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THE INDIAN JOURNAL OF LAW AND PUBLIC POLICY

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FOREWORD

It gives me immense pleasure to learn that the Indian Journal of Law and Public Policy has successfully completed the publication of second issue of the journal.

Law journals are quite informative and help others to enlighten them with the knowledge of law which is a foundation of every civilised society. But what is more laudable, is the fact that the journal has been published by the students all by themselves, under the sagacious guidance, of course, of the eminent members of the Advisory Board.

The efforts made by the students for this noble cause of spreading awareness in the society regarding various issues related to law is also an inspiration to others and will definitely help in building a better society to live in.

I extend my good wishes to all contributors of the journal. I do hope that the journal will continue to strive hard to achieve its purpose in a sustained manner.

KTS Tulsi

Senior Cousel, Supreme Court of India

Member, Parliament (Rajya Sabha)

CONCEPT NOTE

The Indian Journal of Law and Public Policy is a peer reviewed, biannual, law and public policy publication. Successive governments come out with their objectives and intentions in the form of various policies. These policies are a reflection of the Executive's ideologies. Laws, concomitantly, become the means through which such policy implementation takes place. However, there might be cases of conflicts between the policy and the law so in force. These contradictions have given way for a continuing debate between the relationship of law and public policy, deliberating the role of law in governing and regulating policy statement of various governments.

This journal is our solemn effort to promote erudite discernment and academic scholarship over this relationship, in a way which is not mutually dependent on each of these fields but which is mutually exclusively and independent. The focus has been to give a multi-disciplinary approach while recognizing the various effect of law and public policies on the society.

(EDITOR IN CHIEF)

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COMPARATIVE CONSTITUTIONAL ANALYSES OF NIGERIA'S LOCAL GOVERNMENT SYSTEM

*Dr.S.G.Ogbodo and U.E.Okolocha**

INTRODUCTION

Taking it from independence in 1960, Nigeria's political development and constitutional engineering show that the military regimes, (particularly from 1975 – 1979 and 1984 – 1999), have strengthened the machineries of local government, expanded the frontier of local governance and extended democracy at that level more than the civilian administrations, (1979 – 1983 and 1999 to present day). This is rather curious and paradoxical, but the reality is that while the military rooted for a stronger, autonomous and more democratic local government system, the civilian governments have tended to circumscribe it. Writing in 1992, Prof. Oluyede[1] said:

The present military administration like the 1975 – 79 military regimes would appear to do everything in its power to make deliberate efforts to lay a solid foundation for democratic Local Governments in Nigeria…. A lot has been put into the 1989 Constitution (for the advancement of Local Governments); its success or otherwise will depend on the civilian government that takes over in 1992.[2]

Similarly, Ojofeitimi wrote[3] that against expectations, the hope for a virile and democratic local government system was dashed, as various developments, both political and economic, adversely affected it. Political leaders of the first republic dismantled the democratic structures of local governments as epitomized by the replacement of elected Councils in the Western Region by nominated ones in 1963. Specifically he wrote that:

> The third phase inspired and epitomized by the Local Government Reforms of 1976 witnessed a determined effort by the Federal (Military) Government to revamp, rationalize and rehabilitate the system of local

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1 Oluyede P. A. O.in *Constitutional Law in Nigeria*, first edition, (Evans Brothers, Ibadan), 1992, P. 335.

2 1992 was the year scheduled for the conclusion of the transition programme of the time, and for elected civilian government to take over.

3 Ojofeitimi T.: Yesterday's Hope and Today's Disillusionment: whether Local Government in Nigeria, in People-centered Democracy in Nigeria, Ed. 2000, 4.

> government. By October 1979, it could be stated that the rehabilitation of local government had been satisfactorily executed. Unfortunately, the fourth phase of local government administration (1979 – 1983)which held out high hopes for the consolidation of local government as a democratic and results-oriented system witnessed its collapse… the fifth phase witnessed the efforts of the Buhari and Babangida Administrations, especially the latter, to salvage local government from the mess that it was plunged into between 1979 - 1983

The experiences of the civilian era (1979 – 83) under the 1979 Constitution are back in full force since 1999 under the present Constitution. It is helpful at this point, to refer to what the Association of Local Governments of Nigeria, ALGON, said about the state of local government. It is a fairly long advertorial[4] captioned "Open letter to all Nigerians".

Under subhead 6: UNDUE INTERFERENCE BY STATE GOVERNMENTS, the following was stated:

> More worrisome however is the trend that is becoming entrenched and endemic in local government administration in Nigeria and that is the unconstitutional and unceremonious termination of the tenure of elected councils by the state governors and legislatures before the expiration of the mandate given by the people during elections and replacing the elected council with unelected and selected individuals and political associates under the nomenclature of "caretaker committee". The so called caretaker committee assumes the duties and responsibilities of an elected council to the extent that a governor allows and the committee's life span is indefinite until such a time it is most convenient for the State Government to conduct local government elections. A typical example is Anambra State. The last time local government elections was conducted in the State was in 1999. Since 2002 local governments in the State have been managed by the Governor through caretaker committees, yet funds meant for democratically elected councils are still released to the State from the Federation Account.
>
> This practice which first reared its ugly head as far back as year 2002[5] is fast becoming the accepted norm instead of an aberration to democratic practice. Initially Governors

[4] Published in the Vanguard Newspaper edition of Friday, August 12, 2011 at 54 and 55.

[5] It must be pointed out that during the Second Republic, Caretaker Committees, Management Boards, etc, were

> will unilaterally and without recourse to due process of law, suspended or out rightly remove targeted elected Council Chairmen from office. The practice has grown beyond that. Presently, Governors are truncating the tenures of the whole Local Government Councils within their States with impunity. As at June 2011, over 2/3 of the 774 local government councils in the country are being run by non-elected caretaker committees, appointed by State Governors (see appendix A).[6]

The local government system became a national (or federal) issue after the collapse of the first republic, and a constitutional subject in 1979, vide the 1979 Constitution. Before then, it was a regional matter, dealt with by the Governments of the various Regions. The provisions relating to local governments in the 1979 constitution are *inpari materia* to those in the 1999 Constitution. But there are wide and significant differences between the provisions of these two Constitutions (1979 and 1999) and those of 1989 and 1995. The 1995 Constitution appears, in this regard, to be an improvement on the 1989 Constitution. Unfortunately, both Constitutions (1989 and 1995) were not promulgated and didn't take effect.[7]

To this extent, the further efforts made between 1999 and 2001, and between 2005 and 2006, to review, amend and/or enact a new constitution under the Obasanjo civilian administration[8] would also be revisited. Epochal analysesin this paper are local or Nigerian, while comparative analyses of the local government system are from selected foreign jurisdictions.

LOCAL GOVERNMENT SYSTEM UNDER THE 1979 AND 1999 CONSTITUTIONS

Section 7 of the 1999 Constitution is exactly the same as Section 7 of the 1979 Constitution. Aspects of this section have already been quoted, but for the purpose of this chapter, it should be reproduced.

---

also used to run the Councils.

6 Appendix A (table) in the publication, shows that 27 States operate with Caretaker Committees while 10 (including FCT) have elected Councils. Note however that ALCON in Enugu State Published a correction vide Vanguard edition of August 16, 2011, that Enugu Councils are elected.

7 Although some of their provisions were enforced through Decrees.

8 1999 – 2007. Shortly after his swearing into office, Chief Obasanjo set up the Clement Ebri Committee in 1999 which turned in its report in 2001. Again in 2005, he set up the National Constitutional Reform Conference. It is remarkable that Obasanjo as Military Head of State 1976 – 79, also reformed the Local Government system.

7. (1) The system of local government by democratically elected local government councils is under this Constitution guaranteed; and accordingly, the Government of every State shall, subject to section 8 of this Constitution, ensure their existence under a Law which provides for the establishment, structure, composition, finance and functions of such councils.

(2) the person authorized by law to prescribe the area over which a local government council may exercise authority shall –

(a) define such area as clearly as practicable; and

(b) ensure to the extent to which it may be reasonably justifiable, that in defining such area regard is paid to –

(i) the common interest of the community in the area

(ii) traditional association of the community, and

(iii) administrative convenience.

(3)It shall be the duty of a local government council within the State to participate in economic planning and development of the area referred to in subsection (2) of this section and to this end an economic planning board shall be established by a Law enacted by the House of Assembly of the State.

(4) The Government of a State shall ensure that every person who is entitled to vote or be voted for at an election to a House of Assembly shall have the right o vote or be voted for at an election to a local government council.

(5) The functions to be conferred by Law upon local government councils shall include those set out in the Fourth Schedule to this Constitution.

(6) Subject to the provisions of this Constitution –

(a) the National Assembly shall make provisions for statutory allocation of public revenue to local government councils in the Federation; and

(b) the House of Assembly of a State shall make provisions for statutory allocation of public revenue to local government councils within the State.

It is important to recall that the 1999 Constitution was "hastily assembled" by a few persons empanelled by the Gen. Abdulsalami Abubakar administration[9] that took over following the sudden death of Gen. Sani Abacha.[10] The tension in the country informed the short transition programme implemented by Gen. Abubakar, which left him without time to organize a Constitutional Conference or a Constituents Assembly.

However S.8 of the 1999 Constitution departed remarkably from S. 8 of the 1979 Constitution. Four new sub-sections (3) – (6) were introduced, dealing with the procedure for the creation of new local government area:

> (3) A bill for a Law of a House of Assembly for the purpose of creating a new local government area shall only be passed if –
>
> (a) a request supported by at least two-thirds majority of members (representing the area demanding the creation of the new local government area) in each of the following, namely –
> (i) the House of Assembly in respect of the area, and
> (ii) the local government councils in respect of the area, is received by the House of Assembly;
>
> (b) a proposal for the creation of the local government area is thereafter approved in a referendum by at least two-thirds majority of the people of the local government area where the demand for the proposed local government area originated;
>
> (c) the result of the referendum is then approved by a simple majority of the members in each local government council in a majority of all the local government in the State; and
>
> (d) the result of the referendum is approved by a resolution passed by two-thirds majority of members of the House of Assembly.

[9] July 8, 1998 – May 29, 1999.
[10] Who ruled from Nov. 18, 1993 – July 8, 1998.

(4) A bill for a Law of a House of Assembly for the purpose of boundary adjustment of any existing local government area shall only be passed if –

(a) a request for the boundary adjustment is supported by two-thirds majority of members (representing the area demanding and the area affected by the boundary adjustment) in each of the following, namely –

(i) the House of Assembly in respect of the area, and

(ii) the local government council in respect of the area, is received by the House of Assembly; and

(b) A proposal for the boundary adjustment is approved by a simple majority of members of House of Assembly in respect of the area concerned.

(5) An Act of the National Assembly passed in accordance with this section shall make consequential provisions with respect to the names and headquarters of States or local government areas as provided in section 3 of this Constitution and in Parts I and II of the First Schedule to this Constitution.

(6) For the purpose of enabling the National Assembly to exercise the powers conferred upon it by subsection (5) of this section, each House of Assembly shall, after the creation of more local government areas pursuant to subsection (3) of this section, make adequate returns to each House of the National Assembly.

Subsections (5) and (6) above are particularly instructive as they were the main basis of the Supreme Court decision in *Attorney- General of Lagos State vs. Attorney-General of the Federation,*[11] already discussed in Chapter 6, supra. Both subsections refer to S. 3 of the Constitution which deals with the "States of the Federation and the Federal Capital Territory, Abuja." But while S. 3 of the 1979 Constitution has 5 sub sections, S. 3 of the 1999 constitution has an additional subsection (6) which states as follows:

> (6) There shall be seven hundred and sixty-eight local government areas in Nigeria as shown in the second column of Part I of the First Schedule to this Constitution and six area councils as shown in Part II of the Schedule.

[11] (2004) 18 NWLR (Pt. 904).

The legal challenges that confronted the operation of the 1979 constitution[12] probably informed the introduction of this new subsection. It is submitted that this new subsection has not made the creation of new local government (areas or councils) easier as the requirements of "consequential provisions" in S. 8 (5) and "adequate returns" in S.8 (6) circumscribe the powers of the State Assembly in this regard, without investing the power of creation in the National Assembly.

Another significant constitutional provision relating to the local government is S.149 of the 1979 Constitution, which was reproduced with amendments as S. 162 of the 1999 Constitution. Since the latter is more elaborate (being an improvement on the former), it (i.e. S. 162) is reproduced verbatim hereunder:

162 (1) The Federation shall maintain a special account to be called "the Federation Account" into which shall be paid all revenues collected by the Government of the Federation, except the proceeds from the personal income tax of the personnel of the armed forces of the Federation, the Nigeria Police Forces, the Ministry or department of government charged with responsibility for Foreign Affairs and the residents of the Federal Capital Territory, Abuja.

(2) The President, upon the receipt of advice from the Revenue Mobilisation Allocation and Fiscal Commission, shall table before the National Assembly proposals for revenue allocation from the Federation Account, and in determining the formula, the National Assembly shall take into account, the allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density:

Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen percent of the revenue accruing to the Federation Account directly from any natural resources.

[12] *See* for example, the earlier case of *Chief Sule Balogun v. Attorney General of Lagos State and others* (1981), 1 NCLR 31.

(3) Any amount standing to the credit of the Federation Account shall be distributed among the Federation and State Governments and the local government councils in each State on such terms and in such manner as may be prescribed by the National Assembly.

(4) Any amount standing to the credit of the States in the Federation Account shall be distributed among the States on such terms and in such manner as may be prescribed by the National Assembly.

(5) The amount standing to the credit of local government councils in the federation Account shall also be allocated to the States for the benefit of their local government councils on such terms and in such manner as may be prescribed by the National Assembly.

(6) Each State shall maintain a special account to be called "State Joint Local Government Account" into which shall be paid all allocations to the local government councils of the State from the Federation Account and from the Government of the State.

(7) Each State shall pay to local government councils in its area of jurisdiction such proportion of its total revenue on such terms and in such manner as may be prescribed by the National Assembly.

(8) The amount standing to the credit of local government councils of a State shall be distributed among the local government councils of that State on such terms and in such manner as may be prescribed by the House of Assembly of the State.

(9) Any amount standing to the credit of the judiciary in the Federation Account shall be paid directly to the National Judicial Council for disbursement to the heads of courts established for the Federation and the States under section 6 of this Constitution.

(10) For the purposes of subsection (1) of this section, "revenue" means any income or return accruing to or derived by the Government of the Federation from any source and includes: -

(a) Any receipt, however described, arising from operation of any law;

(b) Any return, however described, arising from or in respect of any property held by the Government of the Federation;

(c) Any return by way of interest on loans and dividends in respect of shares or interest held by the Government of the Federation in any company or statutory body.

The financial autonomy granted the judiciary vide the direct allocation in subsection (9) (above) is markedly different from sub sections (5) and (6) under which monies meant for local governments "shall be allocated to the States for the benefit of their local government councils" (Sub-section 5), and paid into "State Joint Local Government Account" (sub section 6). It is strongly contended in some circles that this mechanism is in practice, an effective control tool of the State Governments over Local Governments, on one hand, and on the other hand, it affords the State the license to manipulate local government funds.

LOCAL GOVERNMENT SYSTEM UNDER THE UNPROMULGATED CONSTITUTIONS OF 1989 AND 1995.

As earlier indicated, the provisions of the 1989 and 1995 (unpromulgated) Constitutions are remarkably different from those of the 1979 and 1999 Constitutions, with regards to the system of local government. Advocates of improved local government functions, finances, security, autonomy and restructured machineries, as a separate and effective third tier of government, who lost out to the strict federalists during the Constituents Assembly debates in 1976 – 78,[13] won the day at the 1988/89 Constituents Assembly, and at the 1994/95 National Constitutional Conference. The provisions of the Constitutions that emerged from those exercises attest to this:

Section 7 of the 1989 Constitution provides as follows:

S.7 (1) The system of local Government by democratically elected local government councils is under this Constitution guaranteed.

[13] Pursuant to the enactment of the 1979 Constitution.

(2) There shall be 449 Local Government Areas in Nigeria as named in the second column of Part I of the First Schedule to this Constitution and each of the Local Government Areas shall be the only unit in respect of which the government of a state is empowered to establish an authority for the purpose of local government.

(3) Without prejudice to the provisions of subsection (2) of this section the Government of a State may by law create for any Local Government Area up to a maximum of 7 Development Areas having regard for such factors as common historical and traditional ties, geographical contiguity and administrative expedience.

(4) Subject to subsection (2) of this section, the person authorized by Law to prescribe the area over which a Local Government may exercise authority shall define such area as clearly as practicable and in conformity with the provisions of Part I of the First Schedule to this Constitution.

(5) It shall be the duty of Local Government within the State to participate in economic planning and development of the Local Government Area concerned and to this end a joint economic planning board shall be established by a Law enacted by the House of Assembly of the State.

(6) Government shall ensure that every person who is entitled to vote or be voted for at an election to a House of Assembly shall have the right to vote or be voted for at an election to a Local Government Council.

(7) The functions to be conferred by Law upon Local Governments shall include those set out in Part I of the Fourth Schedule to this Constitution.

(8) Subject to the provisions of this Constitution -

(a) The National Assembly shall make provisions for statutory allocation of public revenue to Local Governments in the Federation; and

(b) The House of Assembly of a state shall make provisions for statutory allocation of public revenue to Local Governments within the State.

(9) The Auditor –General of the Local Governments of the State shall audit annually the accounts of the Local Governments and the report thereof shall be laid before the House of Assembly of the State.

(10) Subject to the provisions of Chapter VIII of this Constitution, the House of Assembly of a State shall enact a Law providing for the structure, composition, revenue, expenditure and other financial matters, staff meeting and other relevant matters for the Local Governments in the State.

S.7(1) – (10) of the 1989 Constitution were largely adopted and adapted, and also improved upon by S.7 of the 1995 Constitution which has thirteen sub sections. While S.7 (2) and S.7 (4) of the 1989 Constitution were dropped, new sub-sections (8) – (11) were introduced into S.7 in the 1995 Constitution as follows:

(8) The Legislative powers of a Local Government shall be vested in the Local Government Council

(9) A Local Government Council shall have power to make bye-laws on matters conferred upon it by this Constitution or by Law of a House of Assembly of a State.

(10) Subject to the provisions of this Constitution, the executive powers of Local Government –

(a) shall be vested in the Chairman of that Local Government Council and may subject as aforesaid and to the provisions of any Law made by the House of Assembly of the State within whose boundaries the Local Government Area is situate and bye-laws made by the Local Government Council be exercised by him either directly or through the Vice Chairman or Supervisory Councilors of the Local Government or officers in the service of that Local Government; and

(b) shall extend to the execution and maintenance of this Constitution, all bye-laws made with respect to which the Local Government Council has for the time being power to make bye-laws.

(11) The executive power vested in the Chairman of a Local Government Council by Subsection (10) of this section shall not be exercised so as to impede or prejudice the exercise of the executive powers of the Federation or of the State in which the Local Government Area concerned is situate or to endanger any asset or

investment of the Government of the Federation or of the State Government in the Local Government Area.

These new subsections foreshadow and reinforce the provisions of the equally new chapter VIII of both Constitutions. Again, both 1989 and 1995 Constitutions introduced Traditional Councils for the Local Government Areas vide S.8, as follows:

S.8 of the 1989 Constitution:

S.8 (1) Subject to the peculiarities of each State, the House of Assembly of the State may enact a Law for the establishment of the Traditional Council for a Local Government Area or a group of Local Government Areas.

(2) Each of such Councils shall be presided over by a Traditional Ruler appointed in the manner prescribed by Law.

(3) The functions to be conferred by Law upon a Traditional Council shall be as set out in Part II of the Fourth Schedule to this Constitution.

However, the 1995 Constitution introduced a new subsection (3) to its own section 8 while retaining but renumbering the subsection as its own subsection (4). The new subsection (3) provides:

(3) The consent of the State Council of Chiefs shall be sought in matters of creating new Chieftaincy or upgrading of any chief or making of any law which may improve the security of tenure or dignity of traditional institutions.

The role of traditional rulers has been a subject of intense debate and controversy in the various constitution making exercises. It featured in the debates of 1976 – 78; 1988/89; 1994/95 (which upheld and entrenched it); and 2005/2006 which produced favourable reports that were however, thrown out at the National Assembly.

What is S.8 in both the 1979 and 1999 Constitution (on procedure for the creation of States, Local Governments and Boundary adjustments) is S. 9 in both the 1989 and 1995 Constitutions,

save that while the two latter Constitutions have only 5 subsections, the 1999 Constitution has 6 subsections. The last (new) one, i.e. S. 8 (6)), as previously reproduced,[14] mandates the State House of Assembly to make "adequate returns" after the creation of new local governments to each of the Houses of the National Assembly. It is submitted here that if the intention was to reserve the right of creating new local governments to the State, the new subsection, (together with the preceding subsection (5)) clogs that power. The operation of these two subsections, according to Prof. Ben. Nwabueze[15] ought to be merely administrative, but the Supreme Court in the *AG Lagos v AGF case*,[16] says until both subsections are complied with, the creation exercise remains inchoate.

It has been argued earlier that the military government worked more for the strengthening the local government system than the civilians. This is again exemplified by the provisions of section 160 (4) and S. 160 (5) of the 1989 and 1995 Constitutions. Having regard to the use of finance as instrument of control by the State over the local governments, and more importantly, the diversion of local government monies by the State, a bold step was taken under these two Constitutions to release monies from the Federation Accounts directly to the local government. The provisions are:

S. 160 (4): Any amount standing to the credit of Local Governments in the Federation Account shall be allocated directly[17] to the Local Governments concerned on such terms and in such manner as may be prescribed by the National Assembly.

S. 160 (5): Each State Government and Local Governments in the State shall main a special account to be called "**Local Government Account**"[18] into which shall be paid such funds to be applied for joint purposes as may be prescribed by the State or National Assembly.[19]

[14] Under the immediate past sub head.
[15] How President Obasanjo subverted Nigeria's Federation System, Gold Press, Ibadan, 2007, P. 22 at P 44.
[16] *Supra.*
[17] Underline supplied.
[18] Underline supplied. Compare S. 140 (4) and S. 149(5) of the 1979 Constitution and S. 164 (5) and 164 (6) of the 1999 Constitution.
[19] The prescriptive power granted to either the State or National Assembly here is capable of causing constitutional conflicts.

By and large, the boldest step taken to protect and strengthen the local government as a independent and effective tier and also as a structural counterpart or equivalent of the State and Federal Governments, is the introduction of a new Chapter VIII Parts I & II, into both the 1989 and 1995 Constitutions.

Much of the provisions of Chapter IX of the 1989 and 1995 Constitutions are contained in Chapter VIII of the 1999 Constitution which is an improvement on the provisions of Chapter VIII of the 1979 Constitution. But not so for the new Chapter VIII of the 1989 and 1995 Constitutions. This chapter deals *in extenso* with the local Government system as chapter V and VI of the various Constitutions under reference deal with the State and Federal Governments. It (i.e. chapter VIII of the 1989 Constitution) is commended to the reader.[20] But mention must be made of a few sections and also of some differences in this 1995 chapter between the 1989 and the 1995 Constitutions.

Section 283 (2) provides as follows:

(2) The Local Government Council shall stand dissolved at the expiration of a period of 3 years commencing from the date of the first sitting of the Council.

Section 296 (3): subject to the provisions of subsection (1) of this section, the Chairman shall vacate his officer at the expiration of a period of 3 years commencing from the date when –

(a) in the case of a person first elected as chairman under this Constitution, he took the Oath of allegiance and the Oath of office, and

(b) the person last elected to that office took oath of allegiance and the Oath of office or would but for his death have taken such Oaths.

These provisions address the pervasive question of the exact tenure of Local Government Councils having regard to the spate of suspension and/or dissolution of Councils before the expiration of their terms by State Governors in collaboration with the House of Assembly. This

[20] Most State Local Government Laws now encompass the provisions of this chapter.

is however missing in the 1979 and 1999 Constitutions. However S. 303 which deals with the tenure of the Councils is silent on the exact duration of the term of office of members and has to be read-together with S. 283 (2) above.[21] With regards to Structure and Composition S. 284 provides that each Local Government shall have not more than 10 and not more than 20 wards, depending on its population, while S. 298 stipulates that each Ward shall be represented by a Councilor. Also the public service of local governments was constitutionally provided for.[22]

There are however, few significant areas of differences between these two pro-local government Constitutions (1989 and 1995), in the new Chapter under reference.

1. Section 287 (b) prescribed 25 years as minimum age for election as Chairman. It is 35 years under S 308 (b) of the 1995 Constitution.
2. Section 288 prohibit any one who has been elected to the office of Chairman at two previous elections, from contesting. There is a provision in the 1995 version, which states that no person shall succeed himself.[23]
3. Section 299 provides for 21 years for councilors. S. 320 of the 1995 Constitution has 25 years.
4. A new subsection (2) was introduced to S. 334 of the 1995 Constitution as follows:

   > The Judicial Service Commission of the Federal Capital Territory, Abuja, the Composition and functions of which shall be as provided for in Part I of the Third Schedule to this Constitution.[24]

5. While Section 314 provides that the Federal Capital Territory, Abuja shall be one Senatorial District and Four Federal Constituencies, S. 335 of the 1995 Constitution departs by stating that the Federal Constituencies can be as many as it id entitled under S. 52[25] of the Constitution.[26]
6. Very significantly, S. 315 of the 1989 Constitution provided that a mayoralty comprising four Area Councils shall be created for the Federal capital Territory, Abuja, and the

[21] It is suggested that both provisions could have been drafted together.
[22] S. 308 – 310 of the (1989) Constitution.
[23] It is not too clear what this provision seeks. Whether it stops a Chairman who has done two terms from succeeding himself or those that have done two terms at any time is not clear.
[24] The closet provision to this Section is section 316 of the 1989 Constitution.
[25] Section 52 provided for the composition of the House of Representatives.
[26] This is the version adopted by the 1999 Constitution (*see* S. 300).

administrative and political structure thereof shall be as provided by an Act of the National Assembly. This was simply deleted or omitted in the 1995 constitution.[27]

REPORT OF THE PRESIDENTIAL COMMITTEE ON THE REVIEW OF THE 1999 CONSTITUTION

Not long after he was sworn into office as president, Chief Olusegun Obasanjo, empanelled the Chief Clement Ebri Committee to review the 1999 Constitution. Two year later,[28] the Committee submitted its report. Here are excerpts.

On Local Government Autonomy:

> Most of the memoranda called for full political and financial autonomy for the Local Government as the third tier of government. Although S. 7 (1) of the Constitution appears to achieve that objective, it empowers the State Houses of Assembly to make laws to ensure the existence of democratically elected Local Government Councils which is seen as detracting from the desired Constitutionally guaranteed autonomy. By that provision, councils are seen as mere administrative appendages of State governments…

The Committee went on to state that it was equally aware of the clamour for direct funding to the Local Governments from the Federation Account.
However, it came up with a measured recommendation that hardly justified its finding:

(a) Section 7 (1) and (2) be retained so that the State Houses of Assembly are vested with powers to legislate on the creation and other necessary powers of the Local Government Councils in the spirit of true federalism;
(b) Section 7 be expanded to take care of the provisions made in this review to ensure the existence and proper functioning of Local Government Councils;
(c) In line with the call for the security of tenure for elected Local Government functionaries, a new provisions for qualifications and removal of the Chairman, Vice Chairman and councilors has been recommended as a separate tier of Government within the States; and

[27] It is also not in the 1979 and 1999 Constitutions. It was an innovation of the Babangida regime that didn't survive.
[28] On the 28th of February, 2001.

(d) In order to strike a balance between the demand by the Local Governments for financial autonomy through direct funding from the Federation Account and the need to ensure financial probity on the part of the Local and State Governments, it is recommended that Section 162 (5) be amended to enable all disbursements to the Local Government Joint Account as provided in Section 162(6).

REPORT OF THE NATIONAL POLITICAL REFORM CONFERENCE

President Obasanjo inaugurated the National Political Reform Conference chaired by Hon. Justice Niki Tobi on the 21st of February 2005. The Conference adopted its report on the 11th of July 2005 and immediately submitted same.

On "Local Government Reforms" the Conference made a 49 point recommendation all of which form Appendix II to this work. Immediate mention must however be made of the following:

On establishment and administration of Local Government:

(e) The conference recommended that constitutional provisions be made to guard against the abuse of S. 7 and to give it true meaning.

On Finances of Local Governments

(g) All Local Government Budgets should be presented to and approved by the State House of Assembly which could in addition to the Local Government Legislature, exercise oversight function over Council finance.

On Local Government Elections:

(a) That Local Government election should be on the exclusive lists in order to provide uniformity and allow the Independent National Electoral Commission (INEC) to conduct the elections.

(b) Election Tribunals must be constituted to hear petitions on the elections conducted and concluded before swearing in the winners.

(f) Independent candidates should be allowed.

On Local Governments in the FCT

(a) The Federal Capital Territory shall be administered by a Mayor appointed by the President in accordance with a Federal Law.

On Traditional Institutions

(a) Traditional Council of Chiefs should be recognized at the Local Government level. Roles should be found for traditional rulers by State Governments to enable them have a feeling of participating in government. The present state council of chiefs should be given additional responsibilities in accordance with local peculiarities.

COMPARATIVE ANALYSIS OF THE NIGERIAN LOCAL GOVERNMENT SYSTEM WITH SELECTED FOREIGN JURISDICTIONS

Before countries are formally born, there are usually systems of administration of (or by) the inhabitants of the geographical areas that eventually become the country. While it is true that "State" or "nations" have come together to form countries or federations,[29] and that big Countries have broken into smaller countries,[30] the preponderant case is for people or nationalities of contiguous, and sometimes, not too contiguous entities, to deliberately unite or federate or evolve[31] or be brought together to form a country.[32] In all these cases, especially the latter set of cases, there exists prior local or native or indigenous systems through which the various peoples governed themselves before the inception of formal statehood and/or nationhood. Except in cases where coercion or fiat has been used,[33] the emergent States, Countries or Nations inevitably have traces, often dominants patterns, of their prior systems of native administration, in their new systems of governance.

[29] E.g. U.S.A.
[30] E.g. U.S.S.R.
[31] E.g. Great Britain.
[32] E.g. Nigeria.
[33] In Nigeria, the different systems of Native Administration were in 1976 coalesced into one "Unified Local Government System."

These differences are sometimes very profound[34] but often marginal and blurred.[35] Whatever be the case, all countries or nations have local administrations for their different component regions, states, provinces, nationalities, localities and/or ethnic groups. Most of them by evolution, some others by political and constitutional engineering and few by prescriptive fiat.

In order to fully grasp or properly understand, and locate, the place of the Local Government under the Nigerian Constitution, it is necessary to look at the local government system in a few foreign jurisdictions even if it is only to do a comparison and/or comparative analyses, before any possible lessons could be drawn or suggestions made. For this reason the Local Government systems in Britain, Switzerland, Germany, Slovenia, and France would be visited to see how and possibly, why they are working. Perhaps a few lessons could be learnt for our own system.

LOCAL GOVERNMENT IN BRITAIN

Writing on the Local Government system, over a century ago, Alexie de Tocqueville said inter alia, that:

> The Local Assemblies of Citizens constitute the strength of free nations. Town meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it. A nation may establish system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty.[36]

Local Government was therefore defined as *government by popular elected bodies charged with administrative and executive duties in matters concerning the inhabitants of a particular district or place, and vested with powers to make bylaws for their guidance*. It was further contended that Britain has an outstanding Parliament because members had a sap of native vigor and an instinct for self-government.[37]

The Local Government system in Britain, or the United Kingdom, is of long ancestry, pre-dating Norman days. The system today is the evolutionary product of the Shires, Vills and/or townships. By the middle ages, the Shire already had its Court and Assembly, which were

[34] As with the tiers of local administration.
[35] As with the functions in most cases.
[36] Select Constitutions, Anud Chand Kapur and K. K. Misra, 15th Ed., 2002, 203.
[37] Ibid.

presided over by the Sheriff. County and Borough Councils were to follow, as the Crown gave Charters of varying degrees to such Councils. By the 14th Century, the Justices of Peace had acquired and combined judicial powers with administrative and police powers. Parishes which were ecclesiastical units of authority also became units of local governance.

ESTABLISHMENT AND STRUCTURE OF MODERN LOCAL GOVERNMENT IN BRITAIN:

The new shape of Local Government in Britain started with the reforms of between 1835 and 1935. It achieved three things, namely:

(i) Reforms and Democratization

(ii) Reforms and Clarification of Powers/Functions

(iii) Reforms and Clarification of the Nexus between the Local and Central Governments.

The Local Government Act of 1888 instituted democratic County Councils to replace the Justices of Peace. Progressively, six types of Local Authorities emerged:

(i) The Administrative County,

(ii) The County Borough,

(iii) The Non County Borough

(iv) The Urban District,

(v) The Rural District, and

(vi) The Parish.

FUNCTIONS

A system of "Integral Local Government" was also developed under which broad functions were given to Local Authorities which included Electricity and Gas, Housing, Public Services, Public Assistance, Road and Transport, Police, Public Health, High Ways, Education Libraries, Museums and Galleries, Parks , Refuse Collection, etc. These were vast areas of responsibilities divided among the different tiers of Councils according to their authority, except in the Metropolitan Districts where Police, Fire and Civil Defence, and Passenger Transport had their

own Authorities. But when the Labour Government took over in 1945,[38]after the 2nd World War, a number of these services were nationalised, especially Education, Water supply and Police.

RELATIONSHIP BETWEEN LOCAL AND CENTRAL GOVERNMENT IN BRITAIN

Britain operates an unwritten Constitution. This further complicates issues of constitutionalism vis-à-vis the local government system. Therefore, what governs the relationship between the Local and Central Governments there is a web of Statutes, Common Law, Conventions, Observances and Tradition.

Without doubt, parliamentary supremacy is cardinal to British democracy. Particularly, the relationship between both tiers of Government is based on contact, co-operation and interaction. Although Parliament could create and/or abolish Local Governments, their relationship is not on that basis but on the ends both systems strive to achieve. It is based on "friendly partnership." The Central Government, indeed "stimulates local initiatives" where it is lacking and "checks" it where there are abuses.

CONTROL OF LOCAL GOVERNMENT IN BRITAIN

The powers of the Federal and/or State Government over Local Governments are clear in some jurisdictions, but nebulous in others. In Nigeria, Sections 88 and 128 of the 1999 Constitution, for example, empower the National and the States Houses of Assembly, respectively, to conduct investigation into areas to which they appropriate money.[39]

The British version of this weapon of control is the system of "grants- in- aid" and "block grant", paid from public funds as subvention to local council finances, which enables the Central Government to supervise and control the activities of local authorities.

Similarly, the Home Office has (more) direct powers over local councils (than the Nigerian Ministry of Internal Affairs, which is the Home Office equivalent, or even the Ministry of Local

[38] Under Prime Minister Clement Atlee.

[39] The power to appropriate money to Local Governments is a constitutional duty in Nigeria (S. 162). Control of Local Government is carried out more by the State which has more supervisory powers over them by virtue of S. 7 of the Constitution.

Government Affairs, where they exist). Ministerial consent is often required in Britain for a host of issues including borrowing, making of by-laws, appointment of senior officials, etc. Other areas include supervision and inspection of work done by such other Ministries as Environment, Housing, Public Works, Transport, etc.

Also, changing social conditions and the broadening functions of government have extended the spheres of the Central Government. The use of Public Corporations involves the transfer of functions. The policy of co-ordination and standardization, issuing of directives, statutory joint meetings and endeavors, approval of schemes, audit, power to require information, etc, are all control mechanisms.

In effect, certain services hitherto considered local had assumed national significance. Education, Public Assistance, Electricity, Gas, etc, are largely nationalized. Administrative considerations also reduced local government spheres of authority.

RESTRUCTURING OF LOCAL GOVERNMENT IN BRITAIN: STRUCTURE AND COMPOSITION

Local Governments in the UK were further reorganized in the 1960s. The 1800 Local Authorities that were existing were replaced by 51 Counties and 375 District Authorities. According to the *Labour Party Speakers' Handbook, the restructuring was to give every citizen the best possible opportunities for a full and happy life*.

Modern local government Structure in the UK differs a great deal. In England, or more specifically, in London for example, the structure was multi-tier:

(i) Greater London (before its abolition in 1986)[40]
(ii) London Boroughs
(iii) City of London
(iv) Inner Temple and Middle Temple

On April 1st1965, the Greater London[41] was re-organised into

[40] Vide Local Government Act of 1985. The abolition was effected on the 1st of April, 1986, largely due to political differences between the Margareth Thatcher led Conservative Party Government and the Opposition Labour Party that was Controlling London under Ken Livingstone.

(a) Greater London Council (which was an intermediate level between Parliament and the smaller councils)

(b) London Borough Councils (which were 32)

The Corporation of the City of London remained as it was unaffected by the Act.

Outside London, England and Wales are divided into:

(i) 51 Counties.

(ii) 375 Districts.

(iii) 6 of the Counties above were made Metropolitan Counties further divided into 36 Metropolitan Districts.

British Councils are made up of elected Councilors who elect their Chairmen and other leaders. The number of Councilors can be as little as 10 for smaller Councils and as much as 30 for the big ones.

LOCAL GOVERNMENT SYSTEM IN SWITZERLAND

First, we must note that there is both conceptual and practical confusion on whether the Government of Switzerland is Federal or Confederal. Given the absence of States but the presence Local Governments of two tiers, with discernible and considerable spheres of authority, it would appear to be Federal. But there is also vast autonomy in the equally vast spheres over which the Local Governments legislate, which approximates confederacy. Worse still, both terms are used interchangeably even in academic texts and legal literatures.

In Switzerland, the citizen is, first of all, a citizen of his canton (Local Government) before being a citizen of Switzerland. The history of the Cantons (Communes and Cantons) is as interesting as it is intriguing.

[41] Under the Local Government Act of 1963.

There are 23 Cantons, 3 of which are further divided into half Cantons. The powers, rights, privileges and duties practically approximate those of States or Regions are Provinces in some Federal States[42]

There are two main types of Cantons: Those governed directly by the people and those governed through elected representatives. The origin of the half cantons is largely traced to religion. Example is the case of Appennzell. It fell apart in 1592 producing a half canton of Catholics and another canton of Protestants. The Cantons governed directly are 5, described as the pure democracies, where the People's Assembly, called the *landsgemeinde* is the Central authority. It has a history of over 500 years.

The *Landsgemeinde* holds annually in open air, usually on a Sunday, with all adult male citizens (or as much as possible) attending. Their decisions are by show of hands, and that is how they elect their Head of Government, Members of the Executive Council, the Cantonal Representatives in the Council of States, Judges and other Officials.

The other cantons are governed by representatives, who assemble in a unicameral legislature (or representative assembly) called the Great Council or the Cantonal Council. The term of office in most Cantons is 4 years but in some it varies from 1 – 6 years.[43] Legislators in the Cantonal Councils do not receive salaries, only nominal *per diem*.

There are 3,118 Communes of varying geographical sizes and population; there are also minor differences between the English, German and French Communes[44]. The French Communes, for example, have two Councils, the smaller of which has a mayor who heads the executive branch. There are also the Districts, which are more of administrative units, between the Cantons and the Communes.

[42] Like America, Nigeria and Canada.
[43] In Nigeria, it is generally 3 years. Some State Local Government Laws prescribe 2 years. But either case, tenures are often cut short through the capricious collaboration of Governors and Assembly men.
[44] These are all autochthonous Swiss nationalities.

POWERS AND FUNCTIONS OF THE SWISS LOCAL GOVERNMENT

The Legislative powers include administrative control and supervision, control of loans, budgets, taxes, deployment of troops, declaration of State of emergency, granting of amnesty and pardon, ratification of inter cantonal treaties, church affairs, banking, election of superior judges, education, etc.[45]

LOCAL GOVERNMENT IN GERMANY:

INTRODUCTION: ESTABLISHMENT OF LOCAL GOVERNMENT IN GERMANY

Before formal State structure came about, there had been municipalities of different forms for many centuries like that of Bonn which is about 2000 years old. These forms of local self-government can be traced back specifically to the Prussian Local Government code of 1808.[46] Stein's code produced a local administration, Towns and Municipalities, that are not mere appendages of the State but seen and regarded as the Third force (tier) in Germany's Federal State, the others being the *Rach* (Federal) and the *Laud* or *Lauder*, the (State/Regional) Governments.

Stein's local government code was revised in 1831 to provide for a Town Council meeting that elected a magistrate as head of the local administration. It was however not sufficiently democratic as only property owners participated (limited franchise). Furthermore, the division and distribution of functions were nebulous and occasioned conflicts that warranted the intervention of the administrative Courts.

However, The *Weimar Reich Constitution*[47] provided for and protected local autonomy, but only as an organizational principle, which also meant that in practice, direct State intervention still took place. Similarly, the Local Government Law of 1935 which introduced the Fuhrer Principle restricted the responsibilities of municipality administrations and consequently, further

[45] Again, these high level of authority and powers make the Swiss Local Governments, the structural and functional counterparts of States or Regions in other federations. In some ways, they even have higher powers (for e.g. declaration of emergency and ratification of treaties.

[46] Developed by German statesman, Karl Freiherr vom und zum Stein (1757 – 1831).

[47] Of August 11, 1919.

reduced local autonomy. But after the Second World War, each lauder issued its Constitution which made fundamental principles for local government administration.

In contemporary Germany, Local Government autonomy is constitutionally guaranteed[48] with the right to manage all their own affairs, on their own responsibility but within lawful parameters. Specifically, the guarantee of local autonomy prohibits the Federal and the State Laws from infringing on the local authorities right to manage their affairs. In practice however, this right can and has been infringed because besides being a general organizational principle, it does not contain guarantees for individual municipalities. Thus, municipalities can be dissolved through Acts of Parliament but this must be strictly for special public reasons.

STRUCTURE AND COMPOSITION

German local Government system is of three tiers: Municipalities, Towns and Districts all of which operate at two levels, namely:

(i) Districts and Towns not belonging to a District; and
(ii) Towns and Municipalities.

The structure of Districts is similar to that of the municipalities. They have an elected District Council[49] (Parliament) which is similar to the elections at both the Federal (Rach) and State (lauder) levels.

There are however differences in the local government systems in the various States (Lauder), especially between the old federal lauder and the five new lauder in the East. Sometimes these differences are blurred as there are also hybrid systems or patterns that cut across or mix within and between the systems. Nevertheless, the State Local Government Laws, or the Local Government Constitutions in the various Lauders in Germany, can be categorized into four as follows:

(i) Magistrate
(ii) Mayoral

[48] *See* Article 28 of the Basic Law and also the States (Lauder) Constitutions.
[49] As provided in Article 28(1) of the Basic law.

(iii) Northern German

(iv) Southern German

(i) Under the Magistrate Constitution, there are the Local Council[50] or the Town Council, with an elected Chairman as head of the Council while the Magistrate is the executive body, elected by the Council and runs the day-to-day activities of the Council. In recent times, a Mayor is directly elected to head the Magistrate but the Chairman remains the head of the Council.

(ii) Under the Mayoral System, the Mayor is both the executive and administrative head of the Council. In recent times, a town Board[51] is also put in place to help the Mayor with technical matters like budget, finance planning, urban development planning, etc.

(iii) Here (Northern German) there are two incumbents: The Mayor and the Town (or Municipal) Clerk. In the Towns not belonging to district, the first incumbent is called Lord Mayor, and the other Chief Town Clerk. The Mayor heads the Municipality Council, while the Clerk heads the administration.

(iv) Under this (i.e. The Southern German) Constitution, the Mayor is something of a sole administrator- Chairman of the Council, head of the administration and legal representative of the Municipality.

FINANCE

Like most local government systems, the sources of finance are basically through internally generated revenue and allocations from the State and Federal Governments.In Germany, the most important sources can be itemised as follows: fees, contributions, taxes, allocation from the federal and State Governments, proceeds from Sales of properties, income from real estates and loans. Other sources are charges under private Law like income from rentages and leases. Municipalities are allowed to take loans, but only for investments or investments promotion.

[50] The Local or Town Council Meeting is called: *Stadtverodnetenversammlung.*
[51] Called *Stadtvorstand*.

FUNCTIONS

German local authorities perform a wide range of functions which are not static but dynamic, depending on economic and social developments. These functions can however be grouped into two broad categories, namely:

(i) The Municipalities own sphere of responsibility; and

(ii) The transferred sphere of responsibility.

(i) Under this category,[52] a subdivision is also made: mandatory and voluntary self-government tasks. The voluntary tasks are not compulsory. A municipality can do it discretionarily. This includes such endeavor as Theatre, Hall, a sports field, museum, etc. The mandatory self-government tasks include: energy and water supply, district heating gas, planning municipality territory (residential, commercial and other land use plans), etc.

(ii) The transferred sphere include: Publishing banns and performing marriage ceremonies, issuing birth and death certificates, general security, nationality registration, passport affairs, commercial affairs, construction matters, health care, veterinary affairs, road traffic, registration of vehicles, vehicle taxation, land cultivation, Federal and State (Laud) parliamentary elections (implementation), social affairs, youth care, historical monuments, statistics, foresteries and fisheries.

LOCAL GOVERNMENT IN SLOVENIA

The law on Local Self-Government[53] and the Law on the Establishment of Municipalities and on the Determining of their Territory,[54] established a single level system of local self-government in Slovenia. By 1996 the Country had moved away from the old Yugoslav administration hierarchy and adopted the European Chapter of Local self-Government.[55] The Constitution of Slovenia guarantees citizens right to self-government, with the municipalities as the basic socio-economic and administrative unit under the central Government. These two tiers

[52] Also called Self-Government tasks.
[53] 1993 (as amended).
[54] 1994.
[55] This was ratified in 1997.

of government are strictly and separately protected by the Constitution, with the municipality being in charge of each local Community.

ESTABLISHMENT OF LOCAL GOVERNMENTS IN SLOVENIA

The Friedrich Ebert Stifting report[56] states that:

As a result of the reform of the local government system, the number of municipalities has tripled since 1991, from the previous 62 communes to 147 municipalities in 1994 and to 192 in 1998, with an average of 10,000 inhabitants. Eleven of them, representing a little more than one third of the total Slovenia population (36%) have the status of Urban Municipalities with some additional responsibilities[57] …. The number of municipalities is expected to increase further, since some 20 new proposals for the formation of new municipalities are already waiting for parliamentary decision.[58]

STRUCTURE AND COMPOSITION

Organizationally, the Municipalities are headed by Mayors, Deputy Mayors and Secretaries who are the chief administrative officers and administrators. These municipalities are representative bodies elected for a tenure of 4 years. Each Municipality defines the number of its Council members but the legal frame work is between 7 to 45 members based on population. The mayors are also elected for a term of 4 years. But Parliament can dissolve Municipal Councils in extreme cases and call for each elections. Mayors are no longer members of the Council, though they chair council meetings.[59] The council constitutes committees which are executive in nature and also creates departments (ministries). They also appoint supervisory boards whose members may not necessarily be Council members. These Boards ensure that municipal budgets are efficiently implemented. Consultative Assembles and Town Hall meetings of the Municipalities are called as a way of ensuring citizens participation in decision making processes.

[56] On Local self-Government and Decentralization in South East Europe, based on the Zagreb Croatian Workshop, 06/04/2001.
[57] The Urban Municipalities have much bigger population which in some cases is over 270,000.
[58] Based on the 1996 Law on the procedure for the establishment of municipalities and determining their territory.
[59] This is a compromise between strict presidential and parliamentary practices in council administration.

FUNCTIONS

It is important to note that in Slovenia, local governments have constitutionally protected (exclusive) functions or spheres of responsibility. They also share functions with the central government, in a concurrent manner.[60] The exclusive functions include:

1. Pre-School Education (Kindergarten)
2. Fire and Civil Protection
3. Social Welfare
4. Environment/Public Sanitation (Refuse Collection and Disposal, Cemeteries and Crematoria)
5. Urban and Economic Development
6. Public Utilities.

The concurrent or shared functions (with the central Government) include:

1. Primary – Adult Education
2. Social Welfare (Social housing and social security)
3. Health Service (primary health care)
4. Culture and Sports
5. Environment/Public Sanitation (Sewage, Environmental Protection, Consumer Protection)
6. Traffic /Transport
7. Urban and Economic Development (Housing Spatial Planning, Regional Planning, Promotion of Economic Development)
8. Public Utilities (Gas)

It is of interest to ask at this juncture, what happens in the event of conflict in areas where both tiers carry out concurrent functions. The constitutional law doctrine of covering the field would appear to be appropriate here. Thus the central Government's action would prevail and override that if the Municipality.

[60] This confers the status of a State in a federation, but even at that "exclusive' functions belong to the central (federal) government in federations.

FINANCES

According to the Law on Financing Local Government, 1994 there are three kinds of financial resources available for Municipalities:

1. Internally Generated Revenue (IGR)
   (a) Taxes
   (b) Rates, fees, charges, fines
   (c) Others (property sales, rentals, leases)
2. Statutory (National) Allocation:
   (a) Shared taxes (35% to Municipality)
   (b) General grants/monthly allocation (Determined and disbursed by the Ministry of Finance)
   (c) Special grants (by individual Ministries)
3. Borrowing: Limited to 10%[61] of Municipal revenue in the previous year. Interest is not to exceed 3%

It should be noted that Slovenian public expenditures are largely centralized, with the Municipalities spending only about 10%. The central government determines almost all the local revenues. It also controls municipalities borrowing capacity, which is restricted to national credit institutions. All of these inform the yearning for a greater financial autonomy for the Municipalities.

LOCAL GOVERNMENT IN FRANCE

ORIGIN AND ESTABLISHMENT

At least five major developments account for the emergence of the modern local administration in France, viz.[62]

1. The increased autonomy of the decisions making processes at the local government units between 1945 and 1975. During this period, these units provided some public services on

[61] This limit maybe exceeded for financing housing, water supply and waste disposal.
[62] *See* generally "the New Face of Local Government in France," Prof. Jean Claude Lugan. University of Social Sciences of Toulouse, Melbourne Australia, 11/04/2001.

behalf of the State. Thus Civil and political societies urged their further use and institutionalization.

2. The central elites were, during this same period, evolving ideologically, and wanted to adopt the multi-level political structures of the past to the growing need of the present, in order to manage the national system, while still maintaining and preserving the traditional administrative and political control.
3. The emergent middle class had achieved more political power in local representation and exerted pressure on the State for more financial resources to meet the growing demand of public goods.
4. Following some external pressures, especially from the OPEC Oil crises, elected local representatives were under pressure to do more, especially in job creation.
5. Many European Countries were also adopting institutional reforms which gave local representation increased responsibilities.

All these culminated in the passage of the Decentralization Laws in 1982 and 1983.[63] By 2000, a further attempt to create Counties witnessed the creation of 160 of them, amalgamating 11, 566 communes or 16% of the population.

STRUCTURE AND COMPOSITION

French political system and administration is very much integrated. Under the (1958) Constitution, there are three tiers of local government. At the local level, there is an unelected Prefect and elected Mayor and Councilors, all integrated by the local public services. There are Regions, Departments and Municipalities (Communes).

The Commune is the smallest unit of local government, and traditionally preserved. Efforts at amalgamation have not significantly reduced the number of Communes: 44,000 in 1793; 38,000 in 1799 and 36,000 in 2001. However in 2000, there were 1,493 Communities of Agglomerations, 12 Urban Communities and 281 Districts, bringing a total of 1,837 structures that had amalgamated 21,000 communes.The average size of each grouping was 11 communes of 22,000 inhabitants, which corresponds with the European Continental Standards.

[63] Under the Socialist Government of President Francoise Mitterand.

Nevertheless, these new amalgamated structures have not eclipsed the old structures with which they are still inter-mixed, blurring their distinctions in a typically French fashion.

FINANCES AND FUNCTIONS

As a result of the dominance of the Central State, the functions of French local authorities are largely residual. The two levels of local authorities are integrated through their public services like Agriculture, Health, Equipment, etc, all of which are statutorily and/or administratively delegated from the Central Government.

CONCLUSION

From the fore-going analyses of governance in Nigeria under various epochs – civil constitutional democracy and military regimes – the local government has emerged as a major organic and institutional casualty of Nigeria's federalism or federalism in Nigeria. Alas, the comparative analyses from few foreign jurisdictions also show that federalism is an itinerant phenomenon, depositing its variants in different jurisdictions according to their ethnological heterogeneity and political peculiarities. Federalist scholars consider this a healthy dynamism while critics consider it an in concise parchment of concepts. The challenge to its practitioners is how to test the federalist thesis against its anti-thesis in order to get the synthesis of federalism most suitable to each jurisdiction.

TRIPS AND ITS IMPLICATIONS ON INDIAN PHARMACEUTICAL INDUSTRY

*Dr. Navdeep Kaur Sasan**

INTRODUCTION

A major land mark in the international economic relations was the successful conclusion of the controversial negotiations on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). It was only after eight years (1986-94) of protracted negotiations that in 1994, the Uruguay Round (UR) of Multilateral Trade Negotiations (MTN) completed successfully by the establishment of World Trade Organization (WTO) that finally came into force on January 1, 1995. At present the WTO is the only international organization that deals with the global rules of trade between nations. Its main task is to make the multilateral trading system credible and transparent. It supports the trading member nations by acting as a forum for such trade negotiations; by resolving trade disputes; by overseeing national trade policies; by administering and implementing the multilateral and plurilateral trade agreements which form part of the WTO and by cooperating with other international institutions involved in global economic policy making.

Of the 29 individual legal texts forming part of the WTO Agreements', TRIPS, an international treaty on the subject of intellectual property, is an attempt to slender the gaps between the trading nations. TRIPS provide guidelines for the harmonization of intellectual property laws in the World Trade Organization. The Member Countries under TRIPS agreement were expected to bring changes within the transition period in their national laws for intellectual property rights to strengthen the framework for protection of intellectual property rights. TRIPS Agreement covers seven categories of intellectual property viz, copyrights, trademarks, industrial designs, patents, geographical indications, integrated circuits and trade secrets. In India it was only in case of patents that the norms and standards of protection envisaged in TRIPS Agreement were significantly different from policies, laws and regulations provided therein. Especially, the pharmaceutical industries in India anticipated huge losses after the introduction of product patents in that field, where no such protection was envisaged in the pre-TRIPS legislations, that is, the Patents Act, 1970.

In this article, an endeavor is made to trace the historical growth of patent legislations in India prior to

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the TRIPS Agreement and its implications on the Indian patent regime, predominantly on the pharmaceutical sector. TRIPS provided for 10 years of transition period to the developing member countries for induction of changes into the laws on patents in drugs, chemicals, food products and seeds. As a developing country, India was allowed a transition period until the year 2005, to conform to the requirements of the WTO. India decided to avail of the full transition period up to January 2005 to extend patent protection to the pharmaceutical products.

INDIAN PHARMACEUTICALS AND PATENT LAWS

In the surge of industrialization and globalization, pharmaceutical sector has been the most preferred one for the policy makers in the developed as well as the developing countries, including India. This special policy proclivity has been due to sensitive needs of the pharmaceutical products for the health safety of the masses as well as for increasing strategic benefits in the knowledge based economy. However, not all the developing countries succeeded in acquiring enhanced capabilities to research and develop new products in the sector at a local level, and their reliance on the developed country products increased, compelling them to frame legislations protecting their own interests, instead of those spending hefty amounts on the development of new and improvised products in the market. Growth of generic industries, however, led the developing countries to establish a firm foothold in the developed country markets, compelling them to take steps to protect their interests, primarily economic in nature. The growth of pharmaceutical industry in the developing countries is mostly confined to a few countries like India, China, Singapore, Korea, Czech Republic, Brazil and Argentina. The Indian pharmaceutical industry, which had little technological capabilities to manufacture modern drugs locally in the 1950s, has emerged technologically as the most dynamic manufacturing segment in the Indian economy in the 1990s.[1]

In India, the production of medicines on large scale began with the incorporation of certain Chemical and Pharmaceutical companies.[2] However, after the Second World War the development of newer drugs

[1] N. Kumar, and J. P. Pradhan (2003), 'Economic Reforms, WTO and Indian Drugs and Pharmaceuticals Industry: Implications of Emerging Trends', CMDR Monograph Series, No. 42, the Centre for Multidisciplinary Development Research, Dharwad, India.

[2] The British initiated the process of establishment of the pharmaceutical industries in India in 1910 with the setting up of Bengal Chemical and Pharmaceutical Works in Calcutta and Alembic Chemicals in Baroda, The King Institute of Preventive Medicine, Madras, (now Chennai in Tamil Nadu), Central Drug Research Institute, Kasoli (Himachal Pradesh), Pastures Institute Coonoor (Tamil Nadu), etc., through British schemes. *See*, Jaya Prakash Pradhan, "Global

like sulpha drugs, antibiotics, etc, revolutionized the drug market in the west but had negative impact on growth of the nascent pharmaceutical industries in India, which were not possessing advanced research techniques.

The history of patents in India can be understood well only after analyzing various patent laws in India before 2005 when India implemented provisions of the TRIPS completely, thereby covering product patents in the areas that were earlier exempted from its ambit. History of Patents Act in India is more than 150 years old. The Patents Act was enacted for the first time in the year 1856 that was titled as "Act VI of 1856 on Prevention of Inventions."[3] It was based on the British Patent Law of 1852, which provided exclusive privileges to inventors for 14 years.[4] The objective of this Act was to encourage inventions of new and useful manufactures and to induce inventors to disclose secret of their inventions. The Act was subsequently repealed by Act IX of 1857 since it had been enacted without the approval of the British Crown. Fresh legislation was introduced for the purpose of granting 'exclusive privileges' in 1859, in the form of an "Act XV of 1859."[5] This enactment contained certain modifications viz, grant of exclusive privileges to useful inventions only for a period of 14 years from the date of filing specifications and extension of priority period from 6 months to 12 months. This Act excluded importers from the definition of inventor. It was based on the United Kingdom Act of 1852 with certain departures which included allowing assignees to make application in India and also taking prior public use or publication in India or the United Kingdom for the purpose of ascertaining novelty.

In 1872, the Act of 1859 was consolidated to provide protection to the designs as well and was renamed as 'The Patents and Designs Protection Act' under Act XIII of 1872. This Act was further amended in 1883 and was named as 'The Protection of Inventions Act 1883' under Act XVI of 1883. It introduced the provision of protecting novelty of the invention. This Act was further consolidated as 'Invention & Designs Act' in 1888. The next development was introduction of 'The Indian Patent and Design Act 1911' that replaced all the pervious Acts.

After independence in 1947, the Indian parliament tabled a new Patents Bill in 1965, which after

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Competitiveness of Indian Pharmaceutical Industry: Trends and Strategies", Working Paper No.2006/05, Institute for Studies in Industrial Development, at 3.

[3] History of Indian Patent System, Available at: <*ipindia.nic.in*> (last visited: July 7, 2015).

[4] Tulasi, G. Krishna and Subba Rao, "A Detailed Study of Patent System for Protection of Inventions", *Indian Journal of Pharmaceutical Sciences*, 70(5)2008: 547-554 at 547, *Available at*: <http://www.ijpsonlone.com> (last visited: 26 August 2015).

[5] *See*, History of Indian Patent System", *Available at*: <http://ipindia.nic.in/ipr/patent/patents.htm> (last visited: 26 August 2015).

considerable debate was reintroduced in 1967, finally resulting into The Patents Act, 1970.[6] This Act came into force on April 20, 1972 as the 'Indian Patents Act, 1970.'

Indian Patents and Designs Act, 1911 was fairly liberal with regards to patenting of products related to pharmaceuticals, chemicals etc., which was available with a full term of 16 years and was directly in line with the British Patent Act of 1907.

Up to 1970 the pharmaceutical industry in India was dominated by MNCs, which imported most of the bulk drugs from their parent companies abroad and sold formulations in Indian. At that time nearly 85% of antibiotic preparations and other medicines were used to be sold by MNCs in India.[7] However, Act of 1970 excluded pharmaceutical product patents from its ambit. In the area of chemicals, pharmaceuticals, agro-chemicals and foods, the product patent was discontinued[8] and patenting of process with a restricted life of seven years or five years from the date of sealing the patent, whichever period was shorter, was introduced.[9] This ultimately led to rapid growth of Indian pharmaceutical industry that got protection for copying the original R&D patented products of MNCs by making cosmetic changes in the process. The lack of protection for products in pharmaceutical and agro-chemical sector resulted in the development of a considerable expertise in reverse engineering[10] of drugs that were patentable as products throughout the industrialized world, but unprotected in India.[11] This resulted in a rapid growth of the Indian pharmaceutical industry whereby cheaper versions of a number of drugs were produced in respect of drugs patented for the domestic market. As a result of reverse engineering activities, the bulk drug industry grew at a phenomenally high rate of 21% and11% per annum during the decades of 1970s and 1980s respectively. Along with the process revolution, product

[6] The Patents Act, 1970, Available at: <http://ipindia.nic.in/ipr/patent/patAat1970-3-99.html> (last visited: 26 August 2015).

[7] Amarjit Singh Sethi, Intellectual Property Rights and Pharmaceutical Sector in India", in Dr. Prankrishna Pal (ed.), *Intellectual Property Rights in India- General Issues and Implications*, New Delhi: Regal Publications (2008) at 145.

[8] Section 5 of Patents Act, 1970 provided that in case of inventions claiming substances intended for use, capable of being used as food, medicine or drug, or relating to substances prepared or produced by chemical processes (including alloys, optical glass, semi-conductors and inter-metallic compounds), patents may be granted only for the methods or processes by which such substances are produced and not to the substances themselves. However, this provision was amended in 2002, but the Patents (Amendment) Act, 2005 has omitted Section 5 of the Patents Act, 1970.

[9] Section 53(1)(a) of the Patents Act, 1970 provided for the term of five years from the date of sealing or seven years from the date of patent, whichever period was shorter, for the patents of food, medicine or drug. However, this provision was amended by the Patents (Amendment) Act, 2002, whereby Section 53 provided as: "term of every patent shall be twenty years from the date of filing of the application of the patent." Section 53 was further amended by the Patents (Amendment) Act, 2005, which further elaborated this provision.

[10] Reverse engineering implies decoding an original process for producing a bulk drug.

[11] Rajiv Kumar, "Paradigm Shift in Pharmaceutical Industry: An Exploratory Study of IPR Regime Scenario", in Dr. Shri Prakash and Dr. H. Chaturvedi (eds.), *WTO, Intellectual Property Rights and Branding*, New Delhi: Har- Anand Publications Pvt. Ltd. (2007) at 298.

development also went up by 13% and 14% during the decades of 1970s and 1980s. The R&D expenditure in 1986 was Rupees 50 crores, 2% of the sales turnover of the industry, compared to less than 1% prior to 1970. Apart from quality problems, most, drugs were available at affordable prices.[12]

Consequently, within a period 3-4 years Indian pharmaceutical companies became capable of marketing their copycats or generic drugs which otherwise would have taken more than 10 years and at a price which was 2.5 to 10% of patented drugs. For example, certain drugs to treat HIV positive cases cost $ 140 per annum as compared to $10,000 per annum charged by MNCs.[13] Thus it led to enormous growth of generic drugs.[14] With the availability of generics, prices of both the original brand name drug and the generic drug slashed down. On account of such factors as zero R&D investment and no license requirements for the patent holders in India, Indian pharmaceutical industry grew and eventually moved aggressively into the international market with such generic drugs once the international patents expired. Therefore, the new patent regime allowed Indian firms to reverse engineer patented drugs using different processes which were not patented. Besides doing away with the product patents, the 'licenses of right' system also proved to be very effective in the growth of domestic pharmaceutical industry.[15]

ADVENT OF NEW INTERNATIONAL IP REGIME AND ITS RAMIFICATIONS ON PHARMACEUTICALS

With the establishment of the World Trade Organization (WTO), a new era in the field of intellectual property marked its beginning. International standards for the protection of intellectual property paved their way in the form of TRIPS Agreement. This obliged the Member States to provide protection to various categories of intellectual property covered under the Agreement, which include copyrights, patents, trademarks, geographical indications, designs, etc. Of all the areas covered by the TRIPS

[12] J. K. Bagchi, "*Intellectual Property, Global and Indian Dimensions*", New Delhi: Manas Publications, (2007), at 92.

[13] *Supra*, note 7, at 145.

[14] A generic drug is a drug which is produced and distributed without patent protection. A generic must contain the same active ingredients as the original formulation. See, "Generic Drug", *Available at:* <http://en.wikipedia.org/wiki.generi> (last visited: 26 Aug 2015).

[15] Prior to the Patents (Amendment) Act, 2002, the Patents Act, 1970 provided for the licenses of right endorsed on patent under Sections 86, 87 and 88, whereby the Controller was competent to make an order on the application made by the Central Government after the expiry of three years from the date of the sealing of the patent, on the ground that the reasonable requirement of the public with respect to the patented invention had not been satisfied or that the patented invention was not available to the public at a reasonable price. Thereafter on his satisfaction as to existence of any of those grounds, the Controller endorsed the patent with the words "licenses of right". As a result, under Section 88, any person interested in working the patented invention in India could require the patentee to grant him a license for the purpose on such terms and conditions as might be mutually agreed upon, notwithstanding that he was already the holder of a license under the patent. Now, Sections 86, 87 and 88 have been deleted by 2002 Amendment in the Patents Act.

Agreement, the developing countries, including India required to incorporate major amendments in the product patents in pharmaceuticals including chemicals and food products. The developing countries were granted a transition period up to 2005 for making their patent legislations TRIPS compliant in the said area where only process patents occurred.

In India, prior to implementation of the TRIPS Agreement, the Patents Act, 1970 was amended two times in 1999, 2002 respectively, till it was finally adopted and implemented by the third amendment in the year 2005. This delay in the implementation of the product patents in expanding area of pharmaceuticals continue to swell till the last day fixed for the implementation of TRIPS Agreement, that is 31 December2004, when on 1 April 2005, it was finally brought into force to bring those generic industries in its ambit. Now, it has further necessitated digging deeply into the developments that took place in India as a response to the obligations under the TRIPS Agreement especially in the area of patents.

PATENTS FIRST AMENDMENT

The Patents (Amendment) Act, 1999[16] was the 1st amendment to the Patent Act, 1970 that was made effective retrospectively from 1st January 1995. This amendment introduced the 'Mail -Box'[17] system under Section 5(2) of 1999 Act, similar to the one required under Article 65.4 of TRIPS Agreement,[18] in order to provide a means by which product patent applications could be filed in the areas of drugs, pharmaceuticals and agro- chemicals, though such patents were not allowed and accorded exclusive marketing rights for 5 years. The 1st Amendment to the Patents Act, 1970 was introduced after the United States lodged complaint before the dispute settlement body of the WTO in 1996. The issue in *United States* v. *India*[19] was whether the Indian Patents Act, 1970 included a mechanism that adequately preserved novelty and priority of product patent applications in the field of pharmaceuticals and agro chemicals and it was established that under the 1970 Act, substances classified as "food(s), medicine(s)

[16] The Gazette of India Extraordinary Part II, Section 1, Ministry of Law, Justice and Company Affairs, "The Patents (Amendment) Act,1999", No.17 of 1999 received assent of President of India on 26 March 1999. Available at: <http://ipindia.nic.in/ipr/patent/patact_99.PDF.Controller of Publications, Delhi: 1999> (last visited: 27 August 2015).

[17] K. D. Raju, "WTO-TRIPS Obligation and Patent Amendments in India: A Critical Stocktaking", J *Intellect Prop Rights* (May) 2004, 9:226-41, at 227.

[18] Article 65.4 of the TRIPS Agreement provides: "to the extent that a developing country Member is obliged by this Agreement to extend product patent protection to areas of technology not so protectable in its territory on the general date of application of this Agreement for that Member, ……."

[19] Dispute Settlement: Dispute DS 50, *India- Patent Protection for Pharmaceutical and Agricultural Chemical Products* (Complaint by the United States), Request for Consultation was received by the Dispute Settlement Body of the WTO on 2 July 1996and the Appellate Body Report was circulated on 19 July 1997.

or drugs(s)" were entitled only to process patents and that the product patents in these fields were not granted. Thus, the WTO panel concluded that India was in breach of Article 70.8 (a) of TRIPS for not providing mailbox provision and had violated its obligation under Article 70.9 of the TRIPS by failing to provide Exclusive Marketing Rights (EMR)[20] during the transition period. The WTO Appellate Board upheld the panel's conclusion. Consequently, amendment was made in the Act of 1970 as the Patents (Amend) Act, 1999.[21] This amendment introduced Chapter IVA in the Patents Act dealing with Exclusive Marketing Rights (EMRs) stipulated under Sections 24 (A) and 24 (B) of the Act. EMRs were expected to apply where a patent was granted for the same product in another WTO Member country after 1995, provided the other Member country obtained marketing approval for the product.

PATENTS SECOND AMENDMENT

In order to cross the barriers raised by the TRIPS Agreement, besides EMR, India had to cross two more milestones viz,

a. Introduction of changes in the Patents Act, 1999 by Jan 1, 2000 and
b. Introduction of product patents in the Patent Act by Jan 1, 2005.

The second amendment had to be introduced for bringing the Patents Act in conformity with all the substantive provisions of the TRIPS, barring those related to the introduction of the product patents. The key issues in the second amendment were:

1. Redefining patentable subject matter;
2. Extension of patent term from 14 years to 20 years from the date of filing of complete specifications;
3. Strengthened Section 84 dealing with compulsory licenses by amending compulsory licenses system[22];

[20] TRIPS Agreement made it mandatory for India to introduce provisions for the exclusive marketing rights to sell or distribute an article or substance. Consequently, India provided EMRs as a pipeline protection to pharmaceuticals and agrochemicals. Further EMR was available for the products for which the applications were made after January 1, 1995 and could be availed for a period of five years, provided other conditions for enjoying them were fulfilled. These rights could be availed till December 31, 2004.

[21] The Free Library, "Exclusive Marketing Rights Revisited in India", *Available at*: <http://www.thefreelibrary.com/Exlusive+marketing+rights+revisited+in+india-a0193420047> (Last visited: 28 August 2015).

[22] Section 84 provides that the compulsory license can be granted after the expiry of three years from the grant of the patent on the ground that reasonable requirements of the public have not been satisfied or patented invention is not available to the public at a reasonably affordable price; or that the patented invention is not worked in the territory of India. The question as to what constitutes "requirements of the public", and when shall it be deemed that the reasonable requirements

4. Introduction of Bolar Provisions under Section 107A, similar to that in the US Drug Price Competition and Patent Term Restoration Act, 1984.[23] It is an exception that allows the generic manufacturers to start producing patented drug in limited quantities during the period of the patent in order to collect data to be submitted to a drug approval authority. This exception therefore, enables generics to enter the market soon after a patent expires.

The 2002 Amendment, besides limiting the exclusive right of the patent holder by issuing the compulsory license after a period of three years on account of violation of Section 84 of the Act, also stipulates the provisions to meet the circumstances arising out of the public health crisis, or the cases of national emergency or extreme urgency or in case of public non-commercial use of the patented article.[24] It is one of the flexibilities on patent protection included in the TRIPS Agreement.

PATENTS THIRD AMENDMENT

The second barrier imposed by the TRIPS Agreement viz. introduction of product patents in The Patent Act was crossed by 1 January 2005 by introducing product patents in the Third Amendment Act, 2005.[25] This led to the beginning of new Patent regime in India.

The Patent Amendment Bill was passed on March 22, 2005 by the Indian Parliament. This bill replaced Ordinance of December 2004. The Bill was passed on 1 January 2005. This Act paved the way for a radical shift in India from a weak process patent system to a strong TRIPS compliant product patent regime.[26]

This Act aims at providing product patent protection in various fields of technology and expected to have far reaching implications on the pharmaceutical industry. Thus from Jan 1, 2005 the Act prohibited pharma companies (producing generic versions of drug by using different process) from manufacturing or marketing them in case drug-patent has been obtained elsewhere. This Act provides

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of the public have not been satisfied, Section 84(7) of 2002 Act provides that due to the refusal of the patentee to grant license on reasonable terms, a trade or industry is prejudiced, or demand for the patented article has not been met to an adequate extent, or an export market of the patented article is not being supplied, or the development of the commercial activities in India is prejudiced. Besides that imposition of the condition by the patentee; non-working of the patent in the territory of India or working of the patented invention in the territory of India on a commercial scale is prevented by the importation from abroad, would also violate reasonable requirements criterion.

[23] R. Srividhya, "Patents Amendments in India in the Wake of TRIPS", *J Intellect Prop Rights*, 2001, 6:459-71.

[24] *See*, Section 92(3) of 2002 Patents Amendment Act.

[25] Gazette of India, The Patents (Amendment) Act, 2005, *Available a*t: <http://ipindia.nic.in/ipr/patent/patent_2005.pdf.> Published on 5 April 2005 and entered into force on 1 January 2005 (last visited: 28 August 2015).

[26] M.D. Janodia, S. Pandey, et al, "Patents Regime in India: Issues, Challenges and Opportunities in Pharmaceutical Sector", *The Internet Journal of Third World Medicine*, 2008 Vol.7 No.1.

protection for product as well as process patents in all technical fields. Thus product patents can now be obtained for drug, pharmaceuticals, chemicals, etc., which were earlier prohibited under Section 5 (1) (i) of the Patents Act, 1970. The 2005 Act, however, provides certain exceptions under Section 3 under the heading Inventions not deemed to be inventions. The amended Section 3 (d) became a cause of concern as it excludes patentability for derivates of known substances; unless it is proved that the efficiency is significantly greater than the original substance. This amendment of Section 3 (d) was carried out to control 'ever greening' and attempts to obtain product patent protection for Pre-1995 molecules in India, which otherwise do not qualify for product patent in India.[27] Thus the attempts of the owners of pharma patents to prolong the effective life of a patent by obtaining related patents on different formulations, new uses of the drug and the like, could not be successful in obtaining the patent again for such new forms of known substances. Amended Section 3 (d) resulted in rejection of the product patent application which now led Novartis to file a Writ Petition challenging the validity of Section 3 (d) amended in the case of *Novartis AG* v. *Union of India* and others before the Hon'ble High Court of Madras. Novartis had filed a mailbox application.

The most controversial change brought to the patents regime in India is the introduction of the product patenting in the field of pharmaceuticals, agrochemicals, etc., besides the other changes made to bring the patent laws in India in compliance with the TRIPS Agreement. This change as to the patenting of the products gave a chance to the proponents of the earlier view to implicate an increase in the drug prices which were earlier not the subject matter of patenting. They argued that the available TRIPS flexibilities have not been exploited properly and that adequate safeguards have not been built in to ensure an affordable supply of medicines. However, the 2005 Act contains a number of safeguards to ensure that the production of existing generic versions of drugs is not jeopardized. It contains various provisions to ensure affordable access to new drugs. The provision providing for the grant of compulsory license for the manufacture of the drugs to be exported to the least developed countries lacking the manufacturing skills is also an important development in the field of drug patents.[28]

Other important provision pertains to the pre-grant and post-grant opposition. This robust opposition mechanism led the Natco Pharma Ltd., an Indian pharmaceutical company to oppose an application

[27] G. Gopalkumar Nair, "Impact of TRIPS on Indian Pharmaceutical Industry", *J Intellect Prop Rights*, 2008, 13: 432-441, at 439.

[28] Article 31(f) of the TRIPS was waived off in the interest of the developing and the least developed countries by Paragraph 6 of the Doha Declaration on TRIPS and Public Health in August 2003, thereby giving some relaxation to the developing and least developed countries.

made by Novartis India Ltd. Pertaining to the anti-cancer drug *imatinib mesylate* on the ground that it lacks novelty. The Natco Pharma contended that the application merely claimed a crystal form (beta) version of a drug that was already known in 1993 on which the company already possessed a patent that was sold under the trade name Glivec, over which it possessed exclusive marketing rights.

Provision for compulsory licenses is one of them, whereby in addition to the existence of provision in Section 84 earlier inserted by 2002 amendment in the Patents Act, 1970, in case the reasonable requirements of the public have not been satisfied or the patentable invention is not available to the public at a reasonably affordable price or the patentable invention is not worked in the territory of India, than after the lapse of three years compulsory license may be granted,[29] provision for enabling the grant of compulsory license for export of patented medicines to the countries which have insufficient or no manufacturing capacity to meet public health emergencies.[30]In a revolutionary move, in the history of Indian Patents Act, Natco Pharma, a Hyderabad based company filed country's first compulsory license to produce and sell a generic version of Bayer's patented medicine at a reasonably affordable price, which ultimately ripe to reach its target on March 9, 2012.[31] This order has a global significance as India has invoked the compulsory license provision for the first time; the same provision has been invoked by other developing countries prior to the Indian decision. This decision has drastically reduced the price of the patented drug and the said drug can be bought by the patients at a 3% price of the Bayer Company. This decision may have repercussions on the innovator drug companies to introduce their patented drugs at a reasonably affordable price.

[29] Section 84(1) of the Patent (Amendment) Act, 2005.

[30] *See*, Section 92-A, added by Patents (Amendment) Act, 2005, which reads as: "(1) Compulsory license shall be available for manufacture and export of patented pharmaceutical products to any country having insufficient or no manufacturing capacity in the pharmaceutical sector for the concerned product to address public health problems, provided compulsory license has been granted by such country or such country has, by notification or otherwise, allowed importation or the patented pharmaceutical products from India. (2) The Controller shall, on receipt of an application in the prescribed manner, grant a compulsory license solely for the manufacture and export of the concerned pharmaceutical product to such country under such terms and conditions as may be specified and published by him." This provision was added in order to give effect to the Doha Declaration on Public Health after Article 31 (f) of the TRIPS Agreement was waived off to meet the public health crisis in the developing and the least developed countries fulfilling other criteria under such Declaration. Article 31(f) of the TRIPS permitted by the law passed by the Member country that the government or the third parties authorized by the government could use the subject- matter of a patent without authorization of the right holder, predominantly for the supply of the domestic market of the Member authorizing such use.

[31] *See*, 'Natco Pharma gets License to sell Generic Nexavar in India', *The Economic Times*, March 12, 2012. Natco received compulsory license from the Mr. P.H.Kurian, Controller of Patents to sell a generic version of Nexavar, a patented drug used to treat cancer.

CONCLUSION

Whatever might have been the fear of the developing countries regarding implementation of the TRIPS Agreement, it is true at the same time that the developing countries had gained something from the TRIPS, which besides providing for minimum standards to be adopted by the Member countries in their IP laws, also affords them an opportunity to share the scientific and technical knowledge in the field of intellectual property, including the product and process patents relating to the pharmaceutical sector. Since the beginning of the TRIPS, it has been noticed that pharmaceutical sector has not seen any downfall in its growth, though it might have become sluggish to some extent. Moreover, the production of medicines by the generic industries has not been affected, as we find the Provisions under Section 107-A of the Patents (Amendment) Act, 2002 affording a chance to the persons interested to develop and do research in the field for the purpose of getting approval from the government of the concerned country has kept the prospect of the generic industries open to produce the generic drugs after the expiry of the patents. Though initially, apprehensions were raised regarding the success of the Agreement, but incorporation of provisions forcing the patent holders of the drugs to meet the reasonable needs of the people, to make available the patented drug at reasonably affordable price, and to exploit the patented drug in India has given a sigh of relief to the patients in need of such drugs. Besides that if those patent holders fail to comply with these provisions under the Patent Act, an alternative arrangement in the form of compulsory licenses serves as a limitation on their monopoly right to produce, sell, vend, distribute, etc. It thus, serves as a check on the patent holders. Irrespective of the Patents Act, 1970 that discontinued the pharmaceutical product patents, which brought a revolution in the pharmaceutical market in India where reverse engineering by the generic industries led to the production of cheap medicines, it is still not impossible to prove their worth if more expenditure is done on the R&D in the same field and the Government of India facilitates them in this regard.

THE LEGALITY OF PIOS REPRESENTING INDIA
OPPORTUNITIES AND PITFALLS IN THE CONTEXT OF FOOTBALL

*Udit Misra**

PERSONS OF INDIAN ORIGIN – WHO AND WHY?

According to the Indian Ministry of External Affairs, a Person of Indian Origin is a foreign citizen, (except a national of Pakistan, Afghanistan Bangladesh, China, Iran, Bhutan, Sri Lanka and Nepal) who at any time held an Indian passport or who or either of whose parents, grandparents or great-grandparents was born and permanently resident in India or other territories that became part of India thereafter, provided that neither was at any time a citizen of any of the aforesaid countries (as referred above), or who is a spouse of a citizen of India or a PIO.[1]

Before we proceed further with argumentation regarding whether or not PIOs should be allowed to represent India, it is important to first establish the non-redundancy of this argument, in that they are indeed eligible, as per FIFA regulations, to represent India.

The principle governing the eligibility to represent National Teams as per FIFA's regulations is that any player is eligible to represent a country, as long as his permanent nationality is not solely dependent on residence within the country.[2] This is largely in line with the principle of effective nationality in international law, which states that there must exist a meaningful connection between an individual and a country in order for nationality to exist.[3]

According to the FIFA Statutes, a player is eligible to represent the national association of a country under the following circumstances:

a) He was born on the territory of the relevant Association.

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[1] PIO/OCI Card, Ministry of External Affairs, India, available at: <http://mea.gov.in/Portal/CountryQuickLink/703_PIO-OCI.pdf>.

[2] Article 15, Part VII, Regulations Governing the Application of the FIFA Statutes.

[3] *Nottebohm case (Liechtenstein v. Guatemala)* [1955] ICJ 1.

b) His biological mother or biological father was born on the territory of the relevant Association.
c) His grandmother or grandfather was born on the territory of the relevant Association.
d) He has lived continuously for at least five years after reaching the age of 18 on the territory of the relevant Association.[4]

In essence, this restrictions on eligibility reflect the principle of the *Nottebohm case*, as mentioned above – whereby in order for a player to represent a particular country, there must exist some sort of meaningful connection between him and that country – going beyond mere residence or financial incentive, to a more intrinsic, familial connection.[5] On an examination of the criteria for eligibility against the criteria for receiving PIO status, we find that they are in fact, largely the same, thus proving that PIOs are eligible, under FIFA regulations to represent India at the international level. Having established this, it is necessary that we move on to a far more important question – Why?

In order to truly understand the relevance of this idea, it is important that we contextualize our argument and situate India in the world, both in football as well as geopolitically.

India, as has been stated far too often, is a nation of over a billion people. Yet, it continues to consistently be ranked between 150th and 200th in FIFAs World Rankings, sitting at a lowly 155th at the time of writing. Moreover, it is alarming that a nation with the population of this number, and with several pockets intensely interested in the sport (such as Goa, West Bengal and Kerala) has failed to ever qualify for the FIFA World Cup, except once by default, when also they were incidentally disqualified. The domestic league structure in India continues to be in complete disarray, even after the transition of the National Football League to the I League and the advent of the Indian Super League. In fact, this puts India in a curious position wherein two competing, federation-sanctioned national leagues run in the country, with different levels of funding and

[4] Article 16 & 17, Part VII, Regulations Governing the Application of the FIFA Statutes.
[5] This in particular is why financial incentives for citizenship and representation, such as those provided by Qatar in the field of Handball are looked down upon by FIFA, with the threat of sanction if the same happens in Football. – Editorial by FIFA President Sepp Blatter in FIFA Weekly, available at: <http://issuu.com/fifa/docs/issuu_englisch_woche_05_2015/23?e=9526632/11302239>.

exposure – leading to the lack of any sort of streamlined system. This confusion trickles down to the grassroots system, where the lack of adequate facilities, advanced training and coaches leads to a consistent stream of players who fail to meet any sort of international standard of quality. Further, unlike most established footballing nations, there is a distinct lack of Indian players playing in top, competitive leagues in Europe or the Americas, which further disadvantages the Indian National Team as an institution.

Unfortunately, many of these problems are deep-rooted and can only be fixed by a long-term plan of training, development and investment. It is commendable, and must be acknowledged that the first steps in such a program have indeed been taken, with the compulsory establishment of youth academies by all ISL clubs – something that will ensure proper facilities and training for a significantly larger number of young players than was previously available.

However, while it is undeniably important that India do well in football in the long term, it is equally, if not far more important that they do well in the short and medium term. This is for several reasons. Apart from doing well for the sake of doing well, promoting the sport and making a name for themselves in the football world, all of which are perfectly legitimate reasons to justify this proposal in their own right, it is important to look at implications of football on a global, geopolitical level in order to understand how it can be used as a tool to help India achieve its ambitions in the international arena.

It is important to realize that today; relations between nations are no longer governed by military might, but more often than not by a display of "soft power"[6]. Because of this, sport, and Football more than any other, now plays a key role in geopolitics and international relations.[7]

Football is widely accepted as the most popular sport in the world. Going further, one could even say that it is the most universal phenomenon that exists in the world, perhaps more

[6] Soft Power includes a nation's capacity to influence others, as well as the image and repute it carries in the global arena.

[7] "Changing Perspectives on Global Sport, International Relations and World Politics", Brian Stoddart, 2012, Global Policy Journal Blog, available at: <http://www.globalpolicyjournal.com/blog/16/07/2012/changing-perspectives-global-sport-international-relations-and-world-politics-0>.

ubiquitous than even democracy or the free-market, solely given the number of people invested in and participating in each concept.[8]

The impact of the sport on international relations is undeniable, with several examples existing through modern history illustrating this. Brazil, in particular is the best possible illustration of this idea, having managed to maintain a likeable image in the global community, even in its worst days of dictatorship, simply by intrinsically linking its global reputation to its success in football.[9] FIFA as an organization has succeeded in instances where even the UN has failed – in bringing China and Taiwan within the same organization and convincing Japan and South Korea to put aside years of animosity to jointly host the immensely prestigious FIFA World Cup in 2002. Delving deeper, football has been acclaimed by several people, including former UN Secretary General, Kofi Annan for its "potential to unite people across borders, despite being so often at odds with each other".[10] A particularly poignant example of this is Didier Drogba and the National Team of the Ivory Coast using football to bring an end to the civil war raging within the nation.[11] Apart from uniting people in non-confrontational setting, football has also been used by several developing nations to raise their international profile. South Africa and Qatar are particularly strong examples of this notion. Hosting the 2010 World Cup established South Africa in a dominant position on the African continent, and signaled its ability to host events of that magnitude. Similarly, Qatar has made a number of investments to establish itself as a "global state-actor". These include the sponsorship deal for one of the world's biggest clubs - FC Barcelona, the ownership of another in Paris Saint Germain and the hosting rights to the 2022 FIFA World Cup, all of which have "helped Qatar attain international prominence in order to meet its foreign policy objectives".[12]

While this paper certainly does not argue that Football is the sole-determining factor of a

[8] "Football as a Factor (and a reflection) of International Politics", Pascal Boniface, Institut de Relations Internationales et Strategiques, Paris, Sciences Po Paris, 2002, available at: <http://www.sciencespo.fr/ceri/sites/sciencespo.fr.ceri/files/artpb.pdf>.

[9] Ibid.

[10] "Football Envy at the UN", Kofi Annan, The Guardian, 2006, available at: <http://www.theguardian.com/commentisfree/2006/jun/12/comment.worldcup2006>.

[11] "Didier Drogba brings peace to the Ivory Coast", Alex Hayes, The Telegraph, 2007, available at: <http://www.telegraph.co.uk/sport/football/international/2318500/Didier-Drogba-brings-peace-to-the-Ivory-Coast.html>.

[12] "Qatar: Football as Soft Power.", D Coruzzi, 2013, available at: <http://cpreview.org/2013/02/qatar-football-as-soft-power>.

country's international repute and prestige, it is important to acknowledge that it nevertheless has played a strong supporting role in diplomacy across continents and in bridging the global North-South divide.[13]

Why is doing well in football of particular importance to India? Football helps confirm; and further enhance national identity in a global context[14] – something that is of particular importance to the country at this point in time. This is because the Modi Government is, for the first time in recent history making a conscious and coherent effort to raise Indian brand value abroad.[15] This is done through a defined and deliberate focus on promoting Indian soft power through Bollywood, Yoga and India's heritage in art, architecture and cuisine.[16] Further, with an emphasis on "Make in India", there is a strong attempt to raise national pride and solidify the Indian national identity.

Football, as discussed above – can only aid this endeavor. Indian national identity, with respect to sport is largely centered and stems from the performance of the Indian Cricket Team. While there is nothing particularly wrong with this, given that India were until recently World Champions of the sport, I argue that in order to aid the promotion of Indian soft power, the sporting identity of a country must in a large part also stem from a sport that is much more pervasive in modern society and universally understood and adopted. To draw a simple analogy, while India knows that Germany are world champions of Football, it is highly unlikely that Germany knows that India are two-time world champions of Cricket. Adding to this the fact that India shall be hosting the under-17 FIFA World Cup in 2017, which although admittedly not as big as the full World Cup, will nevertheless be the first show of India's ability to organize a large-scale event since the controversy-ridden Commonwealth Games in 2010. India's regional and economic rivals, China in the meantime have organized, on the back of a successful Beijing Olympics in 2008, the 2015 World Athletic Championships and have successfully bid for the 2022 Winter Olympics as well. It must be noted that China has performed extremely well in the

[13] "Football as a Factor (and a reflection) of International Politics", Pascal Boniface, Institut de Relations Internationales et Strategiques, Paris, Sciences Po Paris, 2002, available at: <http://www.sciencespo.fr/ceri/sites/sciencespo.fr.ceri/files/artpb.pdf>.
[14] Ibid.
[15] "India's Soft-Power Strategy", Harsh V. Pant, 2015, available at: <http://www.outlookindia.com/article/indias-softpower-strategy/295206>.
[16] Ibid.

competitions it has hosted (which are also largely universal in nature), which has boosted its profile and shone a brighter spotlight on the country. India, with football must look to do the same.

THE PROBLEM WITH PIOS

The Indian law, with respect to the eligibility of PIOs representing India stands at odds with the eligibility criteria for national representation of FIFA, or indeed of other sports governing bodies such as the ICC and the ATP/WTA. FIFA's regulations on the matter have been discussed above. The ICC[17] and the Davis Cup[18] follow regulations along similar lines – whereby a player is eligible to represent a nation if his parents or grandparents were born there – i.e. a meaningful connection[19].

In India however, the law stems from a circular issued by the Ministry of Sport and Youth Affairs in December, 2008 – wherein it directs all national sports federations that anyone representing India at the international level must hold a valid Indian passport.[20]

On the basis of this directive, the Squash Rackets Federation of India framed eligibility rules reflecting these instructions – which were challenged in the Delhi High Court in Karm Kumar v. Union of India.[21] This matter was clubbed with a dispute raised by Robert Blanchette[22], an American citizen by birth who competed in equestrian competitions. Both these cases have similar fact scenarios, wherein the aggrieved party is a citizen of the UK and the United States respectively, is eligible to be a PIO, but post the 2008 circular, has been disallowed from representing India at the international level.

These challenges were made on the ground that the policy itself is arbitrary and

[17] ICC Player Eligibility Regulations, available at: <http://icclive.s3.amazonaws.com/cms/media/about_docs/523af0cd4a1db-Player%20Eligibility%20Rules%20-%20effective%2018%20September%202013.pdf>.

[18] Rule 35, Davis Cup Rules & Regulations, available at: <http://itf.uberflip.com/i/447398-2015-davis-cup-by-bnp-paribas-rules-regulations/0>.

[19] *Nottebohm case (Liechtenstein v. Guatemala)* [1955] ICJ 1.

[20] Circular No. F.45-5/2008 SPI.I Government of India, Ministry of Youth Affairs & Sports, 26/12/2008.

[21] *Karm Kumar v. Union of India*, 172 (2010) DLT 521.

[22] *Robert Blanchette v. Union of India*, W.P. (C) 4263/2010 & CM 8454/2010, High Court of Delhi.

unreasonable. The single judge bench of the High Court held that OCIs and PIOs cannot, at all, be given the same rights as citizens. This is statutorily recognized by the Citizenship Act[23], which only entitles OCIs to statutory rights under than act, and not to fundamental rights. While the court agreed with the argument that they are entitled to treatment at par with NRIs "in respect of all facilities available to them in educational fields", nevertheless this right was limited to admission into educational institutions, and could not be extended to a right to represent or participate in international sporting events.[24] A corollary was drawn with the Sorab Singh Gill case[25], wherein in similar circumstances, an American shooter was allowed to represent India at an international championship in Singapore. However, the Ministry clarified that it had challenged that order as well, which was struck down by the Supreme Court, which said "only Indian citizens could walk under the Indian flag at international sport events".[26]

Further, on the contention that the policy itself was unreasonable, in that an athlete permitted to participate in national events was disallowed from international events, the court disagreed with the argument and referred to the direction given to the Central Government to formulate a uniform policy with respect to eligibility for international representation. This policy is what is reflected in the directive circulated by the Ministry, whereby solely Indian passport holders are permitted to represent India.[27]

Unfortunately, this case and the policy both still stand today, and pose a major hindrance to the ability of PIOs to represent India in any sport. It is in fact a particularly confusing situation, given that before 2008, PIOs were able to and have represented India in a number of sports. Prakash Amritraj and the Uberoi sisters are among numerous examples of athletes who overnight lost the right to represent India, despite having played for the country before.[28]

The key issue the Sports Ministry seems to have with PIO representation is that they do not

[23] S. 7B, Indian Citizenship (Amendment) Act 2003.
[24] *Karm Kumar v. Union of India*, 172 (2010) DLT 521.
[25] *Sorab Singh Gill v. Union of India*, AIR 2010 P&H 83.
[26] Ibid.
[27] Circular No. F.45-5/2008 SPI.I Government of India, Ministry of Youth Affairs & Sports, 26/12/2008.
[28] "Ministry firm with its policy, Amritraj can't play for India", The Hindu, 2013, available at: <http://www.thehindu.com/sport/tennis/ministry-firm-with-its-policy-amritraj-cant-play-for-india/article4290818.ece>.

want to provide financial assistance to non-Indian nationals.[29] While the rationale they employ is understandable and in light of decided cases is legitimate in law[30], the extreme stance they adopt does not stand on several counts. Even if PIOs are not provided financial assistance, does there lay a unique harm in allowing them to represent the nation regardless? The Ministry seems to believe so[31], sticking to what I believe is largely misguided logic. Any financial assistance given by the central government goes to the National Team, rather than to individual players.[32] While the Government no doubt has the right to direct who its financial assistance goes to, and thus does legally have the right to disbar PIOs from representing India, the rationale behind restricting this aid is flawed.

The Ministry, and other critics[33] of allowing PIOs to play have two primary arguments. Firstly, that "limited resources available should be optimally invested in building world class athletes"[34], and secondly that "local talent must get international exposure to attain world class levels."[35] I argue that both these arguments do not stand.

It is important to understand the inherent nature of the National Team of any country. While promoting young, local talent is no doubt important; the National Team is not the place to do this. The Indian National Team is meant to showcase excellence and represent India, and its interests across the globe. As I have argued above, Indian interests lie in the National Team performing well.

While I agree with the long term ideal of having domestic players capable of performing to international standards, recent results of the Indian Football Team showcase the grave and

[29] Circular No. F.45-5/2008 SPI.I Government of India, Ministry of Youth Affairs & Sports, 26/12/2008.
[30] *Amit Kumar Dhankar v. Union of India*, W.P. (C) 3914, 3943, 3955/2014 & CM Nos. 7890, 7935 and 7954/2014, High Court of Delhi.
[31] Circular No.F.45-5/2008-SP-I Government of India Ministry of Youth Affairs and Sports, 12/03/2009.
[32] S.9, S.10, National Sports Development Code, 2011.
[33] "Talk of grassroots, not PIO rule in football", Siddharth Saxena, The Times of India, 2015, available at: <http://timesofindia.indiatimes.com/sports/football/top-stories/Talk-of-grassroots-not-PIO-rule-in-football/articleshow/47743326.cms>.
[34] Circular No. F.45-5/2008 SPI.I Government of India, Ministry of Youth Affairs & Sports, 26/12/2008.
[35] Ibid.

pressing need for an injection of quality to boost short term results.[36] The AIFF agrees, having written to the Sports Ministry seeking an exemption to the existing rule.[37] The long-term idea is to have domestic player capable of keeping PIOs out of the team on merit, but it seems foolish to sacrifice proven, distinct quality in favor of local favoritism. A local player who is good enough, will make the team regardless of whether or not PIOs are allowed to play.

Secondly, the argument that limited resources must be used to develop domestic players, essentially a plea to boost the grassroots program in the long-term instead of taking a short-term view also fails. I argue that allowing PIOs to play for India, will in the long term, in fact, aid the development of grassroots football in India.

Having India play consistently well at the international level will accomplish two things in the context of football. Firstly, Europe and South America will acknowledge Indian football as having distinct quality. This has happened in the past with Japan, South Korea and Iran – with several players from all these nations now plying their trade in Europe. Having recognized a certain level of football in the country, more and more clubs in top European leagues will be encouraged to invest in Indian players, which will help India meet its long term goal of a quality team made of domestic players. Further, consistent performances at the international level will aid Indian football if the team breaks into the Top-100 rankings – as Indian players will not suffer work permit problems to play in Europe, as have been suffered by Sunil Chhetri and Baichung Bhutia in the past.[38] Lastly, and perhaps most importantly, if India doing well in football, because of the new, heightened level of professionalism brought in by PIOs, it will encourage more young players to take it up as a profession, by showcasing it as a viable and prestigious option, which only Cricket is seen to be today.

Finally, it is of particular importance to note that FIFAs General Provisions dealing with the obligations of member nations require every member to "comply fully with the Statutes,

[36] "India Loses to Guam in Soccer World Cup Qualifiers", The Wall Street Journal, 2015, available at: < http://blogs.wsj.com/indiarealtime/2015/06/16/india-loses-to-guam-in-soccer-world-cup-qualifiers/>.

[37] **"**India seeking origin players to stop football rot", Al Jazeera Sport, 2015, available at: <http://www.aljazeera.com/news/2015/06/india-seeking-origin-players-stop-football-rot-150624084530500.html>.

[38] "Failure to Get Work Permit Halts Sunil Chhetri's Move to QPR", Goal, 2009, available at: **<**http://www.goal.com/en-india/news/222/transfer-zone/2009/08/29/1468375/failure-to-get-work-permit-halts-sunil-chhetris-move-to-qpr>.

regulations, directives and decisions of FIFA bodies at any time."[39]

Non-compliance of these duties gives FIFA the power to impose sanctions upon the offending member[40], and could further result in expulsion if not rectified within a specified period.[41] Applying these provisions in the context of Indian law's obvious and problematic distinction with FIFA regulations, the AIFF could very well be handed a suspension by FIFA until such time as the breach is remedied. This would potentially lead to the disqualification of India's national team, as well as all club teams from all FIFA sanctioned international and regional competition.

Indeed, FIFA has not hesitated to impose such sanctions before, with instances in Nigeria and Indonesia standing out in particular. The stance of the Indian Government is particularly curious in this context and one must wonder whether the Government in its hardline, obviously politically motivated stance considers sport to be dispensable enough to ignore the potential threat of suspension of India's FIFA membership.

CONCLUSION: MULTICULTURAL FOOTBALL, WHY NOT?

In order to tie together all the arguments I have made so far, it is imperative that we look at the context that exists in international football today. The 2014 World Cup was won by Germany, with a team made up of players with nationalities including Polish, Turkish, Tunisian and Brazilian.[42] This is despite having one of the best-organized, high quality youth systems in the world[43]; and stands in stark contrast to the situation in India. The difference lays in the fact that Germany, as a footballing nation embraces its multiculturalism (or "Multi Culti")[44], to the extent that the German Football Federation has actually been criticized for failing to convince certain

[39]Article13, FIFA Statues, available at: <http://www.fifa.com/mm/Document/AFFederation/Generic/02/58/14/48/2015FIFAStatutesEN_Neutral.pdf>.

[40] Article 14, Ibid.

[41] Article 15, Ibid.

[42] "MultiCulti is dead, Long live MultiCulti", Andre Tucic, Qantara.de, 2009, available at: <https://en.qantara.de/content/the-german-under-21-football-team-multi-culti-is-dead-long-live-multi-culti>

[43] **"**How Germany went from bust to boom on the talent production line", Stuart James, The Guardian, 2013, available at: <http://www.theguardian.com/football/2013/may/23/germany-bust-boom-talent>.

[44] "Germans celebrate the diversity of their 'multiculti' World Cup team", Kate Connolly, The Guardian, 2010, available at :< http://www.theguardian.com/football/2010/jun/27/german-football-team-ethnic-diversity>.

Turkish footballers to play for the country[45], while the Indian Government actively shuns footballers willing to play for the country. [46]

It cannot be stressed enough that even despite the advantage of all the right fundamentals, Germany even today chooses to take full advantage of FIFA regulations and be represented by a multicultural team, for the sole reason that the best possible eleven eligible to play turn out. It is telling that it is not the only country to do so either – Major powerhouses like Belgium[47], Spain[48], Italy[49], France[50] and even North Korea[51], Pakistan[52] and Guam[53] have taken advantage of these regulations.

The perceived harms that arise in the short term are probably just that, perceptions. While I have agreed that India no doubt needs to revitalize its grassroots efforts in order to fix the problems that ail Indian football in the long term – this is a process that will take upwards of fifteen years and will not show results in the present generation. It would be advisable for India to instead follow in the steps of Germany and Belgium and reconstruct the youth system from the bottom up. In the meantime, it is about time India put itself on the football map, for reasons detailed above, with respect not only to the prestige involved, but also to aid its geopolitical

[45] "For my country, against my country", Andre Tucic, Qantara.de, 2007, available at: <http://en.qantara.de/content/young-turkish-german-footballers-for-my-country-against-my-country>.

[46] "Why Micheal Chopra's dream of playing for India is more of a dream than reality", Goal, 2010, available at: <http://www.goal.com/en-india/news/2292/editorials/2010/11/22/2217704/indian-national-team-comment-why-michael-chopras-wish-of-playing->.

[47] "Manchester United's Adnan Januzaj opts to represent Belgium", The Guardian, 2014, available at: <http://www.theguardian.com/football/2014/apr/23/adnan-januzaj-manchester-united-belgium>.

[48] "Diego Costa included in Spain squad for first time", BBC Sport, 2013, available at: <http://www.bbc.com/sport/0/football/24873408>.

[49] **"**Italy vs England: Brazilian-born striker Eder at heart of national debate ahead of friendly in Turin", The Telegraph, 2015, available at: <http://www.telegraph.co.uk/sport/football/teams/england/11505386/Italy-vs-England-Brazilian-born-striker-Eder-at-heart-of-national-debate-ahead-of-friendly-in-Turin.html>.

[50] "French Players and Migration", Duke University, available at: <https://sites.duke.edu/wcwp/research-projects/players-and-migration/french-players-and-migration/>.

[51] "Jong Tae-se is North Korea's answer to Wayne Rooney", John Duerden, The Guardian, 2010, available at: <http://www.theguardian.com/football/2010/may/30/jong-tae-se-north-korea-wayne-rooney>.

[52] "How fasting at Ramadan helped me become a better footballer", Zesh Rahman, ESPN FC, 2015, available at: <http://www.espnfc.com/blog/football-asia/153/post/2498308/ramadan-and-football-zesh-rehmans-journey>.

[53] "Guam: the tiny US territory that just won its first ever World Cup match", Scott McIntrye, The Guardian, available at: <http://www.theguardian.com/football/2015/jun/12/guam-soccer-dream-fifa-world-cup>.

efforts to establish itself as a major power in the world today. In the short term, this can only happen with the injection of quality PIOs will provide, and for that reason I propose that the Sports Ministry rethink its policy on the matter.

EXCESSIVE EXTRATERRITORIALITY OF COMPETITION LAWS: A FAILED HARMONIZATION

-*Harshini Jhothirman**

INTRODUCTION

The landscape of the world economy has witnessed gradual yet marked progress in its growth as a result of globalization and liberalizations of various economies over the last three decades. This has resulted in a conspicuous and remarkable shift in the characteristic perception of the concept of sovereignty demonstrated in territoriality of jurisdiction. The intensification of competition has culminated in the mushrooming of legion of private and non-state players in the world market. The result of these changes is that the challenges facing international antitrust and competition law lie not only in the emergence of global markets and the increasing nationalization of business processes as manifested in mergers and acquisitions, but more importantly in the profound and comprehensive changes to the regulatory framework, in particular considering that there is no international regulatory regime.[1] Despite the ongoing World Trade Organization (WTO) and International Competition Network (ICN) efforts, the currently dominating 'regime' in international antitrust is the non-coordinated extraterritorial application of national and regional competition laws by national and regional authorities, supplemented by discretionary inter-jurisdictional cooperation.[2]

With the notification of Sections 43A and 44 of the Competition Act, 2002 (hereinafter referred to as 'the Act') the competition law of India comes into full force nearly a decade after its inception[3] but is still in its nascent stage in view of controlling anti-competitive activities taking place outside the territorial jurisdiction of India. The 'Effects Doctrine' allocates the competence to handle an antitrust case non-exclusively to every jurisdiction whose internal markets are affected by the case. In view of this, the Act has an extraterritorial reach based on the '*effects doctrine*'. This lacuna was identified by the Supreme Court in the ***ANSAC***[4] case in which

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[1] *Gomez, David*, "*Extra-territoriality in Competition Law and Globalization: Square Peg in a Round Hole?"* Last accessed: 1st October, 2014. Available at: <http://www.launchpadbz.com/resourcesmodule/.../@random4bc9dace55ec3/.>.

[2] BUDZINSKI, O. "*The governance of global competition competence allocation in international competition policy",* Cheltenham, UK, Edward Elgar, (2008).

[3] Ibid1.

[4] C.A. No. 3562 of 2000 – p. 62 to 79.

it was held that under the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969, the MRTP Commission could take action only against the Indian leg of restrictive trade practice. [5] The effects doctrine is an extended form of objective territorial principle that was mainly developed by American Courts in anti-trust cases wherein they asserted jurisdiction over acts of foreign nationals committed abroad but having effects in the American marketplace.[6] In this paper I would be discussing the efforts of WTO in harmonizing the extra territorial application of competition laws in terms of violating international laws and the claim of restrictive trade practices by the private parties before the international forum. Finally, examine the development of the effects doctrine in various jurisdictions.

Masimo Motta defines the term 'competition policy' as "the set of policies and law which ensures that competition in the marketplace is not restricted in a way that is detrimental to society"[7]. This necessarily calls for an effective measure to regulate the competition laws in various jurisdictions. There have been many efforts by WTO in coordinating the extraterritorial application of national competition laws by the nations and its authorities. In view of this, it provides for the national treatment principle and an effective dispute settlement mechanism between the member countries.

PRINCIPLE OF NATIONAL TREATMENT

The principle of n*ational treatment* is incorporated in all the three main WTO Agreements with a virtue of subtle variations in each. The Most Favored Nation (MFN) treatment in juxtaposition with *national treatment* rule this is one of the most significant steps of the international organizations towards reconciliation of international trade and national competition laws among its members. Article III.4 of the General Agreement on Trade and Tariffs (GATT) establishes *national treatment* in respect of “all laws regulations and requirements” to the extent that they affect the “internal sale, offering for sale, purchase, transportation, distribution or use of goods”. This Article has been interpreted as encompassing not only the rules on their face, but also their *de facto* consequences.[8] Article III of GATT spells out to its Members to abstain from imposing restrictions on imports that are more than what is imposed on "like products" of national origin. The rule lobbies for favorable treatment of all goods regardless of their origin.

[5] *See* Bhattacharjea, A, *India's Comeptition Policy: An Assessment*, Economic and Political Weekly, Vol. 38, No. 34 (Aug. 23-29, 2003), pp. 3561.
[6] Currie, John. "*Public International Law: Essentials of Canadian law,*" Irwin Law, 2001.
[7] Massimo, Mota. "*Competition Policy: Theory and Practice*", Cambridge University Press, 2004.
[8] Guide to GATT note 31 at 168.

The impact of enforcing such rules upon developed and developing nations alike is always an unsettling concern/matter of contention. It provides for the defense of equal competitive conditions within a market for national and foreign products.[9]Apart from the members applying their rules in non-discriminatory manner it also provides that rules whether procedural or substantive is of no relevance. Although this rule does not imply any obligation on competition standards, it provides foreign private parties vis a vis nationals with fair protection of their competitive interests within national markets. This assertion is confirmed through the acceptance and discussion of an Article III (paragraphs 1 and 4) claim in the Kodak non-violation competition dispute.[10] The principle of *National Treatment* annexes the principle of non-discrimination with its underlying object of ensuring healthy competitive conditions for all goods regardless of their supplementary attributes which is believed to bring about a comity between national competition laws of its Members.

WTO DISPUTE SETTLEMENT UNDERSTANDING AND EXHAUSTION OF LOCAL REMEDIES

International law can impose limitations to the ambit of domestic jurisdiction in one of the three ways: through treaty law, through recourse to general principles of law, or through customary law. At any rate, the starting point in order to define jurisdiction is domestic law.[11]There is exhaustion of local remedies rule, and individuals have no access to the international dispute settlement procedure.[12] The exhaustion of local remedies is a negative rule to prevent protection until remedies had been exhausted unsuccessfully. In other words, it places a restriction upon a nation to espouse claims of its nationals, at the first instance, before a forum other than one available locally. But it is also possible to waive this rule by a treaty. International Court of Justice held in the case of ***Interhandel Switzerland v. United States*** that "the rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; before resort may be to an international court in

[9]T-85/76, *Hoffmann-La Roche & Co. AG/Commission, Judgment* of 12 May 1979, E.C.R 461, p.6.
[10]*Eastman Kodak Co. v. Image Technical Service,* 504 U.S. 451.
[11] Daniel C. Esty, *Greening the GATT: Trade, Environment and the Future,* at 140, Institute for International Economics, Washington D.C., 1994.
[12]Hilf, Meinhard, "*The Role of National Courts in International Trade Relations*" Petersmann, Ernst-Ulrich.Ed. *Internation al Trade Law and The GATT/WTO Dispute Settlement System.*Studies in Transnation al Economic Law, Vol.11. The Hague: Kluwer Law International, 1997.

a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress by its own means, within the framework of its own domestic legal system." [13] It is recognized rule that a claim will be inadmissible on the international plane unless the individual or corporation concerned has exhausted the remedies available to him in State which is alleged to be the author of the injury.[14] Internal remedies have to be exhausted before the initiation of an international dispute settlement, as is the case with diplomatic protection.[15]

There is a clear withdrawal from the customary international law practice by GATT and WTO in following the principle of exhaustion of local remedies as a consequence of which a complainant need not pursue all the available domestic remedies before bringing its complaint before a WTO tribunal.[16] The provisions of the Dispute Settlement Understanding under the WTO Agreements do not explicitly mention any rule which hints at judicial restraint of any nature like that of the exhaustion of local remedies though it provides to clarify the provisions in accordance with customary rules of interpreting public international law. Nevertheless, provisions of both the Anti-Dumping and Subsidies and Countervailing Measures Agreements suggest that exhaustion of the local remedy mandated under those Agreements is required before a request for the establishment of a WTO panel may be made to the DSB.[17]

The consent to the WTO tribunal jurisdiction is given generally on accession to the WTO Agreements.[18] The WTO has compulsory and exclusive jurisdiction[19] over a dispute when Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by the rules and procedures of the

[13] *Interhandle* case, *USA v. Switzerland,* I.C.J. Reps. 1959, at 6.
[14] Ian Brownlie, *Principles of Public International Law* 492 (6th ed., 2003). *See.* Jianminf Shen*, The Non-Intervention Principle and Humanitarian Intervention Under International Law, 7 Int'l Lega; Theory 1 2001.*
[15] H.Fuijii, "*The Kodak-Fuji Dispute: A Spectrum of Divergent Colours and a Blueprint for a new WTO Procedure for Disputes Involving Government Toleration of Anticompetitive Practices*". UCLA J. of Int'l.L& Foreign Affairs.vol.2, 2. Fall/Winter 97-98 at 332; and W. H. Barringer, "*Competition Policy and Cross Border Dispute Resolution: Lessons Learned from the U.S.-Japan Film Dispute"* at 463-464, 6 Geo. Mason L. Rev. Spring 1998.
[16] *See*, Thomas Cottier, The *Challenge of WTO Law: Collected Essays.* (1st ed., Cameron May 2006). Vermulst, *The WTO Anti-Dumping Agreement: A Commentary,* (1st ed., Oxford University Press, 2005).
[17] Kennedy, Kevin C., *Parallel Proceedings at the WTO and Under NAFTA Chapter 19: Whither the Doctrine of Exhaustion of Local Remedies in DSU Reform?* The Geo. Wash. Int'l L. Rev., Vol. 39, pp.60.
[18] Lovric, Daniel, "*Deference to the Legislature in WTO Challenges to Legislation"* Petersmann, Ernst-Ulrich. Ed. *Internation al Trade Law and The GATT/WTO Dispute Settlement System.* Studies in Transnational Economic Law, Vol.11. The Hague: Kluwer Law International (1997).
[19] Kwak, Kyung; Marceau, Gabrielle, '*Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements'*, 41 Can. Y.B. Int'l L. 83 (2003).

Dispute Settlement Understanding (DSU).[20] There are treaty provisions in other treaties that enable international adjudication among states, or among private parties and foreign government, without prior exhaustion of local remedies.[21] The WTO Agreements does not make prior exhaustion of administrative and judicial remedies at the national level a condition for recourse to the international WTO dispute settlement system.[22]

As witnessed in the WTO Panel Report in the ***Panel Report, European Communities – Anti-Dumping Measure on Farmed Salmon from Norway (Salmon case)***[23] arguments were put forth and the rule of exhaustion was thoroughly argued but not resolutely decided by the Panel. Also, United States effectively withdrew its argument based on the rule of exhaustion of local remedies. Any dispute arising out of such an agreement would subject to the DSU under the WTO Agreements, as provided in Article 31(3) of the Vienna Convention on Law of Treaties (VCLT), 1969 with respect to the general rules of interpretation of treaties. A GATT ***Panel Report in United States - Anti-Dumping Duties on Gray Portland Cement (Cement Case),*** [24] later, reiterated the same sentiments as the *Salmon Case.*

RESTRICTIVE BUSINESS PRACTICE UNDER WTO DSU

Governmental measures initiating restrictive business practices can be made subject of the dispute settlement procedure if such conducts have the effect of impeding market access of foreign products or entry of foreign enterprises.[25]If there is no government involvement in a restrictive business practice, the possibility that it is a subject matter of dispute settlement procedure of the WTO is remote.[26] All anticompetitive practices and abuse of dominance through horizontal or vertical agreements are determined by the national laws within the territorial

[20] DSU 1994, art XXIII.
[21] *See, Organization for Economic Co-operation and Development, 1996. Towards Multilateral Investment Rules (OECD Documents).* (1 st Edition. Organization for Economic Co-operation and Development (OECD) 2009) at 151-156.
[22] *See,* P.J. Kuyper, "The *New WTO Dispute Settlement System: The Impact on the Community"*, Bourgeois, Berrod and Fournier (eds), The Uruguay Round Results. A European Lawyers' Perspective (1995). p. 87-114.
[23] Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway,* WT/DS337/R, (Jan. 15, 2008).; Kirsty Middleton, *Cases and Materials on UK and EC Competition Law*. 2nd Edition. Oxford University Press, USA. (2009).
[24] Report of the Panel, *United States - Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico* (Sept. 7, 1992) (unadopted).
[25] Matsushita, Mitsuo, "*Restrictive Business Practices and the WTO/GATT Dispute Settlement Process.*" Petersmann, Ernst-Ulrich. Ed. *International Trade Law and The GATT/WTO Dispute Settlement System.* p. 373, Studies in Transnational Economic Law, Vol.11. The Hague: Kluwer Law International, 1997.
[26] Ibid. p. 369.

jurisdiction of the country. These restrictive business practices are not a subject matter of the dispute settlement process of the WTO/GATT.[27] GATT was, and WTO Agreements are, *government-to-government agreements* involving products and services, not agreements between private parties per se, although private parties often have a profound interest in the obligations that other governments owe their government. The failure of private parties to exhaust local remedies, therefore, should not have a bearing on whether one government has acted in a manner inconsistent with its obligations to another government.[28] In the case of ***Switz. v. U.S., (Interhandel case)*** the court held that 'the rule of exhaustion of local remedies applies not only in cases of espousal of private claims by the State in the context of classical diplomatic protection but also when the rights derived by individuals from treaties are at stake.'[29] This was also reiterated in ***U.S. v. Italy (ELSI case)***[30].

Pursuant to the customary rules of international treaty interpretation as codified in Article 31 of the VCLT, international treaties must be construed taking into account "any relevant rules of international law applicable in relations between parties" (Article 31:3,c).[31]The DSU under the WTO agreements provides for two types of complaints- Violation complaints (alleging the failure of another Member to carry out its obligation under a covered agreement)[32] and Non-Violation Complaints (alleging that Member has applied a measure that does not necessarily conflict with a WTO provision but that nullifies or impairs a benefit accruing directly or indirectly under a covered agreement or that impedes the attainment of an objective of a covered agreement).[33]

Under the Non-Violation complaint a Member can refer the dispute to the WTO through Chapter V of the Havana Charter Article 46 which deals with restrictive business practices that

[27] Ibid. p. 367.
[28] David Palmeter, 2004, *Dispute Settlement in the World Trade Organization: Practice and Procedure*. 2nd ed. Cambridge University Press. United Commission draft report on state responsibility. UN GA Doc. A/CN.4/L.528/Add.2 of 16 July 1996, Art 22.
[29] *Interhandel Case (Switz. v. U.S.),* 1959 I.C.J. 6 (Mar. 21).
[30] *Elettronica Sicula S.p.A. (ELSI)* (*U.S. v. Italy*), 1987 I.C.J. 3 (Order of Mar. 2), p 15.
[31] Petersmann, Ernst-Ulrich, *"International Trade Law and the GATT/WTO Dispute Settlement System 1948-1996: An Introduction*". Petersmann, Ernst-Ulrich. Ed. *Internation al Trade Law and The GATT/WTO Dispute Settlement System.* Studies in Transnation al Economic Law, Vol.11. The Hague: Kluwer Law International, 1997.
[32] GATT 1994, art XXIII:1 (a); GATS, art. XXXIII:1 DSU, art.26.1.
[33] GATT 1994, art XXIII:1 (b); GATS, art. XXXIII:3 DSU, art.26.1.

contracting parties ought to prevent and sanction.[34] Although the Havana Charter never came into force, the dispute settlement provisions drafted for it were assumed in the General Agreement on Tariffs and Trade's Article XXIII.[35] The failure of the International Trade Organisation does not affect the enforcement of this Article.[36] Therefore, in principle, private anticompetitive practices could be prosecuted in the WTO indirectly through GATT.[37]

Also, Article 23(1) (c) states that, if a contracting party is denied any benefit under the WTO/GATT agreements due to the existence of "a situation", it can utilize this Article for dispute settlement. The articulation of "a situation" in the provision assumes that there is no governmental measure or breach of an agreement. In the WTO, dispute settlement currently revolves around the concept of nullification and impairment of benefits rather than on violation of the treaty language.[38] The WTO is aimed at liberalization of trade and easement of market access among the member states. The beneficial effects of liberalization achieved through the WTO, The Uruguay Round and previous international trade negotiations may be offset by restrictive business practices exercised by private enterprises.[39] Thus, as of now, such disputes are not subject to the jurisdiction of the WTO Dispute Settlement Board.

EFFECTS DOCTRINE UNDER EU, US AND INDIAN LAWS

Under the Effects Doctrine, a State may assume jurisdiction when an act is committed in another State, by citizens or companies of other states, has effects in the former.[40] This was accepted by the Permanent Court of International Justice in the ***S.S.Lotus***[41] case. Back in 1909, in the case of ***American Banana Co. v. United Fruit Co.,***[42] all the acts complained of were committed outside the territory of the United States, including the defendant's alleged

[34] Havana Charter for the establishment of the International Trade Organisation, U.N. Doc. E/Conf. 2/78 (1948). Reproduced in U.N. Doc. ICITO/1/4 (1948). *See* J. Bergstrom, *"Should the GATT be Modified to Incorporate A Restrictive Business Practice Provision?"* World Competition. Vol. 17, 1. (1992) at 123-126.
[35] Negotiationg Group on Dispute Settlement. "Non-Violation Compalints Under GATT Article XXIII: 2", Note by the SE.C.Retariat MTN.GNG/NG13/W/31, at 7.
[36] Vienna Convention of the Law of the Treaties, International Legal Materials Vol. VIII 4 at 679.
[37] Gracia-Castrillon, C.O , *Private Parties Under The Present WTO (Bilateralist) Competition Regime,* Journal of World Trade Law , Vol. 35, issue.1 (2001).
[38] See Roessler, Frieder, "*The Concept of Nullification and Impairment in the Legal System of the World Trade Organization*" International Trade Law and The GATT/WTO Dispute Settlement System. Studies in Transnation al Economic Law, Vol.11. The Hague: Kluwer Law International (1997).
[39] Ibid 14.
[40] Mark, Furse, "*Competition Law of the EC and UK*", 6th ed., Oxford University Press (2008).
[41] *SS Lotus case, (France v Turkey)* (1927), P.C.I.J. ser.A, no.10.
[42] *American Banana Co. v. United Fruit Co*., 213 U.S. 347 (1909).

inducements of the Costa Rican government to monopolize the banana trade, the US Supreme Court, categorically denied jurisdiction over the issue on the basis of the traditional territorial principle. The US has long applied the effects doctrine in the enforcement of anti-trust law, the primary authority deriving from the case of *Alcoa Case*[43]. The *ALCOA* case contains the classic statement of the 'effects doctrine' of territorial jurisdiction of a state. Judge Learned Hand stated that it was[44] "settled law" that "any state may impose liabilities, even upon persons not within its borders which the state reprehends."[45] It states that national authorities are entitled to prosecute any restrictive business practices, which affect competition in their jurisdiction, irrespective of their origin. The effects doctrine is increasingly accepted and used to settle international cartel issues. The sufficiency of effects doctrine is also contested. Under US legal system, the federal courts have jurisdiction over a defendant corporation if the corporation is incorporated or has its principal place of business in the state where the federal court sits.[46]A court has general jurisdiction over a resident corporation if the corporation's contacts with the forum state are "continuous and systematic".[47] In the case of ***United States v Nippon Paper***[48], the Supreme Court repeated that jurisdiction can be exercised over 'foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States'. With regard to jurisdiction over foreign anti-trust defendants, the locus classicus in the US is ***Hartford Fire Insurance Co. case***[49], wherein a number of states and a private plaintiff sued the defendant companies, alleging that the insurance companies had violated Section 1 of the Sherman Act by conspiring to restrict the terms of coverage of commercial general liability insurance available in the United States. The court also clarified that "international comity" is not a bar to the court's jurisdiction over foreign defendant. In ***Institut Merieux***[50]*case*, the Federal Trade Commission took action in respect of the acquisition by Institut Merieux, a French company, of Connaught Bio Sciences, a Canadian company, because of perceived detriments to competition in the US in the market for

[43] *US v. Aluminium Company of America* et al, 148 F. 2d. 416 (1944).
[44] Stanley D. Metzger, *The Effects'Doctrine of Jurisdiction*, The American Journal of International Law, Vol. 61, No. 4 (Oct., 1967), pp. 1015-1018.
[45] Ibid 9.
[46] Jones, Alison and Surfin, Brenda, "*EC Competition Law: Text, Cases and Materials*". p.1235, 3rd ed., Oxford University Press, USA. (2007).
[47] *Helicopteros Nacionalesde Colombia, S.A. v. Hall,* 466 U.S. 408(1984).
[48] *United States v Nippon Paper,* 109 F 3d 1(1st Cir, 1997).
[49] *Hartford FireIns.Co. v. California,* 509 U.S. 764 (1993).
[50] 55 Fe.d Reg. 1614 (1990).

anti-rabies vaccines.[51] The European Commission has also stressed that it has recognized the 'Effects Doctrine' in the cases of ***Dyestuffs***[52] and ***Woodpulp***[53], though there is lack of any explicit provision in the Treaty of Rome under Articles 81 and 82 with regard to the scope of jurisdiction. In the sixth report on Competition Policy in 1977 the Commission restated its view, concluding that the Community Authorities "can act against restrictions of competition whose effects are felt within the territory under their jurisdiction, even if companies involved are locating and doing business outside the territory, and of foreign nationality, have no link with that territory, and are acting under an agreement governed by foreign law."[54] Also, without such an extraterritorial reach of the rules, transnational business entities could engage in restrictive business practices in a "*twilight zone"* where no state could fully exercise jurisdiction and yet the harmful effects of such restrictive business practices would be felt in one or more states.[55]

This doctrine is still in its nascent stage in India. Section 32 of the Competition Act of 2002 confers the powers over the Commission to inquire into the agreement referred in Section 3 that have been entered into outside India which have an appreciable adverse effect on the competition in the relevant market in India. This Section empowers the Commission to take jurisdiction over disputes taking place outside India if it produces an adverse effect within its territory. The mechanism for controlling anti-competitive acts carried on by persons having the location of their operations at some place in India and are, therefore, directly subject to the territorial jurisdiction of Indian courts and tribunals. Thus, it is an evident inference that where there is conduct within the country and such a conduct causes an appreciable adverse effect within the market of that country, then the Commission positively has jurisdiction to decide such cases. Also, Section 14 of the MRTP Act stated that "Where any practice substantially follows within monopolistic, restrictive, or unfair, trade practice relating to the production, storage, supply, distribution or control of goods of any description or the provision of any services and any party to such practice does not carry on business in India, an order may be made under this Act, with respect to that part of the practice which is carried on in India."

Declaring unlawful any agreement or practice and restraining the local enterprise that is a

[51] Owen and Parisi, '*International Mergers and Joint Ventures: a Federal Trade Commission Perspective*' Ch.1 at p 5-14, (ed Hawk), Fordham Corporate Law Institute (1990).
[52] 48/69 [1972] E.C.R. 619, p 987 – 694, [1972] C.M.L.R. 557, p 593 – 609.
[53] 114/85 *A Ahlstrom Oy v. Commission* [1988] E.C.R. 5193, p 5227.
[54] E. Nerep, Extraterritorial Control of Competition under International Law 1983, 281-282.
[55] In *Re, Insurance Litigation, Antitrust and Trade Reg. Rep*. District Court's Decision and Order in (BNA) No. 1434 at 432, 444.

party to such an agreement is sufficiently effective to make the arrangement inoperative within the country enforcing its domestic law. In ***Haridas Exports v. All India Float Glass Mrfs. Association***[56]**,** the Supreme Court of India while dealing with the application of "*effects doctrine*" and the jurisdiction of the MRTP Commission held that "This 'effects doctrine' will clothe the MRTP Commission with jurisdiction to pass an appropriate order even though a transaction, had been carried out outside the territory of India if the effect of that had resulted in a restrictive trade practice in India. Therefore, even though such an agreement had been entered into outside the territorial jurisdiction of the Commission but if it results in a restrictive trade practice in India then the Commission will have jurisdiction under Section 37 to pass appropriate orders in respect of such restrictive trade practice".

A very brief perusal of the laws in US, EU and India would clearly suggest the non-application of international law unless there is a distinct conflict of laws of two countries.

CONCLUSION

Two types of disputes are possible in case of international trade, dispute between the member countries and the dispute where one or both the opposing entities are non-governmental entities. On accession to the WTO, the member countries subject themselves to the exclusive jurisdiction of the WTO dispute settlement procedure and there is no necessity to exhaust local remedies before approaching the international forum. With the growth of privatization and globalization many companies from foreign countries are striving to establish their mark outside their home country. Thus the forum provided by WTO solves only half the problem. As WTO agreements are government to government agreement, private party disputes cannot be subject matter of the same. Also, not all the countries are members of WTO. These companies are subject to the national laws under the national treatment principle. Thus the restrictive trade practices by these private entities are not subject matter of dispute under the WTO as only member can refer the dispute to the WTO DSB unless the member country espouses the claim of the private entity before the forum. The only defense to escape from being prosecuted under the national laws can be the argument of forum non conveniens. It is pertinent to point out at this juncture that the Central Government can exempt the application of the act in the interest of the public or because of any obligation assumed under a treaty with any country or if the entity performs any sovereign

[56]A.I.R. 2002 S.C. 2728 at p.2742.

function on behalf of the government.

In light of the theme of the article, it indicates the failure of WTO along with other international organizations such as OECD and UNCTAD to try and bring about a common framework for resolution of disputes. The existing guidelines, rules are ill-equipped to address such issues. As it is very clear from the fact that Havana Charter did not come into force, the WTO DSU will not cover the disputes of private anticompetitive practices. Thus, a multilateral system is not a solution for this jurisdictional conundrum. The only viable option as of now would be Regional Frameworks and Bilateral Agreements among the countries.

JUDICIAL INDEPENDENCY VIA NATIONAL JUDICIAL APPOINTMENT COMMISSION

*Ayushi Saxena and Sheetal Kattyan**

INTRODUCTION

Independency is one of the important features of the basic structure of the Constitution which needs to be ensured through a system which could guarantee the independency of judicial system without being bias. Since the time being in force, the government is analyzing the whole system of independency and restoring the original intent or sprit of the Constitution. In this process, the government has observed the boons and banes of the present system thus, recommends the new system that is NJAC. This system takes into consideration all the loopholes of the earlier system and then came up, with the system which relinquish all the failures.

HISTORY OF JUDICIAL APPOINTMENTS

Since 1950, when the Constitution was enacted till 1973, the President of India appointed judges to the Supreme Court and High Courts in consultation with the Chief Justice of India. There was a near consensus between the government and the Chief Justice of India. Apart from these, a trend was developed; this trend was that the senior most judge of the Supreme Court of India was to be appointed as the Chief Justice of India. The judges are being appointed on the basis of their superiority, as it takes knowledge, experience and a competency to interpret the text of the Constitution in its original spirit. This trend was flouted in the1973, when the government appointed Justice A. N. Ray as the Chief Justice of India. Justice A. N. Ray superseded his three seniors. This convention was again violated in the year 1977, when a Chief Justice of India was appointed superseding his senior. T*his marked the clash between executive and judiciary*. After that, a collegium system had been adopted for the judicial appointment of the Supreme Court and High Court judges, as well as for the transfer of the High Court judges.

SUPREME COURT APPOINTMENTS

As per the words enshrined under Article 124(1) of the Indian Constitution, “there shall be a Supreme Court of India consisting of Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than 7 judges”. Thus, the Constitution goes on to state

the number of judges of the Supreme Court while also providing for enlargement of this number by the Parliament and the Parliament has done it. The current strength of the Supreme Court of India comprises of Chief Justice of India and 30 other judges. The Constitution, under Article 124(2), which relates to the appointment of judges, states that "The Judges of the Supreme Court are appointed by the President. The Chief Justice of the Supreme Court shall be appointed by the President after the consultation with such judges of the Supreme Court and of the High Court as he may deem necessary for the purpose". The Constitution further goes on to state that while appointing judges other than the Chief Justice of India, the President of India shall consult Chief Justice of India. The literal interpretation of the text of the Constitution says that President of India while appointing Chief Justice of India may not consult anybody.

HIGH COURT APPOINTMENTS

The Constitution states that every High Court shall consist of a Chief Justice and such other judges as the President may deem it necessary to appoint. There are two parts of this statement, one is that every High Court shall consist of a Chief Justice and it is not constitutionally mandated that every state should have its own High Court. That is the reason why we have 24 High Courts in this country for 29 States and 7 Union Territories. The other part of this text states that every High Court shall also consist of such other judges as the President may from time to time deem it necessary to appoint, it means that the strength of High Court in this country can be enhanced by the President of India which is not the case with the Supreme Court. *The strength of the Supreme Court can be increased by the Parliament while the strength of the High Court of this country can be enhanced by the President*.

Regarding the appointment process in case of High Court, the Constitution states that every judge of the High Court shall be appointed by the President. The Chief Justice of the High Court shall be appointed by the President after consultation with the Chief Justice of India and the Governor of the State in which this judge is to be appointed but, if the President has to appoint a judge other than the Chief Justice of High Court, he may consult, even the Chief Justice of the High Court concerned. So this was the position from 1950 to 1973.

CASE STUDY

Many controversies have been raised regarding the procedure which is being followed for the

appointment of judges of the Supreme Court and the High Court's judges. The issue is regarding the arbitrary interference of the Executive in the matter of appointment of judges. Therefore, many petitions have been filed and in that process many landmark judgment have been laid down. Following are some landmark judgments

FIRST JUDGES CASE

A petition was filed in Supreme Court of India. This case was known as *S.P.Gupta case* [1] or first judges case. In this case, the Supreme Court was asked, that whether the expression consultation under Article 124[1] means concurrence. The Chief Justice of India ruled that, consultation does not mean concurrence, the recommendations, the consultations, the opinion of Chief Justice of India is not binding on the President of India and the Supreme Court of India further went on to state, that a judge of a High Court can be transferred from one High Court to another even against his will. So this was the position of the Supreme Court of India from 1982 to 1993.

SECOND JUDGES CASE

In 1993, another petition was filed in the Supreme Court of India, this time by *Supreme Courts Advocates on Record Association*[2], this case came to be known as second judge's case. In this case the Supreme Court of India overruled its earlier decision, delivered in S P Gupta case of 1982. In this case the Supreme Court of India held that the expression consultation that is enshrined in the text of the Constitution of India means concurrence, it means whatever recommendation Chief Justice of India makes to the President those recommendations are binding on the President.

Here, the Supreme Court of India said that the process of judicial appointment is an integrated, participative and consultative exercise to select the best possible candidate to be appointed as a judge of High Courts and Supreme Court of India. In this case Supreme Court of India also held that the opinion of the Chief Justice of India shall enjoy the primacy. *This resulted in the evolution of*

[1] Establishment and constitution of Supreme Court
(1) There shall be a Supreme Court of India constituting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges
(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years: Provided that in the case of appointment of a Judge other than the chief Justice, the chief Justice of India shall always be consulted:
(a) a Judge may, by writing under his hand addressed to the President, resign his office;
(b) a Judge may be removed from his office in the manner provided in clause (4)

[2] (1993) 4 SCC 441.

Collegium System.

The Supreme Court of India held that whatever opinion is tendered by the Chief Justice of India is not his personal opinion but the considered opinion Supreme Court of India expressed through the Chief Justice of India. It is for this reason that Chief Justice of India has to consult two other senior most judges of the Supreme Court of India. It means the collegium system has evolved. The Supreme Court of India and the second judges case laid that, if there is the vacancy in the Supreme Court of India the process to fill this vacancy, has to be initiated by the Chief Justice of the Supreme Court. If there is vacancy in the High Court, the process of filling vacancy shall have to be initiated by the Chief Justice of the concerned High Court. In this case also the Supreme Court held that senior most judge of the Supreme Court of India should be appointed as Chief Justice of India. *So, the second judge's case was a landmark case which adopted collegium system in judicial appointment*.

THIRD JUDGES CASE

In 1998, *Presidential Reference*[3] or third judge's case was about the role of the Supreme Court, the mandate of the Supreme Court, the jurisdiction of the Supreme Court. The Supreme Court of India is the defender of the Constitution that means any law made by the legislature, any law made by the Parliament, if it violates any of the provisions of the Constitution, then the Supreme Court can strike down that legislation and render them unconstitutional and void. The Supreme Court is also the protector of the fundamental rights of the citizens of the country. That means if any individual claims that the fundamental rights have been violated by the states or an individual then he can directly go to Supreme Court and file a petition under Article 32[4] of the Indian Constitution. The Supreme Court acts as an advisor to the President. That means under Article 143[5] of the Indian Constitution the President

[3] AIR 1999 SC 1.

[4] Remedies for enforcement of rights conferred by this Part
(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part
(3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)
(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution

[5] Power of President to consult Supreme Court
(1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer

can refer a matter to the Supreme Court of India for its advice. This happened in the year 1998, when the then President of India submitted an advisory opinion, a Presidential Reference to the Supreme Court of India asking the Supreme Court of India its views on the judicial appointments. In this third judge's case, the Supreme Court further explained what the collegium system is. Who is going to be appointed as the judge of the Supreme Court of India. For example, if there is a vacancy in the Supreme Court of India, the process of filling that vacancy has to be initiated by the Chief Justice of India and Chief Justice of India shall consult the four senior most judges of the Supreme Court as well and this collegium will discuss the prospective names, those name shall be recommended to the President, the President shall act on those recommendation, that means it is binding on the President to accept those recommendation of the collegium.

The Supreme Court also said in this case, for example the Chief Justice of India is retiring in the next one and half year, the four senior most judges of the Supreme Court are also retiring in one and half year, that means the person, the judge who is going to succeed the Chief Justice of India should also be included in this collegium, if he is not part of these four judges. The Supreme Court also held, that if a nominee is not agreeable to the Chief Justice of India then that nominee cannot be appointed, because this case resulted in giving absolute veto to the Chief Justice of India. Now for any person to be appointed as a judge of the Supreme Court, Chief Justice of India had to consult the four senior most judges and they had to agree upon a name and this name was to be recommended to the President for appointment.

The pertinent question of appointment of the High Court judges arises. The Supreme Court in this presidential reference said that for appointing High Court judge, the Chief Justice of India shall have to consult only two senior most judges of the Supreme Court. So this collegium system of Chief Justice of India and two senior most judges of the Supreme Court shall decide together and recommend a nominee to the President to be appointed as a judge of the High Court.

Then arises the question as to how to transfer a High Court judge? For example, if a judge is to be transferred from Calcutta High Court to Madras High Court. The Supreme Court held in this Presidential Reference case that the Chief Justice of India shall have to consult four senior most judges

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the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon

(2) The President may, notwithstanding anything in the proviso to Article 131, refer a dispute of the kind mentioned in the said proviso to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon

of the Supreme Court as well as two Chief Justices of the High Court concerned that means the Chief Justice of Calcutta High Court and Madras High Court. And this *transfer of judges is also subject to judicial review* but only an aggrieved judge can go to the Supreme Court saying that he or she has been arbitrarily transferred but the Supreme Court can act on this review only when considering whether the Chief Justice of India consulted his four other colleagues and also consulted the Chief Justices of the High Court concerned, if these conditions are met then the transfer is valid. So this was the position that changed from 1950 when executive had the power to appoint judges to the Supreme Court and High Court to the collegium system in 1998, when executive was completely uprooted from the judicial appointments. The Supreme Court in this third judge's case said that the consultation process requires consultation of the plurality of the judges, that means single opinion of the Chief Justice of India does not mean the consultation. For consultation, Chief Justice of India shall have to consult his other colleagues as well.

CRITICISM OF COLLEGIUM SYSTEM

When this collegium system was established, a number of criticisms were there against it. It was criticized by the Government and by civil societies as well. Following were the criticism:-

- The collegium system lacks transparency and accountability because parameters in which a judge is to be evaluated is not expressed. Therefore, entire process is opaque, not transparent.
- The people at large do not know what are the conditions and parameters on which a judge is chosen, so that he become fit to be appointed as a judge of the Supreme Court or the judge of the High Court.
- The criticism was also labeled that, for any organization to work efficiently, there has to be some rules and according to those rules the commission organization must function but in this case no rules were framed regarding how this collegium system should work. So no rules were framed so this means entire collegium system was working in an ad hoc manner.
- This collegium system was also questioned on the fact that, the executive has no role in judicial appointments when the text of the Constitution say that the President shall appoint the judges of the Supreme Court and High Courts in consultation with the Governor of the state as well, then these words has been removed from the Constitution.
- Today the executive had no role in judicial appointments, this was another criticism leveled against the collegium system.

- Former union law minister Mr. Kapil Sibbal in criticism of the collegium system said that "I may have more knowledge then the learned judges but still I can't recommend the name". So these were some of the criticism which were leveled against the collegium system.

But this collegium system was defended by the Judiciary, Bar and the Supreme Court advocates on record associations. They were saying that there are number of vacancies in the Supreme Court and High courts, so to fill these vacancies, collegium system is a must.

As on 1st April 2015 the total strength in High Court is 998 and out of this 358 vacancies are there, it means the collegium system has failed in its purpose.

Then, again a petition was filed in the Supreme Court, this case came to be known as *Suraz India Trust*, *2011*. In this case the division bench of the Supreme Court framed a set of questions to the Chief Justice of India asking for his views. These may well be construed as a criticism of the collegium system.

Following are some questions which were raised in the landmark judgments:-

- Does the expression 'consultation' in the text of the Constitution means 'concurrence'?
- Whether the system of collegium is mentioned anywhere in the Constitution?
- Whether the judicial decision can amend the Constitution?

  Because the Constitution provided, that judges of the Supreme Court and High Court shall be appointed by the President after consultation with such of the judges of the Supreme Court and High Court as the President may deem it necessary. But in this case President shall have to appoint a person which is recommended by a collegium system.
- Can the Constitution be only amended by Parliament within the meaning of Article 368[6] of the

[6] Power of Parliament to amend the Constitution and procedure therefor
(1) Notwithstanding 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
(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill: Provided that if such amendment seeks to make any change in
(a) Article 54, Article 55, Article 73, Article 162 or Article 241, or
(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
(c) any of the Lists in the Seventh Schedule, or
(d) the representation of States in Parliament, or
(e) the provisions of this article, the amendment shall also require to be ratified by the Legislature of not less than one half of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent
(3) Nothing in Article 13 shall apply to any amendment made under this article

Indian Constitution or the judicial decision can amend the Constitution?

Because if we look at the decision of 1993 and 1998 it seems that the Supreme Court of India has amended the Constitution.

- Can the 1993 and 1998 judicial decision be overruled by a large bench?

So these were some of the criticism. After the collegium system was established many union governments decided to replace the collegium system with the commission on judicial appointments.

INTRODUCTION OF NATIONAL JUDICIAL APPOINTMENT COMMISSION (NJAC)

The process of Judicial Appointment Commission was established by Atal Bihari Vajpayee government in 2003, which introduced National Judicial Commission Bill in the Parliament but with the dissolution of the Lok Sabha this bill got lapsed. Then came the congress led UPA government which tried to introduce National Judicial Appointment Commission bill but failed.

NJAC is a Constitutional body. Functions of the collegium system have now been transferred to NJAC, that means NJAC shall now recommend to the President the names of the person who are going to appointed as a judge of the Supreme Court, judges of the High Court, transfer of the judges from one High Court to another High Court .The current Narendra Modi led government at the centre finally created National Judicial Appointment Commission replacing the collegium system. But there is an issue here. The issue is that the Constitution provided that judges of the High Court and the Supreme Court can be appointed by the President of India after the consultation with other judges, the Governor and so on and so forth .So when you say that judges of the Supreme Court and High Court can be appointed by President on the recommendations of the NJAC that means you have to amend the Constitution.

STAGES THAT LED TO THE CREATION OF NJAC

On 1st August 2014, a Constitution Amendment Bill was tabled in the Parliament, along with this Constitution Amendment Bill, NJAC bill was also tabled in the Parliament. The Constitution Amendment Bill talked about that, the judges of the High Court and Supreme Court shall be appointed by the President on the recommendation of the NJAC and the NJAC bill talked about the functions,

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty second Amendment) Act, 1976 shall be called in question in any court on any ground.

composition of the NJAC.

In August 2014 the Constitution Amendment Bill was passed by the Parliament, first by the Lok Sabha then by the Rajya Sabha. But there was an issue, since this Constitution amendment, disturb and effected the federal feature of Indian polity, that means this Constitution Amendment Bill was also to be ratify by at least half of the state concerned. When after passage of this Constitution Amendment Bill in the Parliament this bill was sent to the states for their reconsideration then after getting 16 state ratifying this Constitutional Amendment Bill, this bill was sent to the President for his accent and the President signed on this NJAC bill and this became an act.

Now the process does not end here for NJAC to enter into force, the NJAC act had to be notified in the government gazette and this notification was done in the month April 2015. It is then that the collegium system was shunted out and NJAC came into force.

COMPOSITION OF NJAC

NJAC consist of 6 members-:

- NJAC shall comprise of Chief Justice of India, who is also going to be the chairperson of NJAC, EX-OFFICO chairperson of NJAC, that means by virtue of him been the Chief Justice of India he is going to be the chairperson of NJAC,
- Two senior most judges following the Chief Justice of India,
- The Law Minister of India,
- Two eminent persons.

These two eminent person shall be selected by the Select Committee, consisting of the Prime Minister of India , Chief Justice of India and leader of opposition in Lok Sabha or in case there is no leader in the opposition in the Lok Sabha then leader of the largest single opposition party in Lok Sabha, that means these three people shall have to select two eminent persons and one among these two eminent persons shall be either a women or a member of Chief Justice of India Schedule Caste, Schedule Tribes, other backward class or minorities.

But, the two eminent persons have not yet been appointed, so the NJAC Act has been notified by the government, as it is the duty to appoint these two eminent persons. When these two eminent persons will be appointed, then NJAC will be complete. Therefore, NJAC shall be completed under

section 12[7] of the NJAC Act 2014 and NJAC shall sit together and frame the regulations.

These regulations should lay down the criteria of suitability, how it is going to choose a person to be appointed a the judge of Chief Justice of India, High Court, what are the procedures under which one judge can be transferred from one High Court to another High Court. All these regulations will be framed, but only when this NJAC would be complete that means Prime Minister, the Chief Justice of India leader of the opposition party had to sit together to appoint these two eminent persons .

FUNCTION OF NJAC

- How the vacancies going to be filled.
- The government have to notify within 30 days of NJAC Act entering into force that there are such number of vacancies in High Courts and in the Supreme Court of India to fill these vacancies, this is one part .
- The second part, for example if the judge of the High Court is going to be retired in the next six months, thus today itself the government has to notify to the NJAC, that this judge is going to retire in the next six month therefore to initiate the process.
- A situation may also arise that, if a judge dies or a judge may resign, there is a provision in the Constitution which says that a judge can submit his resignation even before attaining

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power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article
(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the
purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill: Provided that if such amendment seeks to make any change in
(a) Article 54, Article 55, Article 73, Article 162 or Article 241, or
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(d) the representation of States in Parliament, or
(e) the provisions of this article, the amendment shall also require to be ratified by the Legislature of not less than one half of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent
(3) Nothing in Article 13 shall apply to any amendment made under this article
(4) No amendment of this Constitution (including the provisions of Part III) made or purporting
to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty second Amendment) Act, 1976 shall be called in question in any court on any ground
(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on
the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article PART XXI TEMPORARY, TRANSITIONAL AND SPECIAL PROVISIONS

the age of 65 years by submitting his resignation to the President of India. So for example, a judge dies or resigns from his post then within 30 days of this occurrence, the government has to notify to NJAC that there exists a vacancy. So this is the procedure of filling up the vacancies.

- How the judges of the Supreme Court of India and High Courts can be appointed and how they can be transferred. For the appointment of the Supreme Court judges, the NJAC Act says that the senior-most person of Supreme Court of India shall be appointed as the Chief Justice of India, provided he is suitable for that job. Now the question comes to test, whether a person is suitable for that job or not, that suitability criteria shall be framed in the regulations under section 12 of NJAC Act 2014. So these regulations will be framed by the NJAC.
- Who is going to be appointed as the judge of the Supreme Court? The NJAC shall recommend the names to the President of India, of those persons who are going to be chosen as the judges of the Supreme Court of India on the bases of their ability and merit.
- How can you test the ability or merit of a judge, all these shall be the part of the guidelines which the NJAC has to frame.
- Under the NJAC Act, there is a provision of veto power that even, if two members disagree to the nomination, the NJAC shall not refer the name to the President of India for appointment. So there exist a veto power, that two member shall have to veto the name of a person to be appointed as the judge of the Supreme Court of India or the High Court.
- What is the procedure at the High Court level. For example a person is to be chosen as the Chief Justice of Bombay High Court, now the senior-most judge across all High Courts that is 24 High Courts in this country, shall be chosen as the Chief Justice of the Bombay High Court, provided that he is suitable for that post, provided that he fulfills all the ability, merit and other criteria that are specified in the regulations.
- Pointing to the other judges in the High Court, for example there is a vacancy in Madras High Court, now Chief Justice of Madras High Court can recommend a name to the NJAC. Alternatively NJAC can recommend a name to the Chief Justice of Madras High Court asking for its views. In both these cases the Chief Justice of Madras High Court shall have to consult his two other senior-most judges and then after agreeing to a name this name shall be referred to NJAC and NJAC then shall refer this name to the Governor of Tamil

Nadu and the Chief Minister of Tamil Nadu for their views but their views are not binding on the NJAC. NJAC may agree to their views or may disagree, so when this name is decided, this name shall be recommended to the President for being appointed as the judge of the Madras High Court. Again there is a system of veto power similarly. If two members of NJAC disagree on this name this name cannot be recommend to the President for appointment.

- What about the transfer how can a judge be transferred from one High Court to another which is not known yet because the NJAC Act states that a judge can be transfer from one High Court to another High Court depending upon the regulations framed by NJAC, for example under regulations framed by NJAC, it may give some sort of tenure to High Court judge. For example a High Court judge shall be placed at a particular High Court for a period of two years, before that period he cannot be transferred to another High Court or some of these regulations that NJAC will frame.

PRESIDENT'S POSITION

What is going to be the position of the President in this matter? For a person to be appointed as the judge of the Supreme Court and the High Court, his or her name shall be referred by NJAC to the President and President shall have to appoint him or her but there can be a possibility that President may ask NJAC to reconsider this recommendation but if the NJAC unanimously recommends the same name then the President shall have to appoint this person.

What is the meaning of this word shall, it means that it is mandatory on part of the President to appoint this person, if he does not appoint that person as the judge of the High Court or the Supreme Court that means he is committing the violation of the Constitution and impeachment process can be initiated against the President.

MERIT

- NJAC enhances the accountability and transparency for the appointment procedure of the judges of the Supreme Court and High Court of India.
- In order to improve the judicial independency, NJAC is an instrument which would enhance the judicial selection and, therefore, improves the quality of Judiciary.
- It was argued that NJAC violates the basic structure of Constitution but it actually strengthen

the judicial independency as it involves two important tires i.e. Executive and Judiciary for its decision making, rather than giving sole primacy to the Judiciary which was earlier supported by the collegium system.

- The composition of the NJAC reflects the diversity in its decision, as it includes people from different qualification, which indirectly become accountable to the people.
- With the implementation of NJAC, both quality and merit of judicial appointment will become valuable.

REGULATIONS THAT ARE FRAMED BY NJAC

There were controversies surrounding the NJAC, many petitions have been filed in the Supreme Court, challenging the Constitutional validity of the NJAC Act. Petitions filed by the Supreme Court Advocate Records Association, petition filed by noticed of jurist Fali.S.Nariman, petitioners argued that by replacing collegium system, the Parliament of this country has defrauded the Constitution. It violates the judicial autonomy in this country. There is a sort of executive control on judicial appointments that is why number of petitions have been filed in the Supreme Court and the Supreme Court has heard all these petition together. A bench has been constituted by the Supreme Court which was earlier to be headed by Justice A.R Dave, which was to hear these petitions challenging NJAC. Fali.S.Nariman who petitioned the Supreme Court challenging the Constitutional validity of NJAC, suggested to Justice A. R Dave to rescue himself from hearing this case. While Fali.S.Nariman contended that because Justice A. R Dave has now become ex-officio member of the NJAC so there is conflict of interest and then he rescued himself from hearing these petitions.

Alternatively another important development occurred the Chief Justice of India decided not to enter NJAC as its chairperson unless and until these petitions are disposed of by the Supreme Court and the test whether or not NJAC violates basic structure of the Constitution is done away with, only then Chief Justice of India will enter into NJAC. So currently although NJAC Act has been entered into force, we still do not have NJAC in operation but there are other controversies as well noted Chief Justice of India lawyer and formal Additional Solicitor General of India, Indra Jaising write an article on NJAC. She attacks this NJAC Act saying who are these eminent persons, what is the definition of eminent persons, if we go by the past experiences then these eminent persons can be the sons and daughters of the eminent judges and politicians of this country. She further goes on to state that why is merit used as a criteria to select or appoint the judges to the Supreme Court and the High Court. She

argues that this criteria of merit has always been used to oppose the introduction of the minorities, Schedule Cast, Schedule Tribes and other backward classes and women into the fold of judiciary.

TRUTH V/S HYPE

In the original Constitution, there are some safeguards provided to the Supreme Court and High Court judges that guarantee their autonomy. For example, although the judges of the Supreme Court and High Court are appointed by the President, they do not hold their office during the pleasure of the President, they can only be removed from their position by a very complex impeachment process. It is so complex as of now from 1950 to 2015 no judge has been removed from his position. Also the salaries, allowance of Supreme Court judges are drawn on a consolidated fund of India. It is the only appointment process which the Judiciary arrogated on to itself that has calibrated the enactment with the NJAC Act. That means only the appointment process is been sort to re-alignment not the independence of the Judiciary. The composition of NJAC is tilted towards the Judiciary. Even if the two members of NJAC will not agree upon the recommendation, then that recommendation cannot be send to the President for his appointment. That means, if the Chief Justice of India and his two colleagues in the NJAC shall not agree upon the name, that name shall not be recommended for appointment. On the other hand the executive has only one vote, the Law Minister of India. So in order to recommend their favorites to the High Court and the Supreme Court, they have to get either one judge or one eminent person on their vote. Otherwise this NJAC is tilted towards the Judiciary. Another argument that can be put forward in defense of NJAC is that it is in consonance with the original spirit and intent of the Constitution and is also in consonance with the larger principle of Separation of Power. The judiciary in this country has given vast powers to itself, judicial review is available, and the judiciary has coined a term the “basic structure” of the Constitution of India which finds no mention in the original text. So when judiciary is such a powerful institution, there is need to have checks and balances in places as well. In the original Constitution, an overriding power has been given to the Executive to appoint judges to the Supreme Court and the High Court. Today, this NJAC gives super power to the Judiciary in the appointment of the judges. So when the original Constitution cannot be viewed as something which infringes upon the autonomy of independent judiciary.

CONCLUSION

Today we need to design a system which is much more transparent and secures these appointment in a non-controversial way. Unfortunately, over last two and half decades, the judges have clearly shown that the entire process which they have adopted is highly secretive and is far from being open and transparent. The biggest flaw with the collegium system is that judges appoint judges without being accountable to anybody, which is rarely been followed as it only look technical competence and they are bound with seniority. Collegium is a system which support judges appointing judges, therefore, there are various aspects which judges does not scrutinize among themselves, such as a judges' Constitutional vision, his social philosophy, his attitude towards gender justice, attitude to affirmative action's, these are the ideas. There has to be an outsider involved in this process and which is only ensured by the National Judicial Appointment Commission. Therefore, by implementing NJAC the original intent of the Constitution is being resorted. NJAC also provides veto power. As it was rightly pointed out by one of the retried Supreme Court Judge Justice N. K. Sodi "any system which is opaque cannot succeed, because is the best detergent".

PERIL UNDERGROUND: GROUNDWATER CONTAMINATION AND DEPLETION

*Garvit Agarwal and Rajat Rajpurohit**

"…*Water, water everywhere,*
Nor any drop to drink." [1]

- The Rhyme of the Ancient Mariner in Seven Parts by Samuel Taylor Coleridge.

INTRODUCTION

The right to life includes the right to live with human dignity[1] and water though one of the cheapest in the amenities list of human being's life[2] is the one which is neglected and not giving proper status, to it. The water which is like a fuel to the human heart, which provide dissolved oxygen rather than air. When we imagine about groundwater, there is a visual picture in our mind of underground river or lake. The reality is, it forms a great branch of hydrologic cycle on earth, generally referred as "Aquifers".

The fresh water constitutes a very small proportion of this enormous quantity. About 2.7 % of the total water available on the earth is potable water of which about 75.2% lies frozen in Polar Regions and another 22.6% is present as groundwater. What is effectively available for consumption and other uses is a small proportion of the quantity available in rivers, lakes and ground water.[3] In many parts of India, industry, agriculturist and municipalities are increasing their dependence on groundwater resources. The users find this as an attractive option since the source is continuous (unlike monsoon-fed rivers and streams), the water is generally clean and the users need not depend on an external agency for the supply.[4]

Groundwater is vital actor in aiding many people around the globe by being contributor of water and food securer. It is not possible for every human to settle beside a river basin or a stream or Lake etc, in terms of agricultural. They are available at only certain areas but where groundwater is considered it

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[1] *C.E.R.C v. Union of India*, A.I.R. 1995 S.C. 922.
[2] *Francis Cora lie Mullin v. The Administrator, Union Territory of Delhi*, (1981) (2) S.C.R. 516.
[3] Ministry of Water Resource, River Development & Ganga Rejuvenation, GENERAL FACTS, (Apr. 23, 2015), http://wrmin.nic.in/forms/list.aspx?lid=297.
[4] SHYAM DIVAN & ARMIN ROSENCRANZ, ENVIRONMENTAL LAW AND POLICY IN INDIA 239 (Oxford University Press, 2nd ed. 2002).

can be grounded in many areas including the arid and semi-arid regions.This demand on groundwater being limited, chances of misuse or overuse of water stand eliminated (either by evaporation or drainage). Disturbance to groundwater, an essential natural resource, takes in the form of exhaustion of water in underground aquifers,[5] and pollution of underground water[6].

JUDICIARY ON GROUNDWATER

The society advances by age. Relating to law also where right to life is concern it has represented in the initial human rights documents, did not include basic life necessities and was perceived rather narrowly.[7] The judiciary has extended Article 21 to light, water, space, clean air etc. Article 21, 47, 48-A and 51-A(g) of the Indian Constitution, 1950 are interpreted by the judiciary in India to draw right to water as a special but specifically no provision is constituted explaining right to water. Moreover, the judiciary equips with Articles as well as basic provisions of Water (Prevention and Control of Pollution) Act, 1974 and Environment Protection Act, 1986 to decide groundwater case.

However, in *Subhash Kumar v. State of Bihar*[8], the Apex Court held that right to live is a fundamental right under Article 21 of the Constitution and it include the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has a right to have recourse to Article 32 of the constitution for removing the pollution of water or air which may be detrimental to the quality of life. Under the ambit of the following, the government is a baby-sitter for groundwater. That makes them to provide citizens an access to clean drinking and clean environment[9] as it comes under right to life.[10] These rights (like- right to dig bore wells) can only be restricted or regulated by an Act of the legislature but not by executive fiat.[11]

CENTRE AND STATE

The power to legislate[12] on groundwater is mainly with state government. By reading both the

[5] *F.K. Hussain v. Union of India*, A.I.R. 1990 Ker. 321.
[6] *M.P. Rambabu v. Union of India*, A.I.R. 2002 A.P. 256.
[7] Amy Hardberger, *Life, Liberty and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligation it creates*, 4 Northwestern Journal of International Human Rights, 331 (2005).
[8] A.I.R. 1991 S.C. 420.
[9] *Andhra Pradesh Pollution Control Board v. Prof. M.V Nayudu and others*, A.I.R. 1999 S.C. 812.
[10] *Puttappa Honnappa Talavar v. Deputy Commissioner, Dharwad*, A.I.R. 1998 Kar. 10.
[11] Ibid.
[12] The Constitution of India, Art. 246.

Entries of Schedule VII, i.e., Entry 6[13] and 17[14] of List II harmoniously it is inferred that the government have to calculate public health and sanitation with groundwater. So there is an equal level of responsibility and liability of state for upkeep of environment as it is on the various machineries of the state, vide the implication provided in Article 48-A[15] of the Constitution of India.[16] The public body constituted for the principle statutory duty of ensuring sanitation and health is not entitled to immunity on account of breach of this duty.[17] It is the obligation of all concern including Union Government and State governments to conserve and not waste the natural resources like groundwater.[18]

SUSTAINABLE DEVELOPMENT

The sustainable development principle[19] is a part of Art. 21, 48-A, 51-A (g) of the Constitution of India. In *State of Tamil Nadu v. Hind Stone*[20], Apex Court observed as follows:

"Rivers, Forests Minerals and such other resources constitute a nation's natural wealth. These resources are not to be fitters away and exhausted by any one generation. Every generation owes a duty to all next generation to develop and conserve the natural resources of the nation in the best possible way. It is in interest of mankind. It is in interest of the nation."

Doctrine of sustainable development is not an empty slogan. It is required to be implemented taking a pragmatic view and not on ipse dixit of the court.[21] The adherence to the principle of sustainable development is now a constitutional requirement.[22] This implies that groundwater though a renewable is not infinite resource. It requires a constant natural recharge and limited and reasonable extraction. This particular doctrine is well elaborated by Supreme Court in various cases.[23]

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[13] The Constitution of India, Entry 6 of List II (Schedule VII) - Public health and Sanitation.
[14] The Constitution of India, Entry 17 of List II (Schedule VII) - Water that is to, water supply, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of list I.
[15] The Constitution of India, Art. 48-A- The state shall endeavor to protect and improve the environment and to safeguard forest and wildlife of the country.
[16] *T. Damodar Rao v. Special Officer, Municipal Corporation, Hyderabad*, A.I.R. 1987 A.P. 17.
[17] *Ratlam Municipality v. Shri Vardichand*, 1980 (4) S.C.C. 162.
[18] *T.N Godavarman Thirumulpad v. Union of India*, A.I.R. 2005 S.C. 4256.
[19] First time known in the Stockholm Declaration, 1972.
[20] 1981 (2) S.C.C. 205.
[21] *Susetha v. State of Tamil Nadu*, A.I.R. 2006 S.C. 2893.
[22] *Supra* note 19.
[23] *M.C Mehta v. Union of India (Taj Trapezium)*, 1997 (2) S.C.C. 653; *State of Himachal Pradesh v. Ganesh Wood Products*, 1995 (3) S.C.C. 363; *Narmada Bachao Andolan v. Union of India*, 2002 (10) S.C.C. 664.

DOCTRINE OF PUBLIC TRUST

"The Doctrine of Public trust", has been evolved so as to prevent unfair dealing with and the dissipation of all natural resources.[24] The Supreme Court in (landmark) "*The Taj Trapezium case*"[25] held that the Indian legal system includes public trust doctrine as part of its jurisprudence. The state is a trustee of all natural resources which are by nature meant for public use and enjoyment. The state as a trustee is under a legal duty to protect natural resources. In other words, the doctrine of public trust demands the sovereign to protect and regulate all environment aspects of water and land.

POLLUTERS PAYS AND PRECAUTIONARY PRINCIPLE

The twin principle of "Polluter Pays"[26] and "Precautionary Principle"[27] have been accepted as a part of the law of the land. Similar view has been reiterated in *P.U.C.L v. Union of India*[28]. Observing that environment and ecology are national assets. The Supreme Court is also of the view that environment pollution causes several health hazards, and therefore violates the right to life.[29] Therefore the state is under the obligation to provide fellow citizens with adequate clean drinking water including groundwater, where their duty to protect and preserve the ecology plays action.[30] Protecting water from getting polluted is not only a fundamental directive principle in the governance of the state but is also a penumbral right under Article 21 of the Constitution of India.[31]

The Court also ruled that once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on.[32] Taking this as a sound principle the

[24] T.S DOABIA J., ENVIRONMENTAL AND POLLUTION LAWS IN INDIA 523 (LexisNexis, Vol. 1, 2nd ed. 2010).
[25] *M.C Mehta v. Kamalnath*, 1997 (2) S.C.C. 388.
[26] *Supra* note 10.
[27] *Indian Council for Enviro-Legal action v. Union of India*, A.I.R. 1996 S.C. 1446.
[28] A.I.R. 1997 S.C. 1203.
[29] *M.C Mehta v. Union of India*, A.I.R. 1987 S.C. 1086; *M.C Mehta v. Union of India*, A.I.R. 1988 S.C. 1037.
[30] *Vellore Citizens Welfare Forum v. Union of India*, A.I.R. 1996 S.C. 2715.
[31] *P.R Subhas Chandran v. Government of A.P*, 2001 (5) A.L.D. 771.
[32] *Supra* note 28.

contaminators to the groundwater should be held liable for the inconvenience happened to society as well as ecology.

LEGISLATION ON GROUNDWATER

There is no specific central law regarding underground water management and conservation. Essentially, Constitution provisions are the ones which are looked into for the purpose of deriving solutions to the various problems in this sphere. Though other legislations are there such as The Water (Prevention of Pollution) Act, 1972 and Environment (Protection) Act, 1986, but they mainly deal with the issue of water pollution, and not on issue on groundwater contamination and depletion. There is a pressing need for initiating a legislation which has arose from the different observation of different policy provisions in India. This has to achieve by destroying the present pitfalls that are letting more and more complexities.

Right to groundwater is accompanied with right to land, that are going hand in hand for many years in legal system. Indian Easements Act (1882) provides for every owner of land "the right…to collect and dispose within his own limits of all water under the land which does not pass in a defined channel".[33]

Government reaction after a decade of United Nations Conference on Human Environment (1972) enacted Environment (Protection) Act, 1986 which signifies environment pollution, environment and environment pollutant. This was added further by Air (Prevention and Control of Pollution) Act, 1981 plus Water (Prevention and Control of Pollution) Act, 1974. However on the Act and State relation, the Apex Court highlighted the necessity of strict compliance of the provision of the Environment Protection Act, 1986 stating that the power under the Act cannot be treated as a power simplifier, but it is power coupled with duty. It is duty of the state to make sure the fulfilment of conditions or direction under the Act. Without strict compliance, right to environment under Art. 21 could not be guaranteed and the purpose of the Act would also be defeated. The commitment to the conditions thereof is an obligation both under Art. 21 and under the Act.[34]

Coming on to the nearest realm of this issue the Water (Prevention and Control of Pollution) Act, 1972 exist which is in consonance with groundwater. The very objective of this Act is only prevention and control of water pollution and the maintaining or restoring of water. It also provides machinery to take appropriate action to achieve the objective of the legislation. This Act is silent regarding the

[33] Indian Easement Act, § 7, illustration (g), (1882).
[34] *Milk Producers Association, Orissa v. State of Orissa*, A.I.R. 2006 S.C. 3508.

planning and management of the underground water and streams, such as, for the control of dumping of waste on the land, which may eventually pollute underground water streams. At the same time, it does not with prohibition of indiscriminative tapping of underground water, storage of rain water, etc. "Streams" interpretation is meant for subterranean waters. Plain meaning of subterranean water is nothing but underground waters. Discharge of poisonous, noxious and other polluting matter not only into any stream or well, not also into sewer or on land is prohibited in 1978 amendment.[35]

States by their own initiative under the power given to them by the Constitution of India[36] have enacted laws regarding groundwater, few examples like Mysore Irrigation Act, 1964 and Bombay Irrigation Act, 1879. In the light of the government there is an imbalance between the profit motive of individual/ organization and society's at large (by groundwater contamination and depletion). The State's sense of responsibility has to be equipped.

TREATMENT BY GOVERNMENT

Where Ministry of Water Resources is considered, inter alia, of basic function is to "overall planning for the development of groundwater resources, establishment of utilizable resources and formulation of policies of exploitation, overseeing of and support to state level activities in groundwater development".[37] The National Commission for Integrated Water Resources Development during the course of its deliberations, suggested the need for a comprehensive national legislation based framework, to deal with the various issue pertaining to water and its use.[38] Central Ground Water Board (CGWB) was constituted under sub-section (3) of section 3 of the Environment (Protection) Act, 1986 for the purpose of regulation and control of groundwater development and management in the country, for ensuring its long-term sustainability.[39] This initiative was boosted by the Supreme Court ruling that directed the central government to establish the same.[40]The CGWA may also notify regions that are drafting groundwater and designate them as being either "overexploited" or

[35] Water (Prevention and Control of Pollution) Act, § 25, 26, (1974).
[36] The Constitution of India, Entry 6 and 17 of List II.
[37] Ministry of Water Resource, River development & Ganga Rejuvenation, FUNCTIONS, (Apr. 28, 2015), http://wrmin.nic.in/forms/list.aspx?lid=239.
[38] RAMASWAMY R. IYER, WATER; PERSPECTIVES, ISSUES, CONCERNS 108-14 (Sage Publications Pvt. Ltd., 2003).
[39] Central Ground Water Board (CGWB), ABOUT CGWB, available at: <http: //www.cgwb.gov.in/aboutcgwb.html.> (last accessed on Apr. 28, 2015),
[40] *M.C Mehta v. Union of India*, (1997) 11 S.C.C. 312.

"critical".[41] Aftermath of this effect is-

- Restriction for usage of wells
- Requirement for registration of depleted well.

Moreover, in Coca-Cola Company case the High Court held that there is government right as well as obligation to protect groundwater under the right to life.[42]

NATIONAL WATER POLICY

National Water Policy 2012 provides for:-

- The Integrated Watershed Development activities with groundwater perspective need to be taken in a comprehensive manner to increase soil moisture reduce sediment yield and increase overall land and water productivity.[43]
- The over-drawl of groundwater should be minimized by regulating the use of electricity for its extraction. Separate electric feeders for pumping groundwater for agricultural use should be considered.[44]
- Urban and rural domestic water supply should preferably be from surface water in conjunction with groundwater and rainwater. Where alternate supplies are available, a source with reliability and quality needs to be assigned to domestic water supply.[45]
- Implementation of rainwater harvesting should include scientific monitoring of parameters like hydrogeology, groundwater contamination, pollution and spring discharge.[46]
- The State Water Policies may need to be drafted/revised in accordance with this policy keeping in mind the basic concerns and principles as also a unified national perspective.[47]

[41] PHILIPPE CULLET, WATER LAW, POVERTY, AND DEVELOPMENT: WATER SECTOR REFORMS IN INDIA 49 (Oxford University press 2009).
[42] *Perumutty Grama Panchayat v. State of Kerala*, 2004 (1) K.L.T. 731.
[43] Ministry of Water Resources, *National Water Policy, 2012*, ENHANCING WATER AVAILABLE USE, 6, available at: <http: //wrmin.nic.in/writereaddata/NationalWaterPolicy/NWP2012Eng6495132651.pdf.> (last accessed on May 5, 2015).
[44] Ministry of Water Resources, *National Water Policy, 2012*, WATER PRICING, 7, available at: <http: //wrmin.nic.in/writereaddata/NationalWaterPolicy/NWP2012Eng6495132651.pdf.> (last accessed on May 5, 2015).
[45] Ministry of Water Resources, *National Water Policy, 2012*, WATER SUPPLY AND SANITAION, 10, available at: <http: //wrmin.nic.in/writereaddata/NationalWaterPolicy/NWP2012Eng6495132651.pdf.> (last accessed on May 5, 2015).
[46] Ibid.
[47] Ministry of Water Resources, *National Water Policy, 2012*, IMPLEMENTATION OF NATIONAL WATER POLICY, 13, available at: < http: //wrmin.nic.in/writereaddata/NationalWaterPolicy/NWP2012Eng6495132651.pdf.> (last accessed on May 5, 2015).

This policy has only being promulgated that is not binding and does not force these above guiding principle on government. NWP is only a paper pen concept which is non-effective, non-efficient and just an attempt to operationalize. Hence, there is no reinforcement on it.

DRAFT MODEL BILL FOR THE CONSERVATION, PROTECTION AND REGULATION OF GROUNDWATER

There is no direct legislative authority over groundwater for the central government other than the entries mentioned in List I of the Constitution. Until the Supreme Court judgment in M.C Mehta v. Union of India[48], the Union government was of the view that central legislation may not be permissible since "water" was a state subject under Schedule VII of the constitution. Each state would need to introduce separate legislation to regulate and control groundwater resources and to assist the states; a model bill was circulated in 1970. The central government instead of enacting an Act, they served a model groundwater bill. This bill is a practical way by which the state government will seek to be supported by central government. It can be altered according to the former's need. This enhances the state authority over groundwater by liberalizing, subsidiarity and decentralization. Preamble of the bill suggest for-

- Mandatory Principle for Protection, Conservation and Regulation of Groundwater = Non-discrimination and equity, Subsidiarity and decentralization, Protection, Precaution and Prior Assessment.
- Right to water, Legal Status and Groundwater use.
- Groundwater Protection Zones and Groundwater Security Plans = Procedure, regulation and notification of groundwater protection zone and preparation, content, adoption and validity of groundwater security plan.
- Duties of groundwater users, Harvesting, Recycling and Reuse, and Water-logging.
- Groundwater for Livelihood and Irrigation.
- Industrial, Commercial and Other Bulk Uses of Groundwater = Permits to abstract groundwater for industrial use or infrastructural projects, Procedure for applying for permits, Terms and conditions of the permits, Cancellation, transfer and validity of permits, Pricing of Industrial use of groundwater, Mining.
- Offences, Penalties and Liability = Offences and penalties, Civil and administration remedies,

[48] *Supra* note 41.

Cognizance and compounding of offences.

- Dispute Resolution = Dispute resolution, avoidance, mediation and conciliation, Appointment of a groundwater grievance redressal officer, Disqualification for appointment as groundwater grievance redressal officer, Nyaya Mitra, Jurisdiction and procedure, Appeals.[49]

Despite repeated circulation of the Model Groundwater Bill by the central government, states have generally exhibited lethargy in legislating on groundwater.[50] Presently, no state has adopted the entire Model Bill, except Andhra Pradesh and Maharashtra. The first state to promulgate new water related reforms was Andhra Pradesh, which includes Andhra Pradesh Groundwater (Regulation for Drinking Water Purposes) Act, 1996, The Andhra Pradesh Farmer- Managed Groundwater System Project and Andhra Pradesh Water, Land and Tress Act (WLATA), 2002. Maharashtra on other hand is the most efficient state to implement water related reforms, like Maharashtra Groundwater (Regulation of Drinking Water Purposes) Act, 1993 and Maharashtra Water Resources Regulatory Authority Act, 2005.

FOOD GRAINS AFFECTED BY GROUNDWATER

Like Charity food safety also begins at home. Groundwater as discussed earlier is major as well as key component for land / agricultural irrigation. Most of the water extracted from the aquifers is yielded in the form of crops and organic products. Considering the effect of contamination the latent and inedible crops give rise to soaring case of cancer such as Bhatinda. The groundwater of Bhatinda is contaminated with untreated waste water or disposed of effluents (mercury, chromium, arsenic, cadmium and selenium) from industries which lead not only cancer but also genetic deformities, fluorosis, spontaneous abortions, anemia, reproductive aliments. As many as 70 patients per day on an average travel through train from Bhatinda that it comes to be known as the "cancer express" and the region as "cancer belt".[51] The government in this reaction has completely banned the use of

[49] Planning Commission of India, *Draft Bill Model for the Conservation, Protection and Regulation of Groundwater*, available at : <http://www.planningcommission.nic.in/aboutus/committee/wrkgrp12/wr/wg_model_bill.pdf.> (last accessed on May 2, 2015).

[50] Report of the Expert Group, *Ground water Management and Ownership*, OVERALL ASSESSMENT OF STATES APPROACH AND EXPERIENCE, 35 (Sep. 2007), available at : <http://planningcommission.nic.in/reports/genrep/rep_grndwat.pdf.> (last accessed on May 2, 2015).

[51] Praveen Donthi, Cancer Express, HINDUSTAN TIMES, Jan. 17, 2010, <http: //www.hindustantimes.com/india-news/cancer-express/article-498286.aspx.> (last accessed on Apr. 21, 2015).

groundwater for drinking purpose. This present case can be identical to the event of nuclear explosion in Hiroshima and Nagasaki that made regions unfit for agriculture.

An assessment of rejection shows that on a number of occasions, the importing country is adopting different methods for sampling and testing and also testing for parameters/contaminants, which are not notified; which can become reasons for rejection. India being a second ranker in fruits and vegetables producers of the world[52] is losing exports due to low safety standards. Global markets like EU have started rejecting food consignment exported by India which gives fiscal benefit.[53] Holding higher domestic standards including groundwater measures is the only direction where export and market would stabilize and grow. This also has interface with initiatives such as the "Make in India" and "Swachh Bharat", i.e., food processing and water cleanliness/hygiene respectively which would be difficult to achieve. Hence, contaminating and excessively depleting groundwater is like killing a golden goose.

BRAWL FOR WATER

One of the great writers Mark Twain had correctly quoted that "Whiskey is for drinking and water is for fighting over". Looking at the current depletion and pollution amount, as water being most exploited resource, this scenario could result into reality. For instance, in future we might have to pay more for water or purchase it just like oil. World peace is directly or indirectly related to appropriate water, energy and food existence.

The global competition over natural resources, i.e., utilized and extracted blindly are reasons for fight for dominance and price fluctuation in market. Among the main factors aggravating water scarcity are population growth, increasing urbanization, and high levels of per capita consumption.[54] There is drastic impact on ecosystem as in contribution of groundwater depletion. Scarcity of water resource widens the gap between haves and has not, that result in civil wars. As the same conflict arose

[52] Agricultural & Processed Food Products Export Development Authority, FRESH FRUITS AND VEGETABLES, available at: <http://apeda.gov.in/apedawebsite/six_head_product/FFV.htm.> (last accessed on Apr. 21, 2015).
[53] Sudeshna Sen, European Union bans Indian Alphonso mangoes, veggies from May 1, ECONOMICS TIMES, available at: <http://articles.economictimes.indiatimes.com/2014-04-28/news/49464434_1_mango-season-alphonsos-total-mango-crop.> (last accessed on Apr. 22, 2015).
[54] World Trade Report 2010, *B. Natural Resources: Definitions, Trade Patterns and Globalization,* DEFINITIONS AND KEY FEATURES OF NATURAL RESOURCES, 49, available at : <https: //www.wto.org/english/res_e/booksp_e/anrep_e/wtr10-2b_e.pdf.> (last accessed on May 15, 2015).

in Sudan's Darfur, where one of the main reason for war was water scarcity.[55] Political and economic interest is developed in gamut of nations. Conditions may happen where over a little a decade Sana city (Yemen) may become world's first capital to run out of water. Like if Bangladesh bears the main impact of China's damming of the Brahmaputra, the resulting exodus of thirsty refugees will compound India's security challenge.[56]

GROUNDWATER WITH ECONOMICS

The United Nations Development Programme (UNDP) Human Development Report, published on November 11, 2006, reveals that over 1 billion people live without access to clean drinking water and 2.6 billion without adequate sanitation.[57] In the presence of inappropriate governance, access of groundwater exploitation will result into "Tragedy of Commons"[58]. According to this modern concept with groundwater, public at large plays the character of the exploiter and groundwater as exploited. Recklessness over its sustainability and occurrence of scarcity will create hardship for future generation. This generally happens when free riders will over utilize it to their best possible extent. In economic scenario, the abstractors who work for their profit motive will abstract groundwater till the time their marginal revenue will not elevate their marginal cost of production. In other words, fetching of groundwater more than what is required.

For the above economic disease, volumetric pricing must be considered as a suitable way for efficient use of groundwater. The volumetric pricing method works by imposing cost on the usage of groundwater by which limited and required consumption of the same happens. This will create incentives for the consumers as there will be availability of substitute to such coercive instruments for the efficient allocation of the resources. Impact on poor section by paying volumetric price for the necessity commodity will not be feasible. It would raise political agenda by criticizing such prices and creating this as platform for vote bank, and in result the environment will be kept at a stake with the

[55] Abdullahi Shuaibu and Sharon Lukunka, *Towards Equitable Access to Water*, STORIES FROM VOICES OF DARFUR, available at: <http://unamid.unmissions.org/Default.aspx?tabid=12070&ctl=Details&mid=15701&ItemID=22401&language=en-US> (last accessed on May 15, 2015).

[56] Brahma Chellaney, The Coming Era of Water Wars, THE WASHINGTON TIMES, 1, available at: <http://www.washingtontimes.com/news/2014/mar/13/chellaney-the-coming-era-of-water-wars/> (last accessed on May 15, 2015).

[57] Human Development Report 2006 (Summary), *Beyond Scarcity: Power, poverty and the global war crisis*, WATER FOR LIFE AND WATER FOR LIVELIHOODS, 10, available at: <http: //hdr.undp.org/sites/default/files/hdr_2006_summary_en.pdf.> (last accessed on May 2, 2015).

[58] Economic theory given by American ecologist Garrett Hardin in his essay published in 1968.

interest of the public at large. In lieu, this section should be provided with subsidies at a limited level of consumption after which normal pricing will take effect. Ground pricing has been attempted and is key part of groundwater governance regimes in many countries, for example China, Israel, Jordan, Mexico, and United States.[59]

Employment is another realm where the effect of over-exploitation occurs. Supreme Court in Indian Council for Environment-legal Action v. Union of India[60] has correctly held that environment should not be put at stake by economic development and vice-a-versa. Both of these should exist harmoniously. Life, public and ecology have priority over unemployment and loss of revenue.[61] As agricultural and industrial sector produce ambiance unemployment due to lack of water from which population at large suffers.

CONCLUSION

In India till date there is no specific and effective piece of legislation governing groundwater issues at large. Application of such legislation has created quake for the authority regarding its interpretation and implementation. Judiciary by its judicial creativity innovation has given birth to right to clean water by expanding the ambit of Article 21 of the Indian Constitution.[62]

Concerning general public there are difficulties like lack of education and awareness program regarding their rights are existing Moreover, on the question of including environmental education in syllabus was answered by Apex court in *M.C Mehta v. Union of India*[63] by giving directions to NCERT for the same. It is fundamental duty of every individual to maintain purity of environment and right to live in unpolluted environment.[64]

The action plan should be prepared in such a way that it should be guiding tool also in hands of state pollution control boards and Government agencies for enforcement of the environment laws for the restoration of environment quality of the area. In respect of water resources, it has been, inter alia, suggested that in order to draw water resource management plan, it is essential to assess the water

[59] World Bank Report of Study and Technical Assistance Initiative on Groundwater Management in India, *Deep Wells and Prudence: Towards Pragmatic Action for Addressing Groundwater Overexploitation in India*, ECONOMIC INSTRUMENTS, 55, available at: <http://www.indiaenvironmentportal.org.in/files/Deep%20Wells.pdf.> (last accessed on 30-Apr., 2015).
[60] (1996) 5 S.C.C. 281.
[61] *Supra* note 30.
[62] *Supra* note 9.
[63] (2004) 4 S.L.T. 29.
[64] Quoted in *Mandu Distilleries (P.) Ltd v. M.P Produshan Niwaran Mandal*, A.I.R. 1995 M.P. 57.

quality of the various components of the hydrologic cycle, i.e., stream, groundwater, surface water etc.[65]

Even in Model on groundwater bill give brief about to strengthen the regulatory powers of gram sabhas, panchayats and municipal bodies related to groundwater in line with Article 243G and 243W of the Constitution. Also for recognizing that diverse conditions and needs require different specific solutions and recognizing the need to differentiate rural and urban areas, while providing a single legal framework.

Judicial pronouncements have evolved the doctrine of public trust which gives priority of water use for environment preservation rather than its use for industrial purpose. Proper groundwater management, therefore, becomes a significant element in achieving sustainable use of water in the interest of the present and future generations, and points to the need for legal control.[66]

Proper management of groundwater can be achieved by involving the local residents who were suffering from such groundwater pollution, as they are the people who were at the core level of suffering such groundwater contamination but cleansing such groundwater is the most difficult task for the executing authority which lacks transparency. It takes years for polluted groundwater for treating it to be cleaned. Water recycling seeks to provide the best room for running smooth and polluted free life. Industrial, agricultural and many sectors could be benefited by this. Inevitably, it is necessary to impose legal controls to prevent abuse of groundwater and avert evil consequences. It may also become necessary to vary the nature of these controls from region to region, taking into account the availability or scarcity of water.[67] Repercussions like low food supply, disease, hazards, ecological imbalance takes place when water is vandalize. Prudently, people should conquer on waste of water rather than saving water.

[65] *M.C Mehta v. Union of India*, A.I.R. 2004 S.C. 4016.
[66] P. LEELAKRISHNAN, ENVIRONMENTAL LAW IN INDIA 145 (LexisNexis, 3nd ed. 2007).
[67] Alice Jocob*, Development of Ground Waters: Need for Legal Regulation* 540, 542 Journal of The Indian Law Institute, Vol. 32, 1990.