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A SUMMARY OF THE CONSTITUTIONAL PROVISIONS RELEVANT TO DETERMINE THE REACH AND AMBIT OF INDIA'S TREATY-MAKING POWER

[by Shiva Kant Jha[1]] (August 2013)

I

1. It is considered most appropriate to submit on the provisions of our Constitution before the issues involved in this Writ Petition are considered. Our Supreme Court quoted with approval, in *Bengal Immunity (*AIR1955 SC 661 at 671 para 13), what Justice Frankfurter had said so perceptively:

> "….the ultimate touchstone of constitutionality is the Constitution itself and not what we [court] have said about it".

> "If we take the *Brown opinion* as it is written, it certainly ranks as one of the great opinions of judicial history --- plainly in the tradition of *Chief Justice Marshall's seminal 1819 dictum that the Court must never forget that it is a Constitution it is expounding*." {italics supplied)[2]. And Higgins J. observed:
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> > "…..although we are to interpret the words of the Constitution on the same principles of interpretations as we apply to the any ordinary law, these principles of interpretation compel us to take into account the nature and the scope of the Act we are interpreting, to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be."[3]

What our Constitution says emerges from its words and contexts, not from the hurried epithets like 'the Parliamentary form of government', or from our Western borrowings.

> "but then what is there in name, what is important to bear in mind us the thrust and implications of the various provisions of the Constitution.." - Ahmadi J. in *S. R. Bommai (*para 23)

II

2. For exploring the intent of our constitution-makers, and for the ascertainment of meaning, the quest is to be made in accordance with the language of our Constitution as there can be no better pointer to the intent of the makers than the language they used. For proper exposition of our constitutional provisions, the aspects of the matter under consideration are divided into the following Sections:

(a). The Historical Context,
(b) The Provisions under our Constitution, and
(c) Deductions from our Constitutional provisions.

(a).
The Historical Context,

3. The American Constitution, which provided us with a model of a written constitution with fundamental rights, provides an appropriate perspective for comprehending constitutional issues under our Constitution too. The Attorney-General, addressing the court in the *Five Knights' Case* (one of the state trials of Stuart England) for the Crown asked, "Shall any say, The King cannot do this? No, we may only say, He will not do this."[4] It was precisely to ensure that in the American system one would be

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[2] Quoted in Pollack, *Earl Warren: The Judge Who Changed America* 209 (1979); referred by Dr Bernard Schwartz in *Some Makers of American Law* (Tagore Law Lectures) p. 133

[3] *A G for N.S.W. v. Brewery Employees Union* (1908)6 C.L.R. 469, 611-12

[4] 3 Howell's *State Trials* 45 (1627)

able to say, "The State *cannot* do this," that the people in America enacted written Constitution containing basic limitations upon the powers of government[5].

4. Our Constitution does not grant our Executive any external sovereignty through affirmative grants. Under our Constitution it is wrong to think that power over external affairs, in origin and in its essential character, is different from that over internal affairs. The President speaks or listens as a representative of the nation but only within Constitutional limitations. The Executive under our Constitution cannot preempt law, or go counter to it not only in the domestic sphere but also at the international plane. The constitutional limitations, within which all executive powers are to be exercised, are set forth in our Constitution itself. The sovereign status of the Constituent Assembly had been boldly acknowledged by the great Indian leaders. **Granville Austen** very perceptively observed[6]:

> " Gandhi expressed the truth first ---that Indians must shape their own destiny, that only in the hands of Indians could India become herself – when in 1922 he said that Swaraj would not be a gift of the British Parliament, but must spring from 'the wishes of the people of India as expressed through their freely chosen representatives'. Twenty-four years later these words were repeated during the opening session of the Constituent Assembly; they were, some said, the Assembly's origin; all agreed that they were its justification."
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> "The Assembly was the people's. As Nehru said, the British could now dissolve the Assembly only by force. 'We have gone through the valley of the shadow, and we will go through it again for true independence, he said."

5. Jawaharlal Nehru had declared that India's constitution-making could not be "under the shadow of an external authority". The Cabinet Mission had come to New Delhi to help the Viceroy set up in India a machinery by which Indians could devise their own constitution. Our Constitution was not to be one written in the colonial office of the imperial powers and passed by the British Parliament. Austen aptly points out that the desire for a "home-made' constitution is the source of what K.C. Wheare has named the "principle of constitutional " autochthony", or desire for a constitution sprung from the land itself. [7] The Constituent Assembly arrogated to itself an absolute authority to control its being. It declared:

> "The Assembly shall not be dissolved except by a resolution assented to by at least two-thirds of the whole number of members of the Assembly."[8]

The Constituent Assembly had a *sovereign competence* for the constitution-making as it was for the sovereign republic of India. Austen says:

> "India was an emergent , formerly colonial territory, where a sovereign people framed their Constitution in a Constituent Assembly while at the same time working a federal government that pre-existed independence --the federal system of 1935 Act."

The Indian Independence Act came into effect on 15 August 1947, merely recognizing what was *fait accompli*. In terms of Public International Law it was a mere *recognition* of an accomplished fact.

(b)
The India Independence Act, 1947

6. The **Indian Independence Act 1947** was by the U.K. Parliament getting royal assent on July 18, 1947. It sought to set up two dominions, India and Pakistan, on August 14; and with this the British Government's responsibility as well as **suzerainty** were to 'cease' making the two Dominions self-governing in matters pertaining to internal and external affairs. Section 8 of that Act provided: "In the case of the new Dominions, the powers of the Legislature of the Dominion shall, for the purpose of making provision as to the constitution of the Dominion, be exercisable in the first instance by the Constituent

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[5] Bernard Schwartz, *Some Makers of American Law* Tagore Law Lectures p. 37
[6] . Granville Austen, *The Indian Constitution , Corner Stone of a Nation p. 1 & 7*
[7] K. C. Wheare, *Constitutional Structure of the Commonwealth* p. 89
[8] *Constituent Assembly, Rules of Procedure and Standing Orders* Chapter III. Rule 7

Assembly of that Dominion". First, this was said what was the implied authority of a sovereign nation. Secondly, our Constitution was adopted, enacted and given to ourselves on Nov 26, 1949, when we were a sovereign nation..

7.. Our Constitution was framed when we had self-governing powers in the widest amplitude. Our Constitution is not a grant from the Imperial Power, nor was it minted in any foreign chancellery, nor was it regulated and commanded by the colonial masters. . Let the status of the Constituent Assembly that framed our Constitution be compared with the way in which some other constitutions were framed.

8.. Our Constitution was framed under circumstances different from the circumstances under which the USA was formed. The material specifics of the U.S. polity was in the mind of Justice Sutherland who was led to believe in *Curtiss Wright Case* [299 U S A 304 (1936)] that the USA possessed 'extra-constitutional" power[9]: he said:

> "And since the states severally never possessed international powers, such powers could not have been carved out from the mass of state powers but were transmitted to the U.S. from some other source. During the colonial period , those powers were possessed exclusively by and were entirely under the control of the Crown. ……."

(c)

The Constitution of the U.K.

9. . The U.K. Constitution is the product of the the nation's constitutional struggle over the centuries. Courts and Parliament have stripped the Crown of many powers by subjecting that to certain constitutional discipline. Whatever is still left to it belongs to that realm of the Executive's powers which are called 'the Crown's Prerogative' generally invoked in matters pertaining to the foreign affairs and the exercise of the Treaty-Making power. This aspect of the matter has been thus brought out by Oppenheim[10] thus:

> 'The departure from the traditional common law rule is largely because according to British constitutional law, the conclusion and ratification of treaties are within the prerogative of the Crown, which would otherwise be in a position to legislate for the subject without parliamentary assent. Since failure to give any necessary internal effect to the obligations of a treaty would result in a breach of the treaty, for which breach the United Kingdom would be responsible in international law, the normal practice is for Parliament to be given an opportunity to approve treaties prior to their ratification and, if changes in law are required, for the necessary legislation to be passed before the treaty is ratified."

(d)

The **Federal Constitution of Malaysia.**

10. The Constitutional Conference, held in London in 1956 suggested a commission to frame the Constitution of Malaya. It was accepted by Her Majesty Queen Elizabeth II and the Malay Rulers. Lord William Reid, a Lord of Appeal in ordinary, headed that commission. Its report provided basis for the Constitution. It became operative from

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[10] Oppenheim's *International Law* 9th Ed Vol I Peace p. 60-61

August 27, 1957 whereas independence was achieved only on August 31, however, i.e. much after the grant of Constitution to Malaysia.

(e)

The Constitution of Canada

11. Till 1982 Canada was 'governed by a constitution that was a British law and could be changed only by an Act of the British Parliament' with the Queen of England as the Head of the State. The Canadian government was cast in the parliamentary form. Lord Atkin in *Attorney General for Canada v. Attorney General for Onterio* (P.C.) stated two points:

(a)The Privy Council stated the typical British approach in this case emanating from the Canadian jurisdiction as the Preamble to the British North America Act, 1867 stated that :

> "Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom;"

Art. 9 stated :

> 'The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen."

(b)The Privy Council held that legislation implementing an international convention was void as it contravened Sections 91 and 92 of the British North America Act, 1867.

(f)

The Constitution of Australia

12. The Commonwealth of Australia was the creation of the British Parliament. The Constitution Australia, operative from 1 January 1901, had been made operational by by an Act of the U.K. Parliament. It adopted a parliamentary form of government with the Queen as the Head of the State having in Australia her representative, the Governor General, wielding executive powers. It took the passing of the Statute of the Westminster Adoption Act 1942 and the Australia Act 1986 to dissociate Australia constitutionally from the U.K. Till the Australia Act 1982 the Privy Council was the highest Court for Australia. Now Australia can amend its Constitution. Despite all these the 1900 Act is still on the British list of laws with a narration : "The Constitution is not necessarily in the form in which it is in force in Australia".

(g)

The Constitution of the USA

13. The **American War of Independence** (1775–1783) ended with the Treaty of Paris in 1983 in terms of which the British Government gave up sovereignty over the United States. The Constitutional Convention in Philadelphia adopted the U.S Constitution on 17 September 1787 and was ratified by the constituent states in the name of "the People".

III

THE PROVISIONS UNDER OUR CONSTITUTION

14. Our Constitution organizes and distributes the whole of the State power through its well-knit structure leaving the Executive with no hip-pocket with reserve power outside the ken of the Constitution. This deduction is amply borne out by the provisions of our Constitution when analytically examined *viz*.:

20. Art. 53 of our Constitution

It says:

(i) The executive power of the Union is vested in the President;

(ii) This power is to be exercised *in accordance with* the Constitution; and

(iii) In terms of Art 53(3), Parliament can clip the wings of the Presidential power.

(iv) It deserves to be contrasted with the powers of the U S Constitution in whom the executive power is *vested* in the President, not specifically subject to the constitutional restraints and limitations.

A close reading of Art. 53 of our Constitution brings to light certain material points:

(a). Our Constitution does not grant the Treaty-making power to the President, or the Executive Government as has been in many other constitutions: to mention a few: the Constitution of France (Art.52 subject to the restraints under Title VI); Constitution of South Africa (Chapter 14 Title 1 (231); the US Constitution (Art. 2 (3)[11] ;

(b) Whereas in the U.K., whist the *formation* of a treaty is an executive act, the *implementation* of a treaty is a legislative act. The same is the position under the US, Canadian, and Australian Constitutions (to mention only a few). But our Constitution the entire gamut of powers are brought within the exercise of the legislative power (vide entry 14 of the 7th Schedule: the Union List. Even 'treaty-formation', that is done at the international plane is not an extra-constitutional act. .

(c) Our Constitution grants/permits, the Executive Government no Extra-Constitutional Powers at the International plane as was recognized by the US Supreme Court in *United States v. Curtiss-Wright Export Corporation*, 299 U.S. . 304 (1936)[12], and as the US President keeps on exercising off and on. Climax was reached when President Regan issued Executive Order 12662, as authorized by the Congress, to shield the decisions of the binational panels and the Extraordinary Challenge Committees. " These efforts represented an unprecedented cooperation between Congress and the President to shield an international agreement from constitutional challenge."[13]

(d) Art. 53 of our Constitution subjects our President specifically to the constitutional restraints, whereas the US President is not only under constitutional restraints, he is provided with wide scope for the exercise of the Executive Power as the Art. II(3) of

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[11] The Uruguay Round Agreements did not require ratification by the Senate as a treaty, but constitutionally executed by the President,after getting approval through the implementing Act of Congress (as done in the matters of many other *trade agreements, including NAFTA, the United States-Canada Free Trade Agreement, the United States-Israel Free Trade Agreement and the Tokyo Round Agreement.*

[12] "As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America."
Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."

[13] Yong K. Kim, 'The Beginning of the Rule of Law ibn the International Trade System despite U,S. Constitutional Reatraints' 17 Mich. J. Int'l L. 967.

the U S Constitution grants him power to " take care that the laws be faithfully executed, and shall commission all the officers of the United States."

15. Art. 73 of our Constitution

It says:

(i) The entire gamut of the President's executive power is "subject to the provisions of this Constitution"

(ii) What is granted is the 'executive power' that must be exercised in accordance with law. In an appeal from Nigeria in *Eshgabayi Eleko v. Govt. of Nigeria*[14][14] Lord Atkin made the following observation which our Supreme Court has quoted with approval[15][15] in several cases:

> "In accordance with the British jurisprudence no member of the executive can I interfere with the liberty and property of a British subject except on the condition that he can support the legality of his action before a court of justice." (Emphasis supplied.)

(iii). The Art. 73(a) widens only the zone of the 'Executive Power' without freeing from other constitutional restraints, viz the exposition under Art 253 of our Constitution..

(iv) Art 73 (a) widens the Executive's power to traverse all the reals over which Parliament exercises legislative powers even by collapsing certain federal features. The power so exercised remains only the 'executive power', and never acquires the halo of the legislative power of Parliament. ;

It deserves to be noted that our Constitution puts on the exercise of the 'executive power' to specific riders:

(a). The exercise of the 'executive power' would be *ultra vires* if exercised fraudulently,

(b) The exercise of the 'executive power' must not transgress the constitutional limitations in order to be constitutionally valid,

(c) The exercise of the 'executive power' must not breach the mandatory norms of our Administrative Law as judicially interpreted,

(d) The exercise of 'executive power' is subject to the constitutional discipline whether it is exercised domestically or at the international plane,

(e) The Art. 73(1)(b) (like Art 253) deals with, to quote from the *Peoples Commission* (p.150): "*an ex post facto* situation, that is, a consequential situation arising out of an international treaty, agreement or convention already entered into." [16]

16. Art. 245 of our Constitution

It says:

(i) Art. 245 mandates that the law made by Parliament and the Legislatures of the States must be "subject to the provisions of this Constitution"

(ii) It follows *a fortiori* that the law thus framed must be valid by conforming to (a) our Fundamental Rights, (b) our Constitutional Rights which are not *eo nomine* Fundamental Rights, (c) the Basic Structure of our Constitution as judicially expounded,

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[14][14] (1931) A.C. 662 at 670

[15][15] *A.K. Gopalan v. The State A I R 1950 SC 27 ; Basheshar Nath's Case A I R 1959 SC 149*

[16] *Peoples' Commission Report on GATT* by V R Krisna Iyer, O Chinappa Reddy, D A Desai, (all the former Hon'ble Judges of the Supreme Court); and Rajinder Sachar (the then Hon'ble Chief Justice of Delhi High Court);

(iii) It does not say that the 'legislative power' is vested in Parliament (as does the Art. I(1) of the U.S. Constitution in the case of the U.S. Congress). But almost the same result emerges because of the exclusivity of legislative power granted to the legislature is specifically stated in Art 246(1) of our Constitution.

Art 253: what it means.

17. Art 253 of our Constitution;:

"Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

(a) It empowers Parliament to make any law, for the whole or any part of the territory of India, for *the purposes specified in the Article*.
(b) The opening words of the Article "Notwithstanding anything in the foregoing provisions of this Chapter" mean that this power is made available to Parliament by collapsing the division of powers between the Centre and States effected by Article 246 read with the Seventh Schedule.
(c) A close reading of Articles 253 and 73 suggests. on the terms of their text, the following:

(a) Whereas Entry 14 of the Union List refers to Parliament's legislative competence to frame law both pertaining to the *formation* and *implementation* of a Treaty, Article 253 contemplates only *implementation*, not f*ormation*, of a Treaty. The act of *implementation* is a distinct from and posterior to the act of *formation*.

(b) Art. 253 contemplates Parliament's " power *to make any law*…." for implementation of a treaty. Art. 73 contemplates merely the frontiers of the province of the Executive power. The Article does not deal with *formation* or *implementation* of a Treaty. But as the Executive power is exercised only in accordance with and subject to the Constitution, even the formation of a Treaty is within the constitutional limitations.

(c) Art 253, even on its terms, collapses the scheme of the distribution of legislative powers as distributed under the 7th Schedule. The power under Art 73 can stand extended *only when Power is exercised by framing actual legislation* in terms of Art. 253. Unless the appropriate law is framed, Parliament has not *evidenced* its power to collapse the federal structure. As all powers granted under Constitution are subject to the constitutional limitations, there must be specific occasions:

(i) for our Parliament to consider if it would exercise a particular power to ride roughshod over people's Fundamental Right, or in breach of other Constitutional limitations including the norms governing Basic Structure;

(ii) for our Superior Courts to examine the constitutional validity of the exercise of the legislative power under Art. 253 of the Constitution by examining whether a particular law made by Parliament is *constitutionally valid*;

(iii)for our people, as the political sovereign to judge our Parliament at work.

The concept of the extended legislative power can not be construed to subsume notional power widened mere logically *in vacuo***.**

In *Ajaib Singh v. State of Punjab*[17] where the Court held:

"Neither of Articles 51 and 253 empowers the Parliament to make a law which can deprive a citizen of India of the fundamental rights conferred upon him".

The *Peoples' Commission Report on GATT* [headed by V R Krisna Iyer, O Chinappa Reddy, D A Desai, and Rajinder Sachar] quotes (at

[17]. AIR 1952 Punj. 309 at 319.

p. 127) Dr. Basu who had expressed the view analogous to that stated in *Ajai*b:

> "Basu makes a significant observation about Art. 253. He says that Parliament shall be competent to legislate on List II items, if necessary, to implement treaties or agreements. "But other provisions of the Constitution, such as the Fundamental Rights, cannot be violated in making such law". [*Constitution of India* by Basu 1994Edn. P. 858]

(d) After a close examination of Articles 73 and 253 the *Peoples' Commission Report on GATT* [by V R Krisna Iyer, O Chinappa Reddy, D A Desai, (all the former Hon'ble Judges of the Supreme Court); and Rajinder Sachar (the then Hon'ble Chief Justice of Delhi High Court)] explains the correct constitutional position in our country thus:

> " Article 253 and 73 (1) (b) both deal with an ex-post facto situation, that is, a consequential situation arising out of an international treaty, agreement or convention already entered into. **They confer the necessary legislative and executive power to implement such treaty, agreement, etc. however made but must be one made according to the Constitution and not contrary to the Constitution.** For example, the Union Government cannot barter away the sovereignty of the people of India by entering into a treaty making India a vassal of another country and then invoke Articles 253 and 73 (1) (b) to implement the treaty. Such a treaty would be void *ab initio* being repugnant to the basic features of the Constitution, namely, the sovereignty of the people.
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> Thus, an international treaty or agreement entered into by the Union Government in exercise of its executive power, without the concurrence of the States, with respect to matters covered by Entries in List II of the Seventh Schedule, offends the Indian Constitutional Federalism, a basic feature of the Constitution of India and is therefore void *ab initio*. The Final Act (of Uruguay Round) is one of that nature. This is our prima facie opinion on the question whether the Final Act is repugnant to the Federal nature of the Constitution and we strongly urge the Union Government to do nothing which abridges that principle.
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> **Thus, an international treaty or agreement entered into by the Union of Government in exercise of its executive power, without the concurrence of the States, with respect to matters covered by Entries in List II of the Seventh Schedule, offends the Indian Constitutional Federalism, a basic feature of the Constitution of India and therefore void ab initio.** The Final Act is one of that nature. This our prima facie opinion on the question whether the Final Act is repugnant to the Federal nature of the Constitution and we strongly urge the Union Government to do nothing which abridges this principle."[18] (emphasis supplied)

(e) The view of this Petitioner gets support from the following view of some distinguished former Judges of our Superior Courts [Justice V.R. Krishna Iyer, former Judge of the Supreme Court of India; Justice P.B. Sawant, former Judge of the Supreme Court of India; and Justice H. Suresh, former Judge of

[18] *The Report of Peoples' Commission on GATT* p150

the Bombay High Court]: to quote from their recent Declaration[19] : to quote---

"1. The Executive has no power to enter into any agreement, either with a foreign government or a foreign organization, which is binding on the nation. **The agreement will be binding only when it is ratified by Parliament…There is no provision in the Constitution which gives such authority to the executive**. We have a written Constitution and, therefore, we must have a written provision in the Constitution which gives such authority to the Executive.

2. Articles 73 and 253 and entries 6, 13, & 14 in the Union List of the Constitution refer to the powers of the Executive. Article 73, among other things, states that, "…the executive power of the Union shall extend (a) to the matters with respect to which Parliament has powers to make laws, and (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement." ***This means that the matters n which Parliament has no powers to make laws are also matters on which the Union Government cannot exercise its executive power.*** **It also means, conversely, that the Union Government cannot exercise its executive powers beyond the legislative powers of the Union.** ***Both these propositions have an underlying assumption that, before the Union Government exercises the executive power, there is a law enacted by the Parliament on the subject concerned.*** Some argue that the provisions of Article 73(1)(a) gives power to the Executive to act on subjects within the jurisdiction of Parliament, even if the Parliament does not make a law on those subjects. This is both a distortion and a perversion of the said provision and a subversion of Parliament's supreme control over the Executive. If this interpretation is accepted then the Union Executive can act on all subjects on which Parliament has to make law, without there being any law made by Parliament. **You can thus do away with Parliament and the Parliament's duties to make laws**. We will then have a lawless Government. **Democracy presumes there should be a rule of law and all Executive actions will be supported by law and that there shall be no arbitrary action by any authority, including the Union Executive.** It may also be necessary in that connection to remember that it is for this very reason that when Parliament is not in session and, therefore, unable to enact a law, that the power is given to the President to issue an ordinance (which is a law), so that the Executive may act according to its provisions. These ordinances are to be placed before the Parliament within six weeks of its reassembly, and if Parliament approves they become law. **The Constitution-makers were, therefore, clear in their mind that the Executive cannot act without the authority of law and it has no power independent of law and it has no power independent of law made by Parliament.**"[*italics supplied*]

(f) Wherever power is granted to create a thing, it is done in a different phraseology. Art 246 says: " Parliament may make laws…….". Section 90 of the Income-tax Act, 1961 empowers the Central Government thus:

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[19] It had been filed before the Delhi High Court in Shiva Kant Jha v. UoI [2009-TIOL-626-HC-DEL-IT] and can be read at my www.shivakantjha.org;

" (1) The Central Government may enter into an agreement with the Government of any country outside India…..".

Article 73 of the Constitution does not say:

"to the *formation* of an Agreement in respect of the matters with respect to which Parliament has power to make laws".

(g) Lord Atkin's view in *Attorney General for Canada v. Attorney General of Ontario* holding the *formation* and i*mplementation* as two acts, the former being an exclusive exercise of the Executive power at the International plane, and the latter needing legislation does not survive as our Constitution contemplates both under its legislative competence of our Parliament. Our Freedom-Fighters. at work in our Constituent Assembly) could not have forgotten how disastrous were the Treaties like the *Treaty of Allahabad*, or the *Treaty of Severs* . The historical reasons were in the conciousness of the makers of our Constitution.

(h) The word "implementation", as used in Art. 253 is now to be read in a generic way, rather in the technical sense as it was understood in olden days when we were not a democratic republic under the Constitution which subjects all the organs of the State to its rigorous control. When Lord Atkin used this expression in *Attorney General for Canada v. Attorney General of Ontario*, the exercise of foreign affairs powers had not much impact on the citizenry. Acts at the international plane were the preserve of the high chancelleries hardly of much concern to the common people. This point gets revealed from the fact that the World War I was declared by the UK. by the prerogative power of the King alone people smarting under the the nation that the War was to be a brief affair at the international plane. But things in the Globalised economy of days have changed so much so the most Treaties have tremendous impact on the lives of people. There is now a clear mismatch between the national, political and the global economic structure. The line which divided the international from domestic has virtually vanished. Besides, people under our Constitution must in our interest hold the Executive under vigilance. Even conclusion of a Treaty generates great consequences for the nation. Do the following do not affect our rights and interests?

(a) The outsourcing of judicial powers to the foreign fora depriving our Judiciary of any say thus going back to the East India Company's diarchy and two judicial systems;[20]

(b) The outsourcing of the legislative powers to the international institutions, viz the WTO;

© The modification of our socialist mission under the Constitution by substituting it a new paradigm crafted by the neo-liberal economic philosophy;

(d) The subversion of the Income-tax Act by depriving the lawful jurisdiction of the statutory authorities by providing the resolution of DTAA tax disputes under the MAP procedure, and also providing when such disputes can be taken to the *Council for Trade in Services*:[21] and thereafter paving the way to the ICJ, and then to the Security Council (then, perish the thought, to the cruise missiles) .

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[21] Art. XII(3) of General Agreement on Trade in Services provides:

"A Member may not invoke Article XVII, either under this Article or Article XXIII, with respect to a measure of another Member that falls within the scope of an international agreement between them relating to the avoidance of double taxation. In case of disagreement between Members as to whether a measure falls within the scope of such an agreement between them, it shall be open to either Member to bring this matter before the Council for Trade in Services.[21] The Council shall refer the matter to arbitration. The decision of the arbitrator shall be final and binding on the Members."

18. Art 253: and the Federal Feature of our polity

The following points are worth consideration in examining issues apropos Art. 253 of the Constitution of India: these are --

(i) The Art. 253 was designed to ensure that what happened in Canada on account of the decision in *Attorney General for Canada v. Attorney General of Ontario* [1937 A.C. 326 does not occur under the Constitution of India. Canada was a federation , and the powers were distributed between the Federation and the federating provinces. " The question before the Privy Council concerned the competence of the Federal power to implement international obligations in areas of provincial jurisdiction without provincial cooperation. The Privy Council held that the federation had no power to legislate in respect of the matters, which fell within the exclusive jurisdiction of the Provinces. This was so held in the light of S.92 of the British North America Act, 1867."

(ii). As this exposition is in the context of India's Treaty-Making power, the effect of the federal structure of polity on the Treaty-making power is thus summarized by Oppenheim (*Public International Law p. 253:*

> "Federal states may accordingly often find themselves either unable to conclude treaties relating to matters falling within the legislative competence of the member states or, after having validly concluded such treaties, unable to give effect to them. In some federal states, such as **Australia**[22] or **India**, the constitution seems to give some power to the federation to legislate in matters covered by treaties concluded by the federation. In the United States, in *Missouri v Holland*, the Supreme Court decided to the same effect by reference to the article of the constitution which provides that treaties concluded by the United States shall be the supreme law of the land alongside the constitution."

(iii) Oppenheim refers in the footnote 4 at page 253 of his *Public International Law* the Art. 253 of India's comment with some observations:

> "Article 253 of the Constitution of India.... This is also the position in the Federal Republic of Germany (see Arts 73 and 32) and Austria (see Arts 10(1) and 50);...."

Art. 32 of the German Constitution says:

" "

(iv) *The Report of the Peoples' Commission on GATT* [by V R Krisna Iyer, O Chinappa Reddy, D A Desai, and Rajinder Sachar, all our former Hon'ble Judges, at pp 145-146] has summarised the constitutional charecter of 'federalism' under our polity: to quote--

> " Broadly, in the case of Kesavananda v. State of Kerala, AIR 1973 SC 1461, the Supreme Court has held that the Indian Constitution is Federal in nature and that Federalism is a basic feature of the Constitution."[23]

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[22] The King v Burgess, ex parts Henry, AD, 8 (1935-37), No 19; Koowarta v Bjelke-Petersen, (1982), ILR, 68, p 181; Commonwealth v Tasmania (1983), ILR, 68, p 266. See also Byrnes and Charlesworth, Aj, 79 (1985), pp 622-40; Hofmann, ZoV, 48 (1988), pp 489-512.

[23] "In *S. R. Bommai v. Union of India*, (1994) 3 SCC 1, discussing the impact of Article 356 on Federalism, Justice Sawant who spoke for himself and Justice Kuldip Singh observed,

> "Democracy and Federalism are essential features of our Constitution and are part of its basic structure. Any interpretation that we may place on Article 356 must, therefore, help to preserve and not subvert their fabric. The power vested de jure in the President and de facto in the Council of Ministers has all the latent capacity to emasculate the two basic features of the Constitution and hence it is necessary to scrutinize the material on the basis of which the advice is given and the President forms his satisfaction more closely and circumspectly.

The Learned Judges proceeded to quote Mr. Seervai and then observed,

> "The above discussion shoes that the States have an independent Constitutional existence and they have as important a role to play in the political, social,

(v) **The reasons which can never permit the Executive Government (even our Parliament) to modify, or undo, the Basic Features of our Constitution would be set forth while dealing with Art. 368 of our Constitution.**

19. Article 265 of Constitution: the constitutional dimension of taxation

Its effect is stated in the following propositions:

(i). Art 265 states the great constitutional principle of the British Constitution which we have accepted under our Constitution..

(ii) The law framed in pursuance to the power under Art. 265 must be *constitutionally valid* to be treated as the tax law authorized under Art. 265 of our Constitution.

(iii) Even where a tax treaty is made in exercise of power under the Act framed under Art. 265 (as is the Income-tax Act, 1961), our Courts would examine. if the terms and stipulations of a treaty conform to the law framed under Art. 265, and is in *constitutionally valid.*

(a). Art 265 states the great constitutional principle of the British Constitution which we have accepted under our Constitution.[24] That in *India* the

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educational and the cultural life of the people as the Union. They are neither satellites nor agents of the Centre....The people in every State desire to fulfill their own aspirations through self governance within the framework of the Constitution. Hence, interference with the self governance also amounts to the betrayal of the people and unwarranted interference...Whatever the nature of Federalism, the fact remains that, as stated above, as per the provisions of the Constitution, every State is a constituent political unit and has to have an exclusive Executive and Legislature elected and constituted by the same process as the Union Government. Thus the Federal Principle, social pluralism and pluralist democracy....for the basic structure of our constitution."

Justice B.P. Jeevan Reddy speaking for himself and Justice S. C. Agarwal observed, "The fact that the scheme of our Constitution greater power is conferred upon the Centre vis-a-vis the States does not mean that the States are mere appendages of the Centre. Within the sphere allotted to them, States are supreme. The Centre cannot tamper with their powers. More particularly, the Courts should not adopt an approach, an interpretation, which has the effect of **or** tends to have the effect of whittling down the powers reserved to the states.....All this must put the Court on guard against any conscious whittling down of the powers of the States. Let it be said that the Federalism in the Indian Constitution is not matter of administrative convenience but one of principle--the outcome of our own historical process and a recognition of the ground realities."

[24] ***"It was supposed to have been settled by Magna Carta and by legislation in the reigns of Edward I and Edward III that taxation beyond the levying of customary feudal aids required the consent of Parliament." [O.Hood Phillips'*** **Constitutional and Administrative Law** ***(7 th Edition Pg.45).***

The constitutional position was crisply and roundly stated by Hood Phillips (in **Constitutional and Administrative Law** 7 th ed at p.45) thus:

> ***"One of the central themes of English constitutional history was the gaining of control of taxation and national finance in general by Parliament, and in particular the Commons; for this control meant that the King was not able to govern for more than short periods without summoning Parliament, and Parliament could insist on grievances being remedied before it granted the King supply. This applied at least to direct taxation."***

Executive Power under Article 73 of the Constitution cannot be exercised for framing tax treaties. The conjoint effect of Articles 109, 110 and 265 of the Constitution of India is that the Executive can do only what it is permitted to do (and in the manner it is permitted to do) by Parliament through an enactment. It cannot grant any *exemption* from tax, as even exemption is integral to the concept of the levy of tax. These Articles of our Constitution draw on the provisions of the United Kingdom's Parliament Act 1911, and the Bill of Rights. In the Indian context this power is granted under section 90 of the Income-tax Act, 1961 that authorizes the Central Government to enter into double taxation agreements with other countries.

(b) The law framed in pursuance to the power under Art. 265 must be *constitutionally valid* to be treated as the tax law authorized under Art. 265 of our Constitution.

(c) Even where a tax treaty is made in exercise of power under the Act framed under Art. 265, our Courts would examine. if the terms and stipulations of a treaty conform to the law framed under Art. 265, and is in *constitutionally valid.*

(d) Under our Constitution, the exercise of power under Articles 53/73 is as much subject to the Constitutional Restraints as is the exercise of power that is derived from Article 265 of our Constitution. With reference to these two distinct situations, the following are the relevant mandatory constitutional norms:

(i) The treaties made in exercise of powers under Article 73 of the Constitution must have legislative authority to affect the domestic law and people's interests recognized by law, but no such legal authority is needed to frame Tax Treaties (DDAA) as Article 265 of the Constitution has granted this authority in terms of Section 90 of the Income-tax Act, 1961;

(ii) Once a Tax Treaty is so done, it can operate within our country subject to the Constitutional Restraints imposed by our Constitution. The power under Article 265 is clearly subject to the Fundamental Rights and other Constitutional limitations. Though Parts XII (which contains Art. 265) and XIII of our Constitution do not declare that the provisions contained therein are subject to other provisions of the Constitution, there can not be an iota of doubt that this power under Art. 265 is also subject to the Constitutional limitations as the entire gamut of the legislative power (Art. 245) is subject to the constitutional limitations.

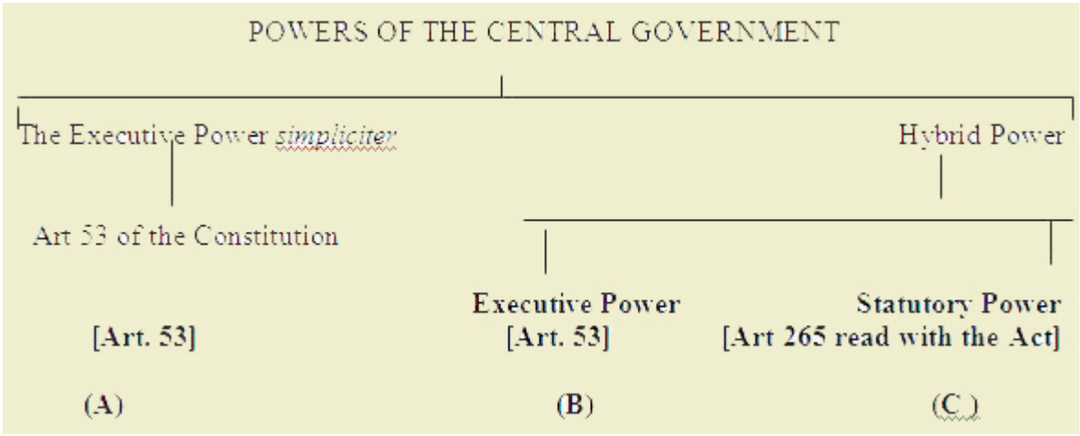
(iii) Powers to make Treaties conferred by Auricle 73 of our Constitution are wide as such Treaties can be given domestic effect (where needed) both: by (a) incorporating them in statutes, and by (b) through *implementing law*. Under the Income-tax Act, 1961, Section 90 contemplates only implementing authority: it does not permit incorporation of a Tax Treaty as law;

That the Tax Treaties are approved by a resolution of the House of Commons, which means, in effect, the British Parliament itself. This effect inevitable follows from certain provisions of the Parliament Act, 1911 similar to which we have incorporated in our Constitution. Pointing out this aspect of the matter *Keir & Lawson* points out the following in their *Cases of Constitutional Cases* [5th Ed p. 54]:

"Once the House of Commons had, by the Parliament Act, 1911 (1 & 2 Geo. 5,c. 13), secured the full and exclusive control of taxation, there was no reason why taxation should not be levied at once under the authority of a resolution of the House,"

(iv) There is a fundamental difference in the interpretation of the Treaties legislatively incorporated and enacted, and as are merely *implemented* as in India;[25]

(v) The powers of the Central Government to make Treaties can be diagrammatically presented thus:



Explanatory comments:

(A) Governed by the Business Rules

(B) Governed by the Rules of Business and statutory bequests, if any.

(C) Powers to be exercised in accordance with the statute ONLY.

(e). We notice that we have adopted a distinct constitutional regime for taxiing or untaxing (or exempting) persons. The exercise of this power is exclusively in the domain of Parliament. What had been done in the U.K. by the famous Bill of Rights and the Parliament Act 1911, has been done under our Constitution by Art. 109, 110, and Art. 265. The concept of 'Money Bill' is wide as to incorporate the levy or imposition of tax, and also thr *remission* , or alteration of its *incidence*. .Art. 110(1)(a) of our Constitution contemplates " the imposition. abolition, remission, alteration, or regulation of any tax." The *Shorter Oxford Dictionary* defines 'remission' to mean: "The action of giving up or reducing a debt, tax, punishment, etc.; esp. the reduction of a prison sentence ..." *The Oxford Dictionary* defines it as : " the cancellation of a debt, charge, or penalty.

(f) It is a great Constitutional principle, that on all matters of Taxation, the authority of the Executive Government has been ousted to preserve and promote constitutional democracy. The effect is that all Tax Treaties are legislated virtually in a manner to incorporate all the provisions of a Tax Treaty. This Petitioner refers to a few instances, but he would have more to say later to point that by missing to notice this Constitutional provision, this Hon'ble Court erred in relying on the Canadian Australian and the Continental Cases without appreciating that ther the Tax Treaties are legislated, and their Courts cannot provide remedy which our Court can grant under Article 32 of our Constitution.

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[25] "Questions surrounding the interpretation of treaties and statutes in English law can generally be divided into two categories: the interpretation of enabling instruments, and the interpretation of other legislation in light of treaties entered into, both incorporated and unincorporated. *As to the former, it is be remembered that primary object of interpretation is the implementing statute, and only at one remove the treaty which implements or incorporates it*. Accordingly, although international courts and tribunals may rule on the interpretation of a treaty, their rulings are not bindings." (italics supplied) Brownlie, *Public International Law* (12th ed.) p, 65

(a) In the U.K, the Tax Treaties are approved by a resolution of the House of Commons, which means, in effect, the British Parliament itself. In the *United Kingdom* a Double Taxation Avoidance Agreement is an *enactment* as it is done through Order in Council on the *resolution* passed by the House of Commons. This effect inevitable follows from certain provisions of the Parliament Act, 1911 similar to which we have incorporated in our Constitution

(b) Under the US practice the President of United States explains to the Senate the considerations involved in framing a tax treaty. The letters of Submittal and of Transmittal pertaining to the Indo-US tax treaty are comprehensively drawn for the full information of the mind of the Senate, and through that to the whole nation.

(c). ***In Canada*****,** every Tax-treaty is an enactment under a separate Act. In *Crown Forest Industries v. Canada* (1995) 2 S.C.R. 802 the Canadian Supreme Court was considering the Canadian-US Tax treaty as done under the Canada-United States Tax Convention Act, 1984. \

(d) **In *Australia*** a tax treaty is enacted; and in all matters arising under a treaty the High Court has original jurisdiction. In **Australia** every Tax-treaty is specifically examined and integrated as a statute under the International Tax Agreements Act, 1953.

(e) "In Germany, a tax treaty is enacted in accordance with Art. 59 Abs. and Art 105 of the *Grundgesetz* (the Federal Constitution). [Klaus Vogel *on Double Taxation Conventions*, 3rd ed. p. 24].

(g) Even while interpreting the reach of a Tax Treaty (DTAA), the right constitutional principle is to interpret such Treaties in tune with the implementing law that Section 90 of the Income-tax Act.

20. **Art. 363 of our Constitution**

Its effects of this Article can be highlighted by culling out the following propositions:

(i) The bar to interference by the courts pertains to certain treaties comprehensively specified in the said Article (certain pre-existing treaties between the native rulers and the Union before Independence).

(ii) As our courts are prohibited to exercise jurisdiction over certain pre-existing treaties as specified, it is amply clear that the Court can exercise jurisdiction to examine the validity of the Executive's acts in relationship to other treaties.

Art 363 of our Constitution is analogous to the effect of Art. III (2) of the Constitution of the United States of America. Article III(2) extends the judicial power to " all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." Justice Holmes in *Missouri v. Holland* [252 U.S. 416., 433 (1920) had said "It is open to question whether the authority of the U.S. means more than the formal acts prescribed to make the convention." He was suggesting the existence of that segment of power which was later called by the U.S Supreme Court in *Curtiss Wright Case* as 'extra-constitutional"[26]. It seems Justice Holmes missed the import of Article III of the U.S. Constitution. It grants the power of judicial control of 'Treaties' to the Judiciary, whereas it denied any legislative control to the Congress. The Constitution vests this power in the President. John C. Yoo perceptively observes:[27]

> "It was not until 1957, though, that the Supreme Court put to rest the idea that the treaty power was not limited by the Constitution, at least with regard to individual rights….See *Reid v. Covert*, 354 U S 1, 15-17 (1957).

[26] "And since the states severally never possessed international powers, such powrs could not have been carved out from the mass of state powers but were transmitted to the U.S. from some other source. During the colonial period , those powers were possessed exclusively by and were entirely under the control of the Crown. ……."

[27] John C. Yoo, 'Globalism and Constitution: Treaties, Non-self-execution, and the original understanding' *The Columbia Law Review* (1966) Vol 99 TK

> This conclusion might have been reached earlier by looking to Art. II, which extends judicial power to cases arising underthe Constitution, the Laws of the United States, and "Treaties made, or which shall be made under their Authority." U.S. Const. Art III $2. cl. 1. **In this provision, the Constitution contemplates that treaties are subject to the Constitution, and to federal statutes as well, rather than vice versa**." (emphasis supplied)

Art. 363 of our Constitution excludes from the Court's jurisdiction only specified Treaties thereby allowing it jurisdiction on all Treaties other than those specified to see that the Treaty-making power is not abused by the Executive.

21. Art. 368 of our Constitution (Amendment to the Constitution)

Art. 368 prescribes:

(i) procedure whereby amendments to the Constitution can be effected (Art. 368(1) by following a rigorous voting power.

(ii) procedure for effecting Amendments affecting certain specified provisions (delimiting the reach of the executive powers, pertaining to the President, the Union and the State Judiciary, the province and distribution of the legislative powers of the Union and the states) is prescribed by the **proviso to Art. 268(2)** mandating that "the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by a resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent."

(iii) The power of the Constitution's Amendment is made subject to the Doctrine of Basic Structure under the law evolved by the Supreme Court. This Doctrine makes certain features of our Constitution beyond the limit of the powers of amendment of the **Parliament of India** (*Keshvanand Bharti v. State of Kerala* AIR 1973 SC 1461).As forming part of the basic structure in our Constitution, **the fundamental rights are under express symbiotic relationship with other basic features**: viz. in *Kesavananda's Case* (AIR 1973 SC1461, also *S. R. Bommai v. Union of India* AIR 1994 SC 1918). The Hon'ble Supreme Court determined certain features of our Constitution constituting **basic structure**: these are (a) Supremacy of the Constitution; (b) Republican and Democratic form of Government; (c) Secular character of the Constitution: (d) Separation of powers between the legislature the executive and the judiciary: and (e) Federal character of the Constitution.

In the context of this Writ Petition the relevance of this reference to Art. 368 is stated as follows:

22. Relevance of this Article: A question comes up: Is it constitutionally permissible to effect changes through its Treaty-Making power which amount to vitually (and in substance) the Amendments to the Constitution. **What our Parliament cannot do in exercise of its constituent power cannot be done by the Executive alone through its Treaty-Making Power. It is submitted that to allow this to happen would be a fraud on our Constitution. This assrtion would be borne out by the GTOUNDS taken in this Writ Petition.**

23. Art. 372 of the Constitution

They following material points emerge from Art. 372 of our Constitution:

(a). The law operative in the British India could survive only to the extent it is in conformity with our Constitution.

(b) The observations of the courts prior to the commencement of our Constitution do not apply to the extent they go counter to our Constitution as judicially interpreted.

24. **Art. 375 of our Constitution**

This Article permits courts, authorities and officers to continue to function subject to the provisions of the Constitution. It mandates all the authorities and courts to ignore the law operative in the British period *if that offends our Constitution*. It would be the duty of the Court to examine how much of the Lord Atkin's statement of Treaty-Making power in *Attorney General for Canada v. Attorney General of Ontario* [1937] A.C. 326 at 347 can survive under our Constitution. This exercise has not been done by our Courts till now.

IV
The Fundamental Constitutional Principles

(i)

The Fundamental Constitutional Principles can be briefly stated thus:

- The Sovereignty of the Republic of India is essentially a matter of constitutional arrangement which provides structured government with powers granted under express constitutional limitations.
- The Executive does not possess any "hip-pocket" of unaccountable powers", and has no *carte blanche* even at the international plane.
- The executive act, whether within the domestic jurisdiction, or at the international plane, must conform to the constitutional provisions governing its *competence.*
- The direct sequel to the above propositions is that the Central Government cannot enter into a treaty which, directly or indirectly, violates the Fundamental Rights and the Basic Structure of the Constitution; and if it does so, that treaty must be held *domestically inoperative.*
- The Executive's signing and adoption of the Final Act of the Uruguay Round Final Act in 1994 was a blatant violation of some of our fundamental rights, and certain vital features of the Basic Structure of our Constitution..
- The signing and adoption of the Final Act bypassed the democratic process as it was neither presented for discussion, nor for an approval before our Parliament despite the fact that it imposed provisions on us grossly against our national laws and Constitution.
- The Final Act (the WTO treaty) established a 'totalitarian' intergovernmental body, and made that the World's highest Legislative Body and also a supreme Judicial Court for the benefit of the MNCs and other economic gladiators who have succeeded in establishing, through strategy and stratagem, the Rule of ruthless, faceless and heartless Market (*Pax Mercatus*);
- The Uruguay Round Final Act virtually subjects our Parliament to morbid coercion and crypto-psychic pressure to legitimize the provisions which the Executive made *fait accompli.*
- The terms of the Final Act are adroitly made to 'police' country level economic and social policies thereby making trespass on our nation's sovereign space reserved for our national government.
- Many pernicious acts are being done under pressure and persuasion of the WTO and other international fora working for the MNCs and other vested interests. The impact is clear from what have been done, (or are being done) in the matters of the collusive intellectual piracy by MNCs, 'the derogation of plant breeders rights, the genetic manipulation by the biotechnology giants, the patenting of life forms including plants, animal, micro-organisms, genetic material and human life forms under the TRIPs agreement'.
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(ii)

No Power to the Executive at the International Plane .

Our Constitution does not grant our Executive any external sovereignty through affirmative grants. Under our Constitution it is wrong to think that power over

external affairs, in origin and in its essential character, is different from that over internal affairs. The President speaks or listens as a representative of the nation but only within Constitutional limitations. The constitutional limitations, within which all executive power is to be exercised, are set forth in our Constitution itself. The sovereign status of the Constituent Assembly had been boldly acknowledged by the great Indian leaders.
This Duty to obedience to the Constitution of India by all the public authorities has been felicitously recognised by our Supreme Court. In *Lena Khan v. Union of India* (AIR 1987 SC 1515), Justice G.L. Oza observed (para 10)

> "Air India in order to avoid committing offences under U.K. Sex Discrimination Act, 1975 is choosing to disregard Art. 14 of the Constitution. An Indian citizen in such a situation would prefer to walk off from a State where he may have to flout our Constitution to save himself from commission of an offence…. If need be, it has to walk out of a country where it may become impossible to act in accordance with the ideals of our Constitution or where it may become necessary to disregard the provisions of our Constitution and it is not something new as we have been keeping away from countries which follow apartheid policies."

(iii)

The Diagram illustrating Treaty-Making Power in the U.K. and India

.ASPECTS OF TREATY FORMATION AND IMPLEMENTATION

UNDER CONSTITUTIONAL LIMITATIONS			
The executive action at the international plane	Treaties other than tax treaties	Tax treaties under Article 265, read with Sec. 90 of the I.T. Act	Exercise of executive power *simpliciter*
A	B Art. 253 situations D Basic C structure situations	E	F

Diagram I

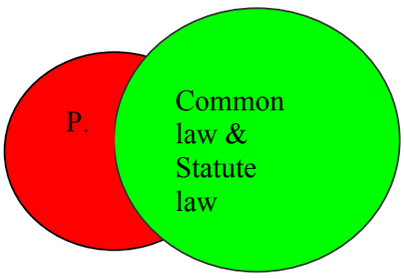

Diagram II

	British Treaty-making power			
Formation	**Implementation of a treaty**			
At International plane	Affecting private rights	When made subject to confirmation by Parliament	Involving an alteration of law or taxation	Treaties of cession & maritime boundaries

(iv)

Our Constitution does not permit provisions warranting imposition of limitations on national sovereign powers, in the interests of so-called international co-operation, or what is made to pass for International Law, as we get in the constitutions of *Belgium* (Art 25bis*), Denmark* (Art 20), *Italy* (Art 11), the *Netherlands* (Art 92), *Spain* (Art 93), the Luxembourg (Art. 49bis), the *Federal Republic of Germany* (Art 24), of the Norwegian Constitution (Art 93), the Greek Constitution (Art 28(2) and (3); nor it lacks the *terms of prohibition* as fetters on the Executive's Treaty-Making Power [as it was found in the U.S. Constitution noted by Justice Holmes to sustain the *Migratory Bird Treaty Act of 1918]*. The Sovereignty of the Republic of India is essentially a matter of constitutional arrangement which provides structured government with powers granted under express constitutional limitations.

(v)

Our Constitution exhaustively distribute the State's 'Sovereign Functions'

In sustaining the *Migratory Bird Treaty Act of 1918*, Justice Holmes, delivering the opinion of the U.S Supreme Court, stated his core reason as the following:

> "The treaty in question does not contravene any prohibitory words to be found in the Constitution**.** The only question is whether it is forbidden by some invisible radiation from the general terms of the 10th Amendment."

It is all clear our Constitution-makers used 'prohibitory words. everywhere in the Articles discussed above. "Subject to the Constitution" is a powerful and all embracing limitations on the Executive's powers. Had the U. S Constitution subjected all powers under specific limitations, *Missouri v. Holland* would have gone the other way. And Justice Sutherland would not have granted 'blank check' to the President in exercise of foreign affairs powers in *Curtiss-Wright*. To undo his view Mr. Bricker moved a constitutional amendment to subject the Treaty-making power to the constitutional control. It was passed by the Congress but could not be cleared by the Senate mainly because the President Eisenhower did not like that for obvious reasons. No Executive Government would ever like to subject its brute power to constitutional discipline. But credit goes to the U S Supreme Court which in Reid v. Covert (1957) held certain provisions certain treaties unconstitutional.

IV
ANDHRA PRADESH HIGH COURT'S M/S. *SANOFI PASTEUR HOLDING SA,*
(A Cornucopia Of Gross Errors)

(a)

The observations on the 'Tax Treaty', as made by the Andhra Pradesh High Court in the following extracts are wholly misconceived as they have been framed in the light of the observations in *Azadi Bachao* and *Vodafone* which are themselves misconceived, even *per incuriam*[28]. It would be clear from the short submissions in the following table:

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[28] "The DTAA is a treaty. As noticed in our prefatory observations, treaty provisions are expressions of sovereign policy, of more than one sovereign State, negotiated and entered into at a political/diplomatic level and have several explicit and/or subliminal and unarticulated considerations as their bases. A tax treaty must be seen in the context of aiding commercial relations between treaty partners and as being essentially a bargain between contracting States as to the division of tax revenues between them in respect of income falling to be taxed in both jurisdictions. As ***Azadi Bachao Andolan*** has noticed, treaty negotiations are essentially a bargaining process, with each side seeking concessions from the other." ... "Dismissing the appeal by Revenue, the Supreme Court observed that taxation policy is within the power of the Government and Sec. 90 of the Act enables the Government to formulate its policies through treaties entered into by it and such treaties determine the fiscal domicile in one State or the other and this determination in the treaty prevails over other provisions of the Act."... "Whose purpose is the question? It is axiomatic that while tax legislation may principally be for revenue augmentation that need not, in all circumstances, be the singular legislative purpose. Sovereign power to tax may be and often is (in contemporaneous governmental objectives, across nations) pursued for effectuating a

	The H.C.'s observations touched	Brief response
	The DTAA is a treaty	In fact, all consensual agreements and understandings, done at the international plane, are 'treaties'
	treaty provisions are expressions of sovereign policy, of more than one sovereign State	The concept of 'sovereignty' has been misunderstood. In interpreting the Tax treaties, the courts expound the statute law, not state policies.[29]
	have several explicit and/or subliminal and unarticulated considerations as their bases.	Our courts are not crystal-gazers. They can expound law to ascertain meaning, they cannot speculate, or take into account factors extraneous to the statute. They should notice the differences *inter se*, incorporating treaties, legislated treaties and the implementing treaties which a DTAA is.[30]

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cornucopia of State objectives; including nurture of societal equilibrium, minimizing economic or other disparities and health or ecological concerns (to mention a few). Normatively, promotion of international trade and commerce, in goods and services is thus a legitimate governmental purpose that may be pursued through tax legislation."....."Strained construction of treaty provisions, where not authorized by settled principles of statutory construction, either by the tax administrator or by the judicial branch at the invitation of Revenue of one of the contracting States to a treaty would also transgress the inherent and vital constitutional scheme, of separation of powers. Treaty-making power is integral to the exercise of sovereign legislative or executive will according to the relevant constitutional scheme, in all jurisdictions."

[29] see para 19 **'**Article 265 of Constitution: the constitutional dimension of taxation' in Part III of this paper

[30] The Treaties/ Agreements can be put into 4 groups with their differential features:

(1).Where priority to a Treaty is specifically granted by a Statute: as in Section 2(1) of the European Communities Act, 1972 providing ' that such provisions of the Community law as in accordance with the Community treaties are to have direct effect shall be given such effect in the U.K.; and s. 2(4) provides that any past or future statute shall be construed and have effect subject to the provisions of s. 2 (including, therefore, those providing for the direct effect of the Community law.'[30]

(2).Where the Orders in Council under the Extradition Act 1870 [now replaced by the Extradition Act 1989 allowing for equivalent Orders in Council under ss. 3 and 4] provide that the Acts shall apply 'under and in accordance with ' the relevant Extradition Treaty, the terms of which are directly before the courts'[30] But Oppenheim comments: "But even in such circumstances a court may still ignore the treaty: *R.v. Davidson* (1976) 64 Cr. App R. 209."[30]

(3)Where the provisions of a Treaty are set out in a Schedule to an Act (eg. The Diplomatic Privilege Act 1964. But *Oppenheim* comments: at p. 59 fn. 25:

> "since it is not wholly clear in that case whether the court would be applying a treaty , or a Schedule to an Act (which happens to be in identical terms with the provisions of a treaty): the latter is probably the correct view…..][30]

(4). Where treaties belong to the category in which come the Double Taxation Avoidance Agreements. These Treaties are done in exercise of the statutory power (Section 90 of the Income-tax Act, 1961) within the frontiers and under the discipline of Art. 265 of our Constitution (which imports in our Constitution analogous provisions from the Bill of Rights 1688). In a case of this sort the terms of a Tax Treaty can operate in the domestic jurisdiction only to the extent of the conformity with Section 90 of the Income-tax Act, 1961, Article 265 of our Constitution, and all other constitutional limitations to which the powers of the organs of the State are subject. Tax Treaties *in our country* do not come

	at a political/diplomatic level and have several explicit and/or subliminal and unarticulated considerations as their bases	It is incorrect as the courts do not see the distinctions between Art. 53/72 and 265.[31] If the statutory remit is transgressed, it is clearly acts *ultra vires*; and such an act amounts to malice in law.[32]
	A tax treaty must be seen in the context of aiding commercial relations between treaty partners.	To do so is to use the Income-tax Act for extraneous purpose, and would be an instance of malice at law.[33]
	being essentially a bargain between contracting States as to the division of tax revenues between them in respect of	But only within the law framed under Art. 265. As 'taxation' is not within the domain of the Executive,

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under the types (i) to (iii) *supra*. Grant of concessions beyond the reach of the terms of Section 90 are unconstitutional. Even under the U.K. tax law, Lord Wilberforce said:

> "that unless it was expressly authorized by the Act of Parliament 'the courts, acting on constitutional principles, not only should not but cannot validate it.' *Vestey v. I R C* [1980]A.C. 1148 quoted by Wade, *Administrative Law* 7th ed. P. 434

It was unfortunate that whilst deciding *Azadi Bachao* this aspect of the matter escaped notice.

31 Art 265 states the great constitutional principle of the British Constitution which we have accepted under our Constitution.

32 *Education Sec v. Tameside* BC(50) 1977 AC 1014, quoted at page 1535 of Seervai's *Constitutional Law*, Vol – II; Lord Somervell quoting *Brett v. Brett* in *AG v Prince Earnest Agustus* 1957 AC 436 at 473 [quoted in Seervai, *Cons. Law* pg. 189]; per Justice Krishna Iyer in *M.P v. Orient Paper Mills* (AIR 1977 SC 687 overruled on another point in *Orissa v. Titagarh Paper Mills Ltd*. AIR 1985 SC 1293; per Lord Esher M.R. in *R. v. Vestry of St. Pancras*; *Federation of Self-employed and Small Business Ltd*. (1981) 2 ALL ER 93 at 107 (HL) quoted in *S.P. Gupta v. President of India & Ors*. (AIR 1982 SC 149 at page 190.; *Rohtash Industries Ltd. v. S.P. Agarwall*, AIR 1969,SC 707.; *The Cheng Poh v. Public Prosecutor*, (1980, AC 458, PC) discussed by H.M. Seervai on opp. 1125-1128 of his *Constitutional Law*, vol -II.; Lord Denning in *Breen v. A.E.U* (1971) 2 QB 175.; *Padfield v. Minister of Agriculture, Fisheries and Food* (quoted by Seervai, *Constitutional Law of India,* Vol-II 4th ed.P. 1529).

33 p. 3 of Keir & Lawson's *Cases in Constitutional Law* (p. 3) "Attempts to generalize form this supposed limitation, so as to deny altogether the competence of Parliament to legislate in derogation of the rules of international law, would likewise fail. In the Scottish case of *Mortensen v. Peters (*1906), 8 F. (Just. Cas.) , Lord Dunedin said:

> " In this Court we have nothing to do with the question of whether the Legislature has or has not done what foreign power may consider a usurpation in a question with them. Neither are we a tribunal sitting to decide whether an Act of the Legislature is *ultra vires* as in contravention of generally acknowledged principles of International law. For us an Act of Parliament duly passed by Lords and Commons and assented to by the King, is supreme, and we are bound to give effect to its terms.
>
> And there is this further difficulty in attempting to limit the legislative authority of Parliament by reference to rules of international Law, that, as Lord Dunedin went on to observe:
>
> > It is a trite observation that there is no such thing as a standard of International Law extraneous to the domestic law of kingdom, to which appeal may be made. International Law, so as far as this Court is concerned, is the body of doctrine regarding the International rights and duties of states which has been adopted and made part of the Law of Scotland.
>
> The same is, of course, true of England."

This proposition is illustrated in matters of foreign affairs in *R. v. Secretary of State for Foreign Affairs, ex parte World Developed Movement Ltd*[33] in the context of the Overseas Development Act 1980 where the QBD holding, to quote from the head note:

> "Although the Foreign Secretary was entitled , when considering whether to provide overseas aid to developing country pursuant to s. 1 of the 1980 Act, to take into account political and economic considerations,….., the grant of the aid had to be for the purpose of s. 1, namely the promotion of economically sound development.

	income falling to be taxed in both jurisdictions.	it must not go beyond the *lakshman rekha* drawn by the law.[34]
	essentially a bargain between contracting States as to the division of tax revenues between them in respect of income falling to be taxed in both jurisdictions.	Section 90 of the Income-tax Act does not authorize the Executive to part with Parliament's taxation power itself, which even Parliament cannot do as no Parliament can make itself servile, or deprive the successor Parliament of its 'sovereign' power.[35]
	that taxation policy is within the power of the Government and Sec. 90 of the Act enables the Government to formulate its policies through treaties	Yes, but the policies are relevant in framing the law.[36]
	such treaties determine the fiscal domicile in one State or the other and this determination in the treaty prevails over other provisions of the Act	But only to the extent the statute permits. The courts are bound to obey the domestic statute, and canot draw light from foreign decisions where the constitutional and legal provisions are different, and where the DTAAs are themselves legislated as to become virtually statutes.
	It is axiomatic that while tax legislation may principally be for revenue augmentation that need not, in all circumstances, be the singular legislative purpose.	No. Government may not need revenue as it can draw resources, these days, from other sources. But this is the Government's worry, not for any court to turn Good.
	and unlawful encroachment into the domain of treaty-making under Article 253 (in the Indian context), an arena off-limits to the judicial branch	Tax Treaties are not in the executive domain. Art. 253 is alien to consideration in this context. .
	treaty-making under Article 253 (in the Indian context), an arena off-limits to the judicial branch	Without prejudice to the point just made, the court has the general jurisdiction in appropriate cases to see if a particular treaty satisfies the parameters capable of invoking Art 253.[37]
	the retrospective amendments to the Income Tax Act, 1961 by the Finance Act, 2012 have no impact on interpretation of the DTAA as the transaction in issue falls within Article 14(5) of the DTAA; and the tax resulting there from is allocated exclusively to France;	It turns on the logic: the DTAA empowers the Executive to gift, or part with, an area of the sovereign jurisdiction of the State for this or that reason. It is submitted that, not to say of the Executive, even Parliament cannot do it. This logic is to help *Vodafone*, by the spacious

[34] see para 19 'Article 265 of Constitution: the constitutional dimension of taxation' in Part III of this paper.

[35] [Thoburn v Sunderland City Council : [2002] 3 WLR 247]]

[36] Besides, the Judges seldom have the credentials to decide socio-economic issues of this sort. If such issues were to be decided, the decision-makers would have studied all the shades of views, and the short-term and long-term effects of such untested economic assumptions in the context of our polity: law and the Constitution; and should have heard in the open court persons with sound proficiency in socio-management. The Hon'ble Judges should have kept in mind what Justice Holmes had said in his classic dissent in *Lochner v. New York*[36]:

> "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I desire to study it further and long before making up my mind."

[37] see para 17 'Article 253 ' in the Part III of this paper

		logic that once tax jurisdiction is bargained away thus, that has gone out of the sovereign province of the State, so no law by our Parliament can be invoked in the matter. It is wished that someday our Supreme Court would save the nation from views of the globalists whatever be their zones of operations.