servants Disclosure Protection Tribunal[81] for its decision.

Protection of Whistle blowers in Australia

The Corporations Act 2001[82] and the Common Wealth Public Interest Disclosure Act 2013[83] deal with protection to whistle blowers. The Corporations Act 2001 is the most frequently used legislation in private sector. The Act protects company officers or employees and contractors who make good faith disclosures about breach of corporation's legislations[84]. Disclosures can be made either to the Australian Securities and Investments Commission or to company's auditor or a member of an audit team conducting an audit of the company; or to a director, secretary or senior manager of the company; or to a person authorized by the company to receive disclosures of that kind.Whistle blowers enjoy privileges such as immunity from civil, criminal and contractual liability[85] for disclosures made. They

72. Id.,Section 8.
73. *Id*., Section 2.
74. ***Id.,***Section**10(1).**
75. *Id.,* Section 13.
76. *Id.,* Section 16A.
77. *Id.,* Section 10(1).
78. *Id.,* Section 19.
79. *Id.,* Section 11(1).
80. *Id*., Section 19.1(1).
81. *Id.,* Section 20.4(1).
82. The Corporations Act, 2001, available at: *file:///C:/Documents%20and%20Settings/user/My%20Documents/Downloads/Corps2001Vol5_1274-Notes_WD02.pdf.*
83. The Common Wealth Public Interest Disclosure Act, 2013, available at: *http://www.comlaw.gov.au/details/c2013a00133.*
84. *Supra*, n.82, Section 1317AA.
85. *Id.*, Section 1317AB.

are protected against victimizations[86] and are liable to be compensated[87]. The Common Wealth Public Interest Disclosure Act, 2013 deals with disclosure and investigation of wrongdoing and maladministration in the Commonwealth public sector[88].The Act also ensures that the public officials who make public interest disclosures are protected from reprisals [89] and that the disclosures are properly investigated into[90]. The Act protects persons who disclosure information from for civil, criminal or administrative liability including disciplinary action for making the disclosure[91]. Reprisals against persons disclosing information in public interest are prohibited by the Act[92]. Act also provides for civil remedies[93] including reinstatement[94] in case reprisals are taken against whistleblowers. The Act also protects the identity of disclosures.

Protection provided under South Africa

The Protected Disclosures Act, 2000[95] affords protection to the employees in both public and private sector who make protected disclosures[96] regarding the unlawful or irregular conduct by their employer[97] or other employee[98].The Act protects employees who make disclosures from occupational detriment[99]. Employees can claim relief any court including the Labor Court, if they are subjected to occupational detriment[100]. The Act defines Protected Disclosures[101] as disclosure made to a legal adviser[102], to an employer[103], to a member of Cabinet or the

86. *Id.*,Section 1317AC.
87. *Id.,*Section 1317A D.
88. *Supra,*n. 83, Section 6.
89. *Id.,* Section 7 reads as Protection of disclosers(2) Part 2 provides the following for public interest disclosures: (a)immunity from liability;(b)offences and civil remedies for reprisals taken against disclosers;(c) offences for disclosure of the identity of disclosers.
91. *Id.,*Section 10, Subdivision A, Part 2.
92. *Id.,*Section 9, Sub-division.
93. *Id.,*Section 14,Subdivision B, Part 2.
94. *Id.,*Section6, Subdivision B.
95. The Protected Disclosures, Act, 2000, Section 2(1).
96. *Id.*, Section 1(i).
97. *Id.,*Section 1(iii).
98. *Id.,*Section 1.
99. *Id,* Section 3 reads as: "No employee may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure".
100. *Id.*, Section 4.
101. *Id.*, Section 1 (ix).
102. *Id.,*Section 5.
103. *Id.,*Section 6(1).

Executive Council of province[104] or to certain persons or bodies[105].

Protection in Japan

The Whistle Blower Protection Act, 2004[106] extends its protection to the life, body, assets and other interests of the general public by ensuring corporate and government compliance with laws and regulations[107]. The Act defines whistle blowing as disclosure of relevant disclosure information by a worker to either an employer or to a government agency or officer with relevant jurisdiction or to any other person deemed necessary to prevent the matter from occurring or worsening and not for an illegitimate purpose[108]. The Act invalidates dismissals[109] or other disadvantageous treatments[110]to those who disclose public interest information about companies or government agencies wrongs.

III. SUGGESTIONS AND CONCLUSION

India's new Act on protected disclosure is a welcome step. But the recent incidents of victimization of whistleblowers like Satyendra Dubey[111], Manjunath Shanmugham[112], S Saseendran in Malabar Cements Limited case[113], etc. points towards the need for an effective mechanism to protect whistleblowers. Some of the suggestions includes - whistle blowing program shall be made mandatory for all public and private companies[114]; whistleblowers shall be protected from retaliations. Provisions be including to make retaliations a criminal offence and more punishment shall be imposed on those who practice it; Corporate whistle blowers must also be included in the Act; time bound procedures should be retained and a provision for incentives to the whistleblowers should be incorporated in the Act. Awareness programmes on whistleblowers protection should be conducted by companies.

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104. *Id.,* Section 7.
105. *Id.,*Section 8.
106. Whistle blower Protection Act, 2004, available at: *www.cas.go.jp/jp/seisaku/hourei/data/WPA.pdf.*
107. *Id.*, Article 1.
108. *Id.,*Article 2.
109. *Id.,* Article 3.
110. *Id.,*Article 5.
111. *Supra* n.6.
112. Manjunath Shanmugham was the sales manager of the Indian Oil Corporation. he was found killed for uncovering a racket that dealt in petrol adulteration (2005).
113. V.Saseendran was a key witness in four vigilance cases against Malabar Cements Limited, was found dead along with his two sons (2013).
114. *Supra* n.8.

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HUMAN RIGHTS AND ENVIRONMENT

V. NAGARAJA*

ABSTRACT : All human beings and other living creatures depend on the environment in which human being live. A safe, clean, healthy and sustainable environment is integral to the full enjoyment of wide range of human rights including the right to life, health, food, water and sanitation. Without a healthy environment human beings are unable to fulfil their aspiration or even live at a level commensurate with minimum standard of human dignity. At the same time protecting human rights helps to protect the environment. When people are able to learn about and participate in the decisions that effect them, they can help to ensure that those decision respect their need for sustainable development

In recent years, the recognition of the links between human rights and the environment has highly increased. The number and scope of International and domestic laws, Judicial decisions and academic studies on the relation between human rights and the environment have grown rapidly. Many countries now incorporate a right to a healthy environment in their constitution. Many questions about to relation of human right and the environment remain unresolved, however require further examination.

Human Rights and Environmental law have traditionally been envisaged as two distinct, independent spheres of rights towards the last quarter of the 20th century, however, the perception arose that the cause of protection of the environment could be promoted by setting it in the frame work of human rights which had by then been firmly established as a matter of international law and practice.

The commission on Human Rights directs UN bodies to coordinate their efforts in activities relating to human rights and the environment. Linking human right concerns to environmental protection and development has been to core of the UN approach to tackling environmental problems. Building on the Stockholm Declaration 1972, which recognised for the first time to relationship between human rights and the environment, the international community attempted to define the rights of the people to be involved in the development of their economies, and the responsibilities of human beings to safeguard the common environment in the Rio Declaration, 1992. The renewed commitment to integrate environmental and human rights protection have led to important progress, such as the human rights council`s creation of an independent expert on human rights and to environment in March 2012. Various national and international agencies including UN bodies have further emphasised the important interdependencies.

Keywords : Harmony, Environment, Human Rights, Human Dignity.

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1. INTRODUCTION

Since vedic time the main motto of social life was 'to live in harmony with nature'[1]. Sages, saints and great masters of India lived in forests, meditated and expressed themselves in the form of Vedas, Upanishads, Smritis and Dharmas. This literature of olden times preached in one form or the other a worshipful attitude towards plants, trees, Mother Earth, Sky, Air, Water and Animals and to keep a benevolent attitude towards them. It was regarded a sacred duty of every person to protect them. The Hindu religion enshrined a respect for Nature, environmental harmony and conservation. It instructed man to show reverence for the presence of divinity in nature. Therefore, trees, animals (cow), hills, mountains, rivers are worshiped as symbols of reverence to these representative samples of Nature. A perusal of Hindu religious scriptures called the Vedas, Upanishads, Smirits, Purana, Ramayana, Mahabaratha, Geeta, mythological literature including stories, social and moral codes and political rules reveal that the following were the general guiding principles to be observed by all in their daily life in combination of Environment and Human Rights :

* Respect nature
* Life in living is dependent on various components of nature
* Protect natural environment
* Utilise natural resources only to satisfy the need of the people
* Presence of the divinity of nature in all living and non-living objects
* Destruction of nature means destruction mankind
* All must have compassionfor animate objects, e.g. trees, animals, birds, aquatic life etc. micro-organisms alike. Himsa (violence) was considered as a sin/
* Air, water, land, sky, trees, animals are the creation of God and he dwells in all them. Therefore, to worship them is to worship him – the creator of the universe Man, being one of the creations of God, has no special privilege or authority over other creatures, on the other hand he has more obligations and duties to protect
* and improve them
* Ahimsa Parmo Dharmah (non-violenbce) is the dharma of the highest order, one should be non-violent towards animals, trees, and other micro organisms alike. Himsa (violence) was considered as a sin.
* Drought, fury of floods and storms, heavy rains, cloudbursts, lightning, earthquakes, volcanic eruptions, heavy tides are the violent forms of anger manifested by the gods and goddesses

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1. S.C.Shastri, Environmental Law, (2nd edn) Lucknow, Eastern Book Company,2007.

* Purity of thought and expression, and cleanliness of the environment around us should be observed
* All lives, human and non-human including tees, are of equal value and all have the same right to existence. It shows that the principle of sanctity of life is clearly ingrained in the Hindu religion.

In article[2] the author clarified that Hinduism declared in its dictum that the earth is our mother and we are all her children(i). The ancient Greeks worshipped the earth Goddess. Islamic law regards man as having inherited 'all the resources of life and nature' and having certain religious duties to God in using them(ii). In the Judoe-Christian tradition, God gave the earth to his people and their offspring as an everlasting possession to be cared for and passed on to each generation(iii) And European Convention on Human Rights clearly states in article 2 is that everyone`s right to life shall be protected by law.

2. RELATIONSHIP BETWEEN HUMAN RIGHTS AND ENVIRONMENT

Section 2(d) of the Protection of Human Rights Act, 1993 defines Human 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[3] The above definition, however, limits the scope of the functioning of the human rights commission of India. Therefore ratified top two covenants, International covenant on civil and political rights and the international covenant on economic, social and cultural rights. But the covenants are not directly enforceable as law before the Indian courts. The definition of Human Rights under Protection of Human Rights Act, 1993 limits human rights strictly to the Fundamental Rights embodied in Part-III of Indian Constitution which are enforceable by the Courts in India.Section 2 (a) of Environment (Protection) Act, 1986[4] defines. 'environment' which includes water, air and land and the inter-relationship which exists among and between water, air and land, human beings, other living creatures, plants, micro organism and property.

1. Protection of Human Rights Act 1993 to provide for the constitution of a National Human Rights Commission, State Human Rights Commission in State

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2. Y.K.Sabharwal, Human Rights and the Environment : reference- (i) Atharva Veda (Bhumi Sukta), (ii) See Islamic principles for the conservation of the natural environment 13-14 (IUCN and Saudi Arabia, 1983), (iii) Genesis 1:1-31, 17:7-8.
3. Dr.H.O.Agarwal, Human Rights (tenth edn)Allahabad, Central Law Publications, 2007 pg.368.
4. Justice T S Doabia, Environmental & Pollution Laws in India (second edn), Nagpur, LexisNexis, (vol.2) pg.2169.

and Human Rights Courts for better protection of Human Rights and for matters connected therewith or incidental thereto.And Environment (Protection) Act, 1986 *to provide* for the protection and improvement of environment and for matters connected therewith . whereas the decisions were taken at the United Nations Conference on the Human Environment held at Stockholm in June 1972, in which India participated, to take appropriate steps for the protection and improvement of human environment. And whereas it is considered necessary further to implement the decisions aforesaid in so far as they relate to the protection and improvement of environment and the prevention of hazards to human beings, other living creatures, plants and property.

The author further said in his article[5] over the years, the international community has increased its awareness on the relationship between environmental degradation and human rights abuses. It is clear that, poverty situations and human rights abuses are worsened by environmental degradation. This is for several obvious reasons;

(i) The exhaustion of natural resources leads to unemployment and emigration to cities.
(ii) This affects the enjoyment and exercise of basic human rights. Environmental conditions contribute to a large extent, to the spread of infectious diseases. Most of the people who live in developing and underdeveloped countries, almost 60% lack basic health care services, almost a third of these people have no access to safe water supply.
(iii) Degradation poses new problems such as environmental refugees. Environmental refugees suffer from significant economic, socio-cultural and political consequences.
(iv) Environmental degradation worsens existing problems suffered by developing and developed countries.

And also the author(supra note 2) said that the Environmental and human rights law have essential points in common that enable the creation of a field of cooperation between the two:

* Both aspects have deep social roots; even though human rights law is more rooted within the collective consciousness, the accelerated process of environmental degradation is generating a new environmental consciousness.
* Both aspects have become internationalised. The international community has assumed the commitment to observe the realization of human rights and respect for the environment. From the second world war(*)onwards, the relationship State-individual is of pertinence to the international community. On the other

5. Supra note 2 : Michael J.Kane, promoting political rights to protect the environment, The Yale Journal of International Law, vol.18, No.1 pgs. 389-390.

hand, the phenomena brought on by environmental degradation transcends political boundaries and is of critical importance to the preservation of world peace and security. The protection of the environment is internationalised, while the State-Planet Earth relationship has become a concern of the international community.

* Both areas of law tend to universalise their object of protection. Human Rights are presented as universal and the protection of the environment appears as everyone's responsibility.

The author enlightened that human rights and environmental law have traditionally been envisaged as two distinct, independent spheres of rights. Towards the last quarter of the 20th century, however, the perception arose that the cause of protection of the environment could be promoted by setting it in the framework of human rights, which had by then been firmly established as a matter of international law and practice. Because of the many complex issues that arise when these two seemingly distinct spheres interact, it is to be expected that there are different views on how to approach human rights and the environment

1. Where environmental protection is described as a possible means of fulfilling human rights standards. Here, environmental law is conceptualised as giving a protection that would help ensure the well-being of future generations as well as the survival of those who depend immediately upon natural resources for their livelihood. Here, the end is fulfilling human rights, and the route is through environmental law.
2. The two spheres in inverted positions- it states that the legal protection of human rights is an effective means to achieving the ends of conservation and environmental protection.
3. Human rights and the environment is to deny the existence of any formal connection between the two at all. According to this approach, there is no requirement for an environmental human right. The argument goes that, since the Stockholm Conference in 1972, international environmental law has developed to such extents that even the domestic environments of states has been internalised.

3. INTERNATIONAL FORMS ON HUMAN RIGHTS AND ENVIRONMENT

Proclaims this Universal declaration of Human Rights 1948[6] as a common standard of achievement for all peoples and all nations to the end that every individual

6. Supra note 2 pg 329.

and every organ of society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and Freedoms and by progressive measures nation and international to secure their universal and effective recognition and observance both among the people of members states themselves and among the peoples of territories under their jurisdiction. 30 Articles were declared by this Universal Declaration. The Universal Declaration enumerated the basic postulates and principles of human rights in a most comprehensive manner. It dealt not only with civil and political rights but with social and economic rights as well. Article 2 to 21 deal with those civil and political rights which have been generally recognised throughout the world.

The International Conference on Human Environment in the year 1972[7], Stockholm was the turning point in the international environment law. It was for the first time that World Nations gathered at a place under the U.N. leadership to evolve a common strategy to combat environmental degradation, pollution and ecological imbalance. 26 principles were declared on this conference which are known as Magna Carta on human environment. India participated in the conference and also signed the declaration known as Stockholm Declaration of 1972.

Human Rights includes the right to life, health, food, water and sanitation and Safe, clean, healthy and sustainable environment is integral to the full enjoyment of wide range of human rights. Earth Summit, meeting in Rio Declaration, 1992 endeavoured to focus the responsibilities of human beings to safeguard the common environment.

The United Nations Conference on the Human Environment, having met at Stockholm during June 1972 having considered the need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment. It proclaims that 1. "Man is both creature and Moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself. Some of the principles of this declaration are:

Principle 1 – Man has the fundamental right to freedom, equality and adequate conditions of life in an environment of quality that permits a life of dignity and well being and he bears a solemn responsibility to protect and improve the

7. Supra note 1 pg.310.

environment for present and future generation

Principle 2 – The natural resources of the earth including air, water, land, flora and fauna must be safeguarded for the benefit of present and future generation though careful planning and management

Principle 22 – States shall co-operate to develop the international law relating to liability and compensation for the victims of pollution and other environmental damage.

Article 11 of Additional Protocol to the Inter-American Convention on Human Rights 1994[8] popularly known as the San Salvador Protocol, states that (1) everyone shall have the right to live in a healthy environment and to have access to basic public services (2) the state parties shall promote the protection, preservation and improvement of the environment.

Article 24(2)(c) Convention on the Rights of the Child, 1989 requires state parties in the matter of combating disease and malnutrition to take into consideration, 'the damage and risks of environmental pollution'

Article 24(1) African Charter on Human and People's Rights 1981 a right to a general satisfactory environment favourable to their development.

4. INDIAN CONSTITUTION ON HUMAN RIGHTS AND ENVIRONMENT

Article 48A obligates the state to endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country. There is at present a growing consciousness and awareness that suitable measures be adopted to protect the environment, forests and wildlife. To enable effective steps being taken for the purpose, wildlife and forests have now been placed in the Concurrent List so that the Central Government may play a meaningful role in this increasingly significant area[9].

The Supreme Court has clarified that whenever a problem of ecology is brought before the court, it is bound to keep in mind Articles 48A and 51A(g) and cannot leave the matter entirely to the government. The least that the court may do is to examine whether appropriate considerations are borne in mind and irrelevance excluded. In appropriate cases, the court may go further.[10]

In Mehta v. Union of India[11] the court said 'articles 39(e), 47 and 48A by

8. Supra note 2.
9. M.P.Jain, Indian Constitutional Law, (6th edn) Nagpur, LexisNexis, (vol 2) 2010, pg.1994.
10. Sachidanan Pandey v. State of West Bengal, AIR 1987 SC 1109.
11. JT 2002(3) SC 527.

themselves and collectively cast a duty on the state to secure the health of the people improve public health and protect and improve the environment. Notwithstanding adequate laws being in the place, the administration did not show much concern about environmental pollution. Accordingly, the Supreme Court has had to take an active interest in this area.

To protect environment and ecology the court can take affirmative action by mandating the State to take action for that purpose. Reading articles 21,47, 48A and 51A(g) together, the Supreme Court has taken an active interest in the protection of the environment. Many questions pertaining to environment and ecology have been brought before the court by way of public interest litigation.[12]

The courts seek to draw a balance between preservation of the environment and sustainable development. The courts have to adjust and reconcile between the imperative of preservation of the environment and the protection of the human rights.

5. JUDICIAL VIGIL ON COMBINATIONS OF HUMAN RIGHTS AND ENVIRONMENT: SUPREME COURT INDIA

The Constitution (Forty Second Amendment) Ac 1976 explicitly incorporated environmental protection and improvement as part of state policy through the insertion of Article 48A. And Article 51A(g) imposed a similar responsibility on every citizen to protect and improve the natural environment including forests, lakes, rivers, and wildlife and to have compassion for all living creatures.

Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh supra was one of the earliest cases where the Supreme Court dealt with issues relating to environment and ecological balance. The expanded concept of the right to life under the Indian Constitution was further elaborated on in Francis Coralie Mullin v. Union Territory of Delhi[13] where the Supreme Court set out a list of positive obligations on the State, as part of its duty correlative to the right to life. The importance of this case lies in the willingness on the part of the Court to be assertive in adopting an expanded understanding of human rights. Its is only through such an understanding that claims involving the environment can be accommodated within the broad rubric and the right to life was further addressed by a constitution bench of the Supreme Court in the Charan Lal Sahu[14] similarly, in Subash Kumar[15] the Court observed that right to life guaranteed by article 21 includes the right of enjoyment of pollution-

12. Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh, AIR 1987 SC 359.
13. AIR 1981 SC 746.
14. Charan Lal Sahu v. Union of India, AIR 1990 SC 1480.
15. Subhash Kumar V. State of Bihar, AIR 1991 SC 420.

free water and air for full enjoyment of life. Through this case, the court recognised the right to a wholesome environment as part of the fundamental right to life. This case also indicated that the municipalities and a large number of other concerned Government agencies could no longer rest content with unimplemented measures for the abatement and prevention of pollution. They may be compelled to take positive measure to improve the environment.

6. CONCLUSION

The environment is closely related with human rights. While the human rights derive from the inherent dignity of the human may be maintained. It is rather impossible for a human being to preserve its dignity in a polluted environment. Environment therefore has to be conserved in order to maintain, and improve the quality of mental and imagine of his physic awe well as mental health and happiness. But the human life was not realised earlier. Neither the Universal Declaration of human rights nor the two international covenants stipulated for conserving the environment. the importance of safe and adequate human environment was stresses in the Stockholm Conference of 1972 when the declaration adopted in the conference proclaimed that both aspects of man's environment, the natural and the man-made, are essential to his well being and to the enjoyment of basic human rights even the right to life itself. Earth Summit at Rio declaration has also recognised that all human beings are entitled to health and productive life in harmony with nature.

Environment has to be conserved if we are all concerned to provide human rights as stated in the concepts. There is a close relationship between human rights and environment. Safe and adequate environment is one of the means by which human rights can be protected and promoted. The right of pure, safe and decent environment is a collective right. It is required to be preserved for which, at international level, international cooperation has to be achieved and at national level such policies and programmes should be formulated so that all kinds of pollution may be curbed. It is a duty of the world community to safeguard the existence of mankind by providing safe and decent environment.

And the Spirit of the International law, National law and verdicts of the Judiciary shall be implemented and strict enforcement shall also be taken by the State and concerned authorities.

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WOMEN LEADERSHIP IN ENTREPRENEUR SEGMENT : A STUDY ON THE ROLE OF WORKING WOMEN

M. MADHURI IRENE*

ABSTRACT : Women constitute half of the world population and 1/3 of official labour force. They perform nearly 2/3 of hours of work but according to some estimate (based on UN &ILO statistics) only 1/10 of world income goes to women, and women are called silent majority, pace makers of development, better half of the society.The women's understanding about the meaning of work was shaped by their workplace ethos. Those working in the corporate sectors had a strong investment in, and commitment to, caring for the profession. They talked about their work as "making a difference" and "playing a part", reflecting the mission of "serving the family". The most dramatic and unexpected consequences of the Industrial Revolution was the rising status of women by the end of the nineteenth century. There was the separation of home and the workplace, which led to men often competing with women for factory jobs. Men disliked this, especially since women were often preferred by factory owners who could more easily overwork and underpay them.Women's entrepreneurship can make a particularly strong contribution to the economic well-being of the family and communities, poverty reduction and women's empowerment, thus contributing to the Millennium Development Goals (MDGs). Thus, governments across the world as well as various developmental organizations are actively undertaking promotion of women entrepreneurs through various schemes, incentives and promotional measures.The new generation women across the world have overcome all negative notions and have proved themselves beyond doubt in all spheres of life including the most intricate and cumbersome world of entrepreneurship. India too has its own pool of such bold and fearless women who have made a mark for themselves both within the country as well as overseas.

Keywords : Women Entrepreneurship, Working women, Employment, Industry.

"There is a difference between being a leader and being a boss.
Both are based on authority. A boss demands blind obedience;
A leader earns his authority through understanding and trust."

- Klaus Balkenhol [1]

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1. Available at: *http://www.inc.com/jeff-haden/75-inspiring-motivational-quotes-on-leadership.html.*

I. INTRODUCTION

Women have unique position in every society whether developed, developing or under developed. This is due to the various roles they play during various stages of their life.Throughout the world, women make a vital contribution to industrial output. Over 200 million women are employed across all industry sectors, with half of this number in developing countries. Their work not only sustains their families, but also makes a major contribution to socio-economic progress. Most women are employed in low-skilled, poorly paid positions, where they are often exposed to health hazards. On the other hand, we are seeing the advance of an increasing number of highly educated women into senior decision-making positions. The creativity and talents of all women are an invaluable resource, which can and should be developed both for their own self-realization and for the benefit of society as a whole.[2]

II. ROLE OF WOMEN IN EMPLOYMENT SECTOR

It may be observed that in developed as well as developing countries of the world the contribution of women in economic development is underestimated.Women have limited job opportunities in modern occupation and trade, hence their income is treated to be never equal to that of man. Women's unpaid household work is considered as non-economic and is not measured in the country's gross national product (GNP). As per the women development report 1955, it is observed if these unpaid activities were treated as market transactions in the prevailing wages they would yield huge monetary valuation. A strategic official estimated value is approximately 70 percent of global output (around 16 trillion dollars). The government of India has also introduced number of programs to enable women to become economically independent specially the schemes like Indira Mahila Yojana, Mahila Samriddhi Yojana 1993, Balika Samriddhi yojanas.

The Union government of India has constituted national commission for women to promote and strengthen the rights and privileges of women and to review the laws relating to women. Even at the international level several women organization have worked and continue to work for the cause of economic emancipation and their freedom and equality, they include women's league for peace and freedom, the national council of women, the federation of business and professional women.[3]

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2. Message from the Chairperson of UNIDO's Task Force on Preparations for the Fourth World Conference on Women taken from UNIDO website.
3. P. Sarojini Reddy, *Justice for women eradicate injustice and discrimination against women*(Hyderabad: Sai Srinivasa Printers, 1stedn2002)

III. WOMEN IN INDUSTRIAL SECTOR

In the sphere of Industrial law, the women have been assigned a special position in view of their unique characteristic, physically and mentally. Article – 39 (1) of the Constitution of India specially directs the states to secure equal pay for equal work for both men and women, to give effect to this the Equal Remuneration Act, 1976 has been passed which gives the mandate to pay equal remuneration for equal work. The Act further prohibits the discrimination in recruitment[4] Art.42 of the Constitution of India directs the State to make provisions for securing just and human conditions of work and for maternity relief in pursuance of this Maternity Benefit Act, 1961 has regulated the employment of women in certain establishments, for certain period i.e. from 6 to 12 weeks, prohibited the employment and work not only during the period of pregnancy but also gives other benefits like leave for Miscarriage; Payment of medical bonus; Leave with wages for tubectomy operation; Leave for illness due to pregnancy, delivery; and Nursing breaks.

Not only Maternity Benefit Act, other industrial laws have specifically made provisions for the welfare of women . Sec 46 of Mines Act 1952 , Mentions that no women shall be a part of mine below the ground and above the ground except between 6 am to 7 pm .Women employer shall be allowed to work in mines between two successive working days at least with 11 hours of interval.Beedi and Cigar Workers (Conditions and Employments) Act 1966 provides number of benefits to women employees especially under section 25 of the Act. Section 48 of the Factories Act 1948 specifically provides that in every factory where more than 30 women workers are ordinarily employed they should be provided with suitable rooms for the use of their children below 6 years of age. Further Supreme Court of India explained in Associate Banks Officers Association *Vs* State Bank of India[5] the concept of 'Equal pay for Equal work' and held that women are entitled for equal remuneration to that of men.

IV. WOMEN IN MODERN INDUSTRIAL WORLD

As muchioned before the most dramatic and unexpected consequences of the Industrial Revolution was the rising status of women by the end of the nineteenth century. Working class men did what they could to push women out of what they saw as "male" occupations in order to keep their jobs.

This, along with the growth of new technologies and the emerging consumer society, had two effects. For one thing, more affluent middle class women especially tended to stay home in what became associated with the "housewife" role. This

4. The Equal Remuneration Act, 1976, Section 5.
5. (1998) 1 SCC 428.

gave many women more leisure time, which they often used to get involved in political and social issues. Oftentimes, this would start through participation in church activities that typically were concerned with such causes. At the same time, since many middle class women were spending time at home and doing the shopping, they were seen as important aspects of the emerging consumer society. Therefore, the advertising industry targeted many of its campaigns specifically toward women. As a result, women's status in society started rising in the last half of the nineteenth century.

By the same token this rising status opened up new avenues of activity and expression for women. More women pursued secondary and university educations. Many of them also found their way into the workplace in what would eventually come to be seen as "female" occupations as nurses, teachers, and secretaries. In their leisure time, women took part in casual social dancing and sports. At first these were "feminine" sports such as croquet, bicycling, and horseback riding using the more "feminine" (and dangerous) sidesaddle. Even women's fashions in the early twentieth century reflected their social mobility by becoming increasingly less confining. More adventurous women were also taking part in mixed swimming and tennis. Only six years after the inauguration of men's singles at Wimbledon, women had their own singles tournament. Not only did women's rising status allow them to take part in these activities, but these activities gave women more visibility in society and increased their status, thus opening them more doors, and so on.

All this encouraged many women to work for suffrage (the right to vote). Serious discussion of this topic largely started with the French Revolution. Mary Wollstonecraft's book, *A Vindication of the Rights of Women,* argued that women were neither mentally nor physically inferior to men and those different standards for women were stifling to both sexes. This gained further support, including from such men as the political philosopher, John Stuart Mill. In Britain, demonstrations to gain the vote occasionally met with harsh reactions from men. When several women were jailed after a demonstration in 1905, newspapers finally broke their silence on the suffrage issue. This gave more publicity and support for women's suffrage, which sparked more demonstrations, reactions, publicity and sympathy, and so on. Although some women, frustrated at their treatment, turned to more destructive and even violent actions (vandalism, bombs in mailboxes, and one woman even throwing herself in front of a racehorse), most kept to more moderate tactics and continued to gain support.

Two things accelerated this process. First of all, women became especially vital to the workplace during World War I when so many men were gone and women were needed to fill their jobs. Secondly, there was the philosophy of Liberalism, which was originally intended to apply just to men. However, it could

just as easily apply to women and became the philosophical basis for the women's suffrage movement. In 1918, women over 30 won the vote (thus keeping male voters in the majority until 1927 when women over 21 could also vote). Women in other industrial countries soon gained suffrage: Finland (1906), Norway (1913), Russia (1917), and the United States (1919), along with Germany, Sweden, Austria, and the Netherlands. France, Italy, Switzerland and eventually most other countries around the globe would grant the vote later in the century. However, many barriers to equality remained and the struggle to attain equal status continues today.

V. WOMEN ENTREPRENEURSHIP

Women entrepreneurship has been recognized as an important source of economic growth. Women entrepreneurs create new jobs for themselves and others and also provide society with different solutions to management, organization and business problems. However, they still represent a minority of all entrepreneurs. Women entrepreneurs often face gender-based barriers to starting and growing their businesses, like discriminatory property, matrimonial and inheritance laws and/or cultural practices; lack of access to formal finance mechanisms; limited mobility and access to information and networks, etc.[6] Women's entrepreneurship can make a particularly strong contribution to the economic well-being of the family and communities, poverty reduction and women's empowerment, thus contributing to the Millennium Development Goals (MDGs). Thus, governments across the world as well as various developmental organizations are actively undertaking promotion of women entrepreneurs through various schemes, incentives and promotional measures. Women entrepreneurs in the four southern states and Maharashtra account for over 50% of all women-led small-scale industrial units in India.

Before the 20th century women were operating businesses as a way of supplementing income or in many cases they were simply trying to avoid poverty and making up for the loss of a spouse. The ventures that these women undertook were not known as entrepreneurial due to the time in history and usually had to yield to their domestic responsibilities. The term entrepreneur is used to describe individuals who have ideas for products and or services that they turn into a working business. In earlier times this term was reserved for men.[7] Women became more

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6. Available at: *http://smallb.in/%20/fund-your-business%20/additional-benefits-msmes%20/women-entrepreneurship.*
7. "From Ideas to Independence A Century of Entrepreneurial Women",available at: *www.entrepreneurs.nwhm.org.*

involved in the business world after it was a more acceptable idea to society. This does not mean that there were no female entrepreneurs until that time. In the 17th century, Dutch Colonists who came to what is now known as New York City operated under a matriarchal society. In this society many women inherited money and lands and through this inheritance and became business owners.

One of the most successful women from this time was Margaret Hardenbrook Philipse, who was a merchant, and ship owner, also involved in the trading of goods.[8] During the mid 18th century and on it was popular for women to own certain businesses like brothels, alehouses, taverns, and retail shops among others. Most of these businesses were not perceived with good reputations mostly because it was considered shameful for women to be in these positions. Society at the time frowned upon these women because it took away from their more gentle and frail nature. During the 18th and 19th centuries more women came out from under the oppression of society's limits and began to emerge into the public eye.

Women gained the right to vote in 1920 and two years later Clara and Lillian Westropp started the institution of Women's Savings & Loan as a way of teaching women how to be smart with their money. As each change in society happened, female entrepreneurs were there taking great gains along the way. With the boom of the textile industry and the development of the railroad and telegraph system, women like Madame C.J. Walker took advantage of the time and was able to market her hair care products in a successful way becoming the 1st African American female millionaire. Carrie Crawford Smith was the owner of an employment agency opened in 1918 and like Madame C.J. Walker; she sought to provide help to many women by giving them opportunities to work. During the Great Depression, some of these opportunities afforded to women took a seat and society seemed to have reversed its views, reverting to more traditional roles. This seemed to affect women working in the business world however; it served as a push to those involved in the entrepreneurial world. More women began starting their own businesses, just looking to survive during this time of hardship.

The Federation of Business and Professional Women's Clubs were a source of encouragement to women entrepreneurs. They often would hold workshops with already established entrepreneurs, such as Elizabeth Arden giving advice. When the 1950s came, women found them surrounded by message everywhere, stating what their role should be. Domesticity was the overall concern and theme that was highly stressed during this time and women were juggling, trying to combine the home and their career. Home based businesses helped to solve a good part of the

8. Bostwick, Heleigh. "History's Top Women Entrepreneurs",*LegalZoom: Online Legal Document Services,* 2014.

problem for those women who worried about being concerned mothers. Lillian Vernon while pregnant with her first child started her own business dealing with catalogs by investing money from wedding gifts and started filling orders right at her kitchen table. Mary Crowley founded Home Decorating and Interiors, as a way of helping women to work from home, by throwing parties to sell the products right in the comfort of their own home. In an effort to avoid criticism and loose business from those who did not support women in business,

The public also was becoming more receptive and encouraging to these women entrepreneurs, acknowledging the valuable contribution they were making to the economy. With the continual attention given to female entrepreneurs and the educational programs afforded to those women who seek to start out with their own business ventures, there is much information and help available. Since 2000 there has been an increase in small and big ventures by women, including one of their biggest obstacles, financing.[9]

Women Entrepreneur Associations

The efforts of government and its different agencies are supplemented by NGOs and associations that are playing an equally important role in facilitating women empowerment. List of various women associations in India is provided in the table below.

S.No.	Association Name	Website
1	Federation of Indian Women Entrepreneurs (FIWE)	http://www.fiwe.org/
2	Consortium of Women Entrepreneurs(CWEI)	http://www.cwei.org/
3	Association of Lady Entrepreneurs of Andhra Pradesh	http://www.aleap.org/index.html
4	Association of Women Entrepreneurs of Karnataka (AWAKE)	http://awakeindia.org.in/
5	Self-Employed Women's Association (SEWA)	http://www.sewa.org/
6	Women Entrepreneurs Promotion Association (WEPA)	http://www.wepa.org/
7	The Marketing Organisation of Women Enterprises (MOOWES)	http://www.moowes.org/
8	Bihar Mahila Udyog SanghBiharMahila Udyog Sangh	http://www.biharmahilaudyogsangh.com/
9	Mahakaushal Association of Woman Entrepreneurs (MAWE)	http://www.maweindia.com/
10	SAARC Chamber Women Entrepreneurship Council	http://www.scwec.com/index.htm
11	Women Entrepreneurs Association of Tamil Nadu (WEAT)	http://www.weat.com/index.html
12	TiEStree Shakti (TSS)	http://www.tiestreeshakti.org/
13	Women Empowerment Corporation	http://www.wecindia.org

9. *Supra* n. 7.

Details of Women Entrepreneur Associations in India Source[10]

Policies and Schemes for Women Entrepreneurs in India

In India, the Micro, Small & Medium Enterprises development organizations, various State Small Industries Development Corporations, the nationalized banks and even NGOs are conducting various programmes including Entrepreneurship Development Programmes (EDPs) to cater to the needs of potential women entrepreneurs, who may not have adequate educational background and skills. The Office of DC (MSME) has also opened a Women Cell to provide coordination and assistance to women entrepreneurs facing specific problems. There are also several other schemes of the government at central and state level, which provide assistance for setting up training-cum-income generating activities for needy women to make them economically independent. Small Industries Development Bank of India (SIDBI) has also been implementing special schemes for women entrepreneurs.

In addition to the special schemes for women entrepreneurs, various government schemes for MSMEs also provide certain special incentives and concessions for women entrepreneurs. For instance, under Prime Minister's Rozgar Yojana (PMRY), preference is given to women beneficiaries. The government has also made several relaxations for women to facilitate the participation of women beneficiaries in this scheme. Similarly, under the MSE Cluster Development Programme by Ministry of MSME, the contribution from the Ministry of MSME varies between 30-80% of the total project in case of hard intervention, but in the case of clusters owned and managed by women entrepreneurs, contribution of the M/o MSME could be upto 90% of the project cost. Similarly, under the Credit Guarantee Fund Scheme for Micro and Small Enterprises, the guarantee cover is generally available upto 75% of the loans extended; however, the extent of guarantee cover is 80% for MSEs operated and/ or owned by women.

Some of the Schemes related to women eudrep reneurs :

* Trade related entrepreneurship assistance and development (TREAD) scheme for women
* Mahila Coir Yojana

Schemes of Ministry of Women and Child Development

* Support to Training and Employment Programme for Women (STEP),
* Swayam Siddha
* Self employment loan programmes
* Educational loan schemes
* Single women benefit schemes

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10. Available at: *http://smallb.in/%20/fund-your-business%20/additional-benefits-msmes%20/women-entrepreneurship.*

* Job oriented training programmes
* Marketing support for women entrepreneurs
* Autorickshaw / school van's driver scheme
* Kerala Government's Women Industries Programme
* Delhi Government's Stree Shakti Project
* Schemes of Delhi Commission for Women (Related to Skill development and training) Incentives to Women Entrepreneurs Scheme, 2008, Government of Goa
* Magalir Udavi Scheme, Pudhucherry Government
* Financing Schemes by Banks/ Financial Institutions[11]

VI. CONCLUSION

The male dominated world was always reluctant to even acknowledge the fact that women were as good as men on parameters of hard work, intelligence quotient (IQ) and leadership traits. The new generation women across the world have overcome all negative notions and have proved themselves beyond doubt in all spheres of life including the most intricate and cumbersome world of entrepreneurship. India too has its own pool of such bold and fearless women who have made a mark for themselves both within the country as well as overseas. Some of the most successful women in Indian industry are given below:Indra Nooyi (the current chairman and CFO of the second largest food and beverage business, PepsiCo. She has been conferred with prestigious Padma Bhushan for her business achievements and being an inspiration to India's corporate leadership); Naina Lal Kidwai(_Group General Manager & Country Head – HSBC, India); Kiran Mazumdar Shaw(CMD, Biocon); Chanda Kochar(MD & CEO – ICICI Bank); Indu Jain - Designation – Chairperson (former), Times Group; Simone Tata(Chairperson (Former), Lakme Chairperson (Present), Trent Limited); Neelam Dhawan(MD, HP-India,A woman with 'never-say-die' spirit, Neelam Dhawan is presently the Managing Director of Hewlett-Packard (HP), India); Sulajja Firodia Motwani(JMD – Kinetic Motors); Priya Paul - Chairperson, Apeejay Park Hotels); Mallika Srinivasan(Director, TAFE (Tractor and Farm Equipment). This is only an infinitesimal part of victorious women in our country.

In view of the recorded victories of powerful feminism, it is suggested to draft the services of experienced women industrialists for resuscitating the sick industries; to grant licenses and financial assistance liberally to enthusiastic women entrepreneurs to start medium and big industries; industrial policy making body should consist of 50% women industrialists; to check the rising financial frauds and scandals in corporate sector effectively, 'Ombuds-Woman' must be appointed.

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11. Available at: *http://smallb.in/%20/fund-your-business%20/additional-benefits-msmes%20/women-entrepreneurship.*

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INDIAN NUCLEAR LAW WITH CONSTITUTIONAL AND INTERNATIONAL LAW CONFORMITY

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ABSTRACT : Indian nuclear laws and policies are in conformity with international law, India, though not a party to any of the non-proliferation treaties yet has declared its policy of no first use of nuclear weapons and a commitment to non-proliferation. Most of the law relating to nuclear energy is derived from the customary international law principles which are ipso facto part of Indian law. India also has accepted many rules of the IAEA with regard to nuclear safeguards and safety. Indian nuclear liability law also takes substantially from the language of International law - the CSC or customary principles like strict liability.

KEY WORDS : Constitution of India, Treaties and Agreements, distribution of powers, the centre and state, Acts and Rules pertaining to Nuclear energy in India

I. INTRODUCTION

There are several treaties and other formal legal instruments brought into force under the aegis of the IAEA and OECD regarding nuclear safety and Liability. One aspect of International law that is closely linked to nuclear activities is international environmental law. Although international environment law is of relatively recent origin, it already has established a core of fundamental legal principles that are pertinent to nuclear activities. The sources of these principles include both hard law as well as soft law. Hence, in relation to nuclear activities, apart from formal obligations, States are also bound by a host of customary principles. Some of these principles are considered more substantive, that is, focused on outcomes, as the "no harm" rule, the "polluter-pays" principle, and state responsibility: while others are more procedural, with their focus on means, such as the duty to notify, consult and negotiate; the principles of effective public participation in decision making; and the precautionary principle. Still others combine both substantive and procedural aspects, such as "good neighborliness' and the duty to cooperate. However, it is difficult to distinguish between the substantive and procedural principles. Aiming to ensure the safety of nuclear activities, there are also several subsidiary principles of customary law such as the principles of protection, prevention and precaution and

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to address the threat of trans-boundary radioactive pollution.[1]

The Constitution of India is the Supreme law of the Land. Any policy of the legislative initiative must confirm to the constitutional philosophy and the Fundamental Right enshrined in that. As far as nuclear energy is concerned, the law applicable includes International treaties, customary principles, and the law in force at the time the constitution entered into force and post-independence legislations.

II. CONSTITUTION OF INDIA AND IT'S IMPLICATION ON TREATIES AND AGREEMENTS

The basic provisions of the Constitution of India relevant for its interaction and inter-relationship with International Law are; (1) Article 51 (2) Article 73 (3) Article 245 & 246 (4) Article 253 (5) Article 260 (6) Article 363 (7) Article 372 and (8) VII schedule – entries 10 to 21.Article 51 provides that; the state shall endeavor to –

a) Promote international peace and security
b) Maintain just and honorable relations between nations
c) Foster respect for International Law and Treaty obligations in the dealings of organized people with one another; and
d) Encourage settlement of International dispute by arbitration.

Article 51 of the Constitution had its source and inspiration in the Havana Declaration of 30 November 1939. It is significant to note that the clause 'c' of Art. 51 specifically mentions 'International Law' and 'Treaty Obligations' separately.[2] According to Prof. C. H. Alexandrowicz the expression 'International Law', connotes Customary International Law and 'Treaty Obligations' stands for obligations arising out of International Treaties.[3] It is also significant to note that Art. 51 (c) treats both International Customary Law and Treaty Obligations on the same bases.

Article 53: provides that the Executive Power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him accordance with this Constitution. Article 253 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.

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1. Ved P. Nanda "International Environmental Norms", 35(1) *Denver Journal of International Law and Policy*, 2006,pp.49-50.
2. JagadishS.Halashetti,and Ramesh,"The Status of International Law under the Constitution of India", available at: *http://www.legalindia.in/the-status-of-international-law-under-the-constitution-of-india*.
3. C.H. Alexandrowicz, "International Law in India", *ICLO*, 1952, at 292.

It is pertinent to note here that the President acts under the aid and advice of the Union Cabinet.[4] Under Article 73, the executive power of the Union extends to all matters in respect of which parliament may make laws and to exercise of all powers that accrue to the Government of India from any International Treaty or Agreement. It is also important to note here that executive power has to be exercised in accordance with Constitution and the laws.

Though signing and ratifying an international treaty is within the domain of the executive, implementation of such treaty falls under the domain of Parliament as explicitly provided under Article 253. Further it is to be remembered here that under Article 51, India commits itself to make endeavor to 'foster respect for international law and treaty obligations'. Thus in the Constitution, International Treaties can be legally enforceable in India only when Parliament enacts an enabling legislation incorporating it under the domestic system. This attitude is also fortified by the fact that India continues to act under the influence of Common Law system accepted during British rule and continued even after the coming in to force of the Constitution[5]

The Supreme Court of India observed that - "The effect of Art 253 is that if a treaty, agreement or convention with a foreign state deals with a subject within the competence of state legislature, the parliament alone has, notwithstanding Article 246(3), the power to make laws to implement the treaty, agreement or convention or any decision made at any international conference, association or other body."[6] And in other case the Constitution Bench of the Supreme Court observed -"A treaty entered in to by India cannot become law of the land and it cannot be implemented unless parliament passes a law as required under Article 253. The executive in India can enter in to any treaty be it bilateral or multilateral with any other country or countries".[7]

The importance of putting Article 253 in the Constitution over and above the entries in List I of the Seventh Schedule was to clarify beyond doubt that for implementation of an international treaty, agreement or covenant or to give effect to a decision taken at an international forum, the Union Parliament could make any law irrespective of some items in the State List being attracted. Thus, the distribution

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4. The Constitution of India, 1950, Article 74.
5. *Id.,* Article 372.
6. *MagnabhaiIshwarbhai Patel* v. *Union of India*(1970) 3 SCC 400.
7. *State of West Bengal* v.*Kesoram Industries Ltd. And Ors* 2004 Appeal (civil) 1532 of 1993.

of legislative powers between the Union and the States under the Constitution cannot come in the way of international law obligations being implemented through parliamentary law. The fact however is that the parliament has not so far made any law on treaty making powers and until that is done, the power of the executive in the matter of treaty-making shall remain unfettered.[8]

What is important to note here is that the common law treats International custom as part of municipal law unless it is inconsistent with municipal law in which case municipal law prevails over international law[9]and Article 372 sustained all the pre-constitution 'laws in force' until altered, repealed or amended except that all those laws that were repugnant to any provision of the Constitution were declared to be void. The importance of this provision here lies in the fact that continuance of "laws in force" means continuance of the British Common Law also as that was applied by courts in India in the pre-constitution period[10].

Adopting a federal model, the Constitution of India provides for distribution of power between the centre and state. Article 246 has reference to the legislative and executive powers of centre and state respectively. Under Schedule VII of the Indian constitution, the list I confer power on the centre regarding atomic energy and mineral resources necessary for its production (entry 6) industries (entry 52) and regulation of mines and mineral development to the extent necessary and declared by Parliament to be in public interest (entry 54). The centre also has residual power in the sense that if an item were not listed in any of the three lists, the centre would have power to regulate such matters (entry 97). There are some entries in list II (which deals with the powers of the states) through not directly on atomic energy but having a bearing on atomic energy. These incidental matters are public health and sanitation (entry 6).Regulation of mines and mineral development subject to the power of the power of the Union (entry 23) and industries (subject to the power of the Union) (entry 24).

The concurrent list III refers to matter on which both the Union as well as state has the power, ultimate power vesting on the Union. The matters that are pertinent to nuclear energy are electricity (entry 38), forest (entry 17 A), economic and social planning (entry 20) etc. Besides Article 246, it is worth mentioning Article 249 which empowers the Union to legislate in respect to matters in the State list in the national interest and Article 252 under which Parliament may make any legislation

8. Subash C. Kashyap, *Constitutional Law of India* (New Delhi: Universal Law Publishing Co. Pvt. Ltd. 2008) at 22.
9. *Chung Chi Cheung* v. *R* A.C. (1939) at 168; *See also*,Gurdip Singh, "Status of Human Rights Covenants in India", *IJIL*, at 216.
10. *Id*., at 29.

for the state by consent of the state concerned and the same may be adopted by the other states.

All nuclear activities and not just those confined to nuclear weapons, are cause for serious concern because of their potential threat and harm. The April 1986 Chernobyl accident, the worst industrial disaster ever, has alerted the international community, that nuclear power plants pose a grave danger not only to the region in which they are located but to distant lands, as well.Chernobyl has also sharpened our awareness of what sever ecological and health impacts an unintended release of radiation can have on vast geographical area.[11]

III. LEGISLATIVE MEASURES

Listed below are some of the Acts and Rules pertaining to Nuclear energy in India, but only The Atomic Energy Act of 1962 has been discussed below in detail for circumscribed understanding of the Nuclear Law in India.The Atomic Energy Act, 1962; Atomic Energy (Working of the Mines, Minerals and Handling of prescribed substances) Rules, 1984; Atomic Energy (Safe Disposal of Radioactive Wastes) Rules, 1987; Atomic Energy (Factories) Rules, 1996; Radiation Protection Rules, 2004; Civil Liability for Nuclear Damage Act 2010; and Notification of Civil Liability for Nuclear Damage Rules 2011.

The Atomic Energy Act, 1962

The establishment and regulation of the nuclear energy regime in India has largely been effected through the provisions of the Atomic Energy Act, 1962 ('1962 Act' hereinafter). Although the essential scope of this enactment has been to facilitate the development of atomic energy, the range of the regulatory arm of this enactment is much longer and broader to include any activity that relates to or involves a radioactive substance. In other words, any substance, whether a material or a mineral that could be regarded as radioactive substance, could come under the purview of this enactment. The precursor to the 1962 Act has been the Atomic Energy Act, 1948, a legislation enacted soon after India's independence.

This also shows the urgency and the perception with which the immediate political establishment of post independent India sought to locate the development and use of nuclear energy. The 1948 enactment envisaged the constitution of an Atomic Energy Commission (AEC). The Department of Atomic Energy was established in 1954. The 1962 Act replaced the 1948 [12] enactment. This enactment essentially provides for the "development, control and use of atomic energy for the welfare of the people of India and for other peaceful purposes and for matters

11. Ved P. Nanda,supra n. 1, pp.185-203.
12. Repealed vide Section 32 of the 1962 Act.

connected therewith"[13] . The Act came into force from 15th September-1962.

Under the Act, the Central Government is required to prevent radiation hazards, guarantee public safety and safety of workers handling radioactive substances and ensure the disposal of radioactive wastages. The Act provides the Centre the authority to regulate nuclear research, the manufacture and to transport the radioactive substances along with production and supply to generate nuclear energy.

Section 2 defines "atomic energy" as energy released from atomic nuclei as a result of any process, including the fission and fusion processes; "fissile material" means uranium-233, uranium-235, plutonium or any material containing these substances or any other material.The clause (h) under the section 2 of this Act rovides the meaning of "radiation" as including gamma rays, X-rays, and rays consisting of alpha particles, beta particles, neutrons, protons and other nuclear and sub-atomic particles, but not sound or radiowaves, or visible, infrared or ultraviolet light and that "radioactive substance" or "radioactive material" means any substance or material which spontaneously emits radiation in excess of the levels prescribed by notification by the Central Government. Section 16, provides the Control over radioactive substances. The safety provision on mining, treatment, storage, or use and disposal are dealt under section 17 of the Act.

General powers of the Central Government are provided under section 3 of the Act and states that the Central Government has powers to manufacture, produce, develop, use and dispose of atomic energy either by itself or through any authority or Corporation established by it or a Government company and carry out research into development or use of atomic energy.

The 1962 Act places all activities to do with nuclear energy under the sole authority of the chairman of the AEC. This includes initiating, executing and promoting atomic energy, controlling its exploration, planning and manufacturing all atomic material and any related hardware in India, and all nuclear research and developmental activities. Section 3 of the 1962 Atomic Energy Act confers power concerning nuclear energy on Central Government, including:

(c) to declare as "restricted information" any data not so far published or otherwise made public relating to -

(i) the location, quality and quantity of prescribed substances and transactions for their acquisition, whether by purchase or otherwise, or disposal, whether by sale or otherwise;

(ii)the processing of prescribed substances and the extraction or production of fissile materials from them;

(iii) the theory, design, construction and operation of plants for the treatment

13. The Atomic Energy Act, 1962, Preamble.

and production of any of the prescribed substances and for the separation of isotopes;

(iv) the theory, design, construction and operation of nuclear reactors; and

(v) research and technological work on materials and processes involved in or derived from items (i) to (iv);

(d) to declare as "prohibited area" any area or premises where work including research, design or development is carried on in respect of the production, treatment, use, application or disposal of atomic energy or of any prescribed substance. [14]

Under section 18 the "restricted information" is discussed including the location, the processing of fissile materials and the theory, design, construction and operation of plants for the treatment. The provisions for control over radioactive substances or radiation generating plant are mentioned. The Central Government, under section 5 exercise controls over mining or concentration of substances containing uranium and any such concentrations need to be disclosed to the central government and the Central Government may by notice in writing restrict the mining or comply with terms and conditions for mining. Disposal of Uranium, under section 6 is carried out by the Central Government through prescribed notification. Any person authorized by the Central Government may, enter any mine, premises or land under section 8 and has the Power to conduct inspection and retain possession thereof for a period not exceeding seven days.

Sections 10 and 11 provide for compulsory acquisition of rights to work minerals, including the right to and occupy the surface of any land for the purpose of erecting any necessary equipment, buildings and installing any necessary plant.

Whenever the Central Government acquires, in accordance with any law, any mine or part of a mine, a compensation in respect of such acquisition shall be paid in accordance with section 21, but in determining the amount of such compensation, no account shall be taken of the value of uranium which may be obtained from such mine or part of a mine.Section 20 denies any person or organization not authorized by the AEC the right to invent or to patent anything which the AEC believes to be relates to atomic energy and Section 21 (5) gives the AEC absolute authority over any legal or formal arbitration[15].

Section 23 of the Act states the authority to administer the Factories Act 1948; the Central Government can establish and own any factory and establish with corporation or by itself as a Government Company. Section 24 provides for Offences and Penalties for contravenes of any rules which includes be imprisonment for a term which may extent to five years, or with fine, or both. Delegation of power is provided under sections 27, to State Government or such officer or authority

14. *Ibid.*

15. *Ibid*.

subordinate to a State Government as may be specified. The Central Government under section 30 of this Act has power to make rules on regulation by licensing, compulsory acquisition of mines and plants, regulating the production, import, export, transfer, refining, possession, ownership, sale, use or disposal of material. The nuclear establishment in India is protected by the Atomic Energy Act of 1962, but this policy framework is unjustified for a civilian nuclear sector devoted to generating electricity. Under the provisions of the Act, the government is permitted to deny information to citizens requesting details of nuclear power plants or nuclear material being used for research or industrial purposes. In line with this, the DAE does not proactively disclose details of safety measures at nuclear power plants, or of accidents which may occur. Requests for these details from DAE are more often than not denied citing sections 8 and/or 9 of the Act.

The 1962 Act, as stated above, is a framework legislation providing, *inter alia*, broad areas for regulation specifically of the use and development of radioactive substances. Section 30 of the 1962 Act itself specifies areas in which rules and regulations are needed. If one looks at these broad areas it is clear that these rules and regulations are necessary for effective implementation and operation of the 1962 Act.[16] But, there are restrictions on information and rules that prescribe measures to guard against unauthorized dissemination or use of such restricted information; declaring any area as prohibited area and prescribing measures to provide against unauthorized entry into or departure from this area; reporting of information relating to the discovery of uranium, thorium and other prescribed substances and payment of rewards for such discoveries; control over mining or concentration of substances containing uranium; regulating by licensing and encouraging by award of concessions including rewards, floor prices and guarantees, mining and prospecting for other prescribed substances; compulsory acquisition of prescribed substances, minerals and plants; regulating the production, import, export, transfer, refining, possession, ownership, sale, use or disposal of the prescribed substances and any other articles that in the opinion of the Central Government may be used for, or may result as a consequence of the production, use or application of atomic energy[17] ; regulating the use of the prescribed equipment [18]; regulating the manufacture, custody, transport, transfer, sale, export, import, use or disposal of any radioactive substance; regulating transport of such prescribed substances as are declared dangerous to health developing[19], controlling, supervising and licensing

16. *Id.,* Section 30 (4) requires that each rule made under the 1962 Act be laid before the Parliament.

17. For the definition of what is a 'prescribed substance' (which is very often used in the 1962 Act and rules framed) see Section 2 (g) of the 1962 Act according to which "any

the production, application and use of atomic energy; fees for issue licenses; manner of serving notices etc. and promoting co-operation among persons, institutions and countries in the production, use, application of atomic energy and in research and investigation in the field.

IV. CONCLUSION

Energy law has its origin in environmental law and is closely linked to development law. We have a well-established body of international law rules pertaining to nuclear energy. Every state has an obligation to structure its nuclear law so as to be in harmony with those principles of International law- both treaty and customary rules. Development compulsion and ecological needs must be balanced mutually and with aspiration of the people. It is in this background that Indian nuclear law has been appreciated. Legislation have tried to strike a balance between the desirability of monopoly of state in atomic energy and the need for private initiative in core development and ecological protection while paying attention to the health needs and rights of the workers. New scientific technologies involving nuclear radiation for diagnostic and therapeutic purposes and for preservation of food pose new challenges to the legislation and require a proactive role on the part of the successive government.

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substance including any mineral which the Central Government may, by notification, prescribe, being substance which in its opinion is or may be used for the production or use of atomic energy or research into matters connected therewith, and includesuranium, plutonium, thorium, beryllium, deuterium or any of their respective derivatives or compounds or other materials containing any of the aforesaid substances".

18. For the definition of what constitutes a 'prescribed equipment' see Section 2 (f) of the 1962 Act according to which, "any property which the Central Government may, by notification, prescribe, being a property which in its opinion is specially designed or adapted, or which is used or intended to be used for the production or utilisation of any prescribed substance, or for the production or utilisation of atomic energy, radioactive substances, or radiation, but does not include, mining, milling, laboratory and other equipment not so specially designed or adapted and not incorporated in equipment used or intended to be used for any of the purpose aforesaid"

19. See Section 17 (2) of the 1962 the Act

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BOOK REVIEW :

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ParyavaraniyaVidhi: Chunautiya, VishleshanaurBhavishya
Central Law Publications, Allahabad, 1st edn.,2015, pp. i-xxxv + 664, Rs. 370/

Environmental pollution is one of the most serious problems facing humanity in present century. The problem of environmental pollution has been a long-debated issue and part of almost all the discourses on environment. In *Global 2000 Report to the President*, the United States Council on Environmental Quality (USCEQ) offered rather pessimistic projections for environmental conditions through the end of this century.[1] If present trends continue, the world will be more crowded, more polluted, less stable ecologically, and more vulnerable to disruption than the world we live in now. Despite greater material output, the world's people will be poorer in many ways than they are today.[2]While modern societies face growing concern about global environmental issues, developing countries are experiencing complex, serious and fast-growing pollution related problems of their own.[3] Environmental pollution is more than just a health issue; it is a wider social issue in that pollution has the potential to destroy homes and communities. Despite this, many developing countries either have not developed environmental pollution control measures, or have not provided adequate implementation structures to ensure that policies are effective.[4]The present book is an attempt to understand problems of environment pollution and challenges before environmental laws in India. It also covers discussion over various international instruments and future of environmental laws of India.

The present book entitled *ParyavaraniyaVidhi: Chunautiya, Vishleshanaur Bhavishya*is an edited book in *Hindi* on Environmental Law. It comprises thirty-three chapters which have been divided into four parts. The book throws light on various dimensions of International and Indian Environmental Laws. First partof the

1. E.S. Geller, "Prevention of Environmental Problems", in B.A. Edelstein and L. Michelson (eds.), *Handbook of Prevention* (New York: Plenum Press, 1986).
2. *Ibid*.
3. "Environmental Pollution Control Measures", available at: *https://www.jica.go.jp/jica-ri/IFIC_and_JBICI-Studies/english/publications/reports/study/topical/health/pdf/health_08.pdf*
4. *Ibid*.

book focuses on Concept of Environment and Development of Environmental Laws. First five chapters of the book are devoted to above theme.Second part of the book looks into International, Constitutional and Jurisprudential Approaches to Environment Protection and next nine chapters in the book present discussion on the above approachs. Part third of the book contains nine chapters dealing with the theme Indian Legislative Approach towards Environmental Protection. It examines various Indian laws on environmental protection. At the end part four of the book which includes last ten chaptersemphasize over Environmental Protection and Future Dimensions.The book also contains a list of relevant books on Environment and Environmental Laws and a detailed subject index.

Part I covers jurisprudential aspect of environment and development of environmental laws. Chapter 1 comprehensibly explainsthe concepts of environment, environment pollution and examines available remedies in detail. Chapter 2 makes an analysis of ancient Indian approach to environment protection. It describes the life style of ancient India society and its importance in protection of environment. Chapter 3 focuses on duty of individuals to protect environment. It also examines religious and legal nature of the individual's responsibility towards environment. Next chapter traces development of environment laws in India. This chapter also makes an analysis of impact of international conventions/treaties on Indian environmental laws. At the end of this part chapter 5 examines various five years plans keeping in mind environmental goals and environmental philosophy. It also includes discussion on National Environmental Policies. It discusses in detail the National Environmental Policy of 2006.[5]

Part II includes chapters focusing on International, Legal and Jurisprudential aspects of environment protection. Chapter 6traces the growth of international environmental laws and analyses various international conventions and treaties on environment protectionincluding conventions on climate change which came into force in different circumstances and in different times.It also looks upon changes brought into Indian laws. Chapter 7develops an understanding on environment protection from human right perspective and examines various declarations and covenants from this perspective. This chapter also includes interpretations of Article 21 of Indian Constitution as human right. Chapter 8 examines various provisions of Indian Constitution relating to environment and environmental protection. Besides legislative attempt it also looks into judicial interpretation of various provisions. Author of this chapter has also compared provisions of Indian Constitution with the Constitution of Spain and Netherland. Chapter 9 again examines constitutional provisions relation to environment and environment protection. It primarily includes discussion on Article 21, Article 48A and Article 51A(g) of the Indian Constitution. It also draws attention of readers towards the role performed by various courts in the country. Chapter 10 brings to fore a discussion on movements relating to environment

5. *See,* Anoop Kumar (ed.) *ParyavaraniyaVidhi: Chunautiya, Vishleshanaur Bhavishya* (Allahabad: Central Law Publications, 1stedn., 2015) Part I, pp.21-98.

protection and environmental justice in America and India.It also attempts to explain concept of environmental justice in the backdrop of social justice. Next chapter focuses on various principles of environmental jurisprudence. It particularly includes principle of absolute liability, earth jurisprudence and post-modern environmental jurisprudence, and ecological feminism *etc*. Chapter 12 discusses in detail the concept of sustainable development in the field of environmental law. It looks into philosophical aspect of the concept and examines international law and judicial decisions to understand challenges before this concept. Chapter 13 also includes some principles in the field of environment law. It basically elucidates concept of polluter pays and precautionary principle, traces the growth and examines the applicability of these principles in Indian Laws. It examines the approach of Supreme Court of India in this context. Last chapter of this part deliberates on public trust doctrine under environmental law.[6]

Part III includes next nine chapter and these chapter are basically focusing on Indian Legislative Approach on Environment Protection. Chapter 15 presents critical analysis of laws relating to water pollution, and composition and functions of Central Water Pollution Board. The next chapter makes an analysisof the Air (Prevention and Control of Pollution) Act, 1981. An attempt has been made to understand problem of noise pollution in the country in the next chapter. This chapter focuses on prevention and control of noise pollution and examines legislative and judicial attempts in India. The next chapter present a critical analysis of the (Environment) Protection Act, 1986. It basically criticizes functions of Central Government for protection of environment. Chapter 19 presents a descriptive analysis of National Green Tribunal. It explores it historical background and examines it effectiveness in the present context. Chapter 20 examines various criminal and other laws which directly or indirectly provides for remedies against environment pollution. The next chapter focuses on protection of forest in India. It includes brief discussion of every attempts which have been made since pre-independence in India to protect forest. Chapter 22presents a brief analysis of the Wild Life (Protection) Act, 1972. It also includes discussion on amendment which was made in this Act in 2013. At the end of this part chapter 23 deliberates on problem in management of waste in India. It presents an environmental aspect of the waste management and problem of e-waste *etc*.[7]

The last part of the book includes last ten chapters which are devoted to contemporary issues and future aspect inenvironment protection. Chapter 24 contains discussion on protection of biological resources and its environmental aspects. It attempts to explain international as well as national measures which have been adopted for protection of these resources. The next chapterdeals with the issue of green-house effect and the issue of incensement of temperature of earth in detail. It examines its causes and attempt which have been made at international and national levels to

6. *Id.,* Part II, pp.99-225.
7. *Id.,* Part III, pp.226-428.

control its effects. Chapter 26 examines liability of state for extra-territorial environment pollution under international law and exceptions available to the states. It also examines Indian stand and judicial decisions in this context. Further, chapter 27elucidates issue of cross-border regulation and management of hazardous waste. It emphasizes on International Covenant of 1990 and the manner in which the obligations of the covenant have been complied with under Indian Laws. Chapter 28 examines rights of tribal in the context of forest laws. It critically examines provisions of the Forest Rights Act, 2006 keeping in view various rights relation to land. Next chapter presents a chronological study of bauxite mining activities in various regions of the country and the issue of sustainable development. The arguments in this chapter are based on various judgments of courts. Next chapter focuses on participation of civil society in determining environmental policies. It includes discussion made at international level to encourage participation of common people in making of environmental policies. Chapter 31 makes a comparative study of Environmental Impact Assessment and its role in evaluation of environment effect in Notification of 2006, 2009, and 2013. It also includes various judicial decisiona which have recognized environmental impact assessment as an instrument of prevention of environment pollution. Chapter 32 dwells into right to development and protection of environment. It proffers light on the way development activities deteriorate or strengthen environment. At the end chapter 33 examines contemporary global politics from the perspective of environment protection. It focuses on ideological differences between developed and developing countries. It discusses Rio+20 and looks into the issue of environment from the perspective of global trade. It also examines India approach towards these issues in detail.[8]

The extensive coverage is the merit of the book, however, one may get the impression that there is scope of improvement in many chapters keeping in mind the recent developments in the field. A very good attempt has been made by the editor of the present book in selection of topics and its division in various part. The foreword by Prof. BC Nirmal (Vice Chamcellor, NUSRL Ranchi) adds value to the book. It is hoped that the book will gain popularity amongst students, researchers and teachers. The book fulfils the long standing demand for an extensive edition on the subject in Hindi. The work must be appreciated for its printing quality as well as the price. It may be said that the present book is a combined outcome of the efforts of experienced and young scholars in the field of Environmental Law which deserves appreciation because of the analytical approach adopted throughout.

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8. *Id.,* Part IV, pp.429-628.

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