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A Commemorative Issue
of
the Centenary Year of the University

Pandit Madan Mohan Malaviya Ji

(The Founder of Banaras Hindu University)

(25.12.1861 - 12.11.1946)

"It is my earnest hope and prayer, that this centre of life and light, which is coming into existence, will produce students who will not only be intellectually equal to the best of their fellow students in other parts of the world, but will also live a noble life, love their country and be loyal to the Supreme Ruler."

- Madan Mohan Malaviya

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JUDICIAL SYNERGY IN THE ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS IN NIGERIA

IBRAHIM IMAM*

ABSTRACT : Nigeria is a democratic state operating on a tripod of legislature, executive and judiciary all working in union to provide, protect and promote good governance. The judiciary is however in a unique position to articulate dynamics of good governance without being encumbered by political social vagaries as an independent institution from the perspectives of the Constitutions of the Federal Republic of Nigeria 1999 (as altered). However, the judiciary has been arm twisted and or encumbered by the same constitutions by making the Economic, Social and Cultural Rights which justifies government's discharge of their obligations to citizens not ordinarily justiciable. Instructively, though, with the enactment of Human Rights Bill in the Nigerian Constitutions, debates on the ESCR have intensified. It may be assumed that the Chapter on human rights in the constitutions should ordinarily promote the perception that ESCR are judicially enforceable. Notwithstanding, there have been outrages as a reaction to ESC Rights shortcomings particularly in times of economic meltdown or austerity affecting the daily lives of Nigerians, not to mention the relevance of ESC Rights to good governance. It is argued that the significance of these Rights demand they be addressed in forms of legally binding obligations. Instructively, it is a common and popular argument when people died of unemployment, poor health services, poverty, environmental pollutions, hunger or thirst or when thousands of citizen from either rural or urban dwellers are evicted or displaced (i.e. people displaced by Boko Haram) citizen tends to fix the blame on the nameless poor Economic and Social forces or the simple inevitability of human deprivation, before placing liability on the door step of the government. Whereas Nigeria National Bureau of Statistic estimated about 84.5 percent of Nigeria lives in poverty, 52.8 percent of which is in the rural area as against 34.1 percent in the urban. In same vein, 12.2 percent representing about 10.644 million Nigerian are unemployed. It is against the above background that this paper seeks to argue that the judiciary remains a veritable tool and in the best position to upgrade good governance by allowing the enforceability of ESC Rights of citizen especially through the instrumentality of public interest litigation and judicial activism.

KEY WORDS : Judiciary, Socio-Economic, Good-Governance, Litigation.

I. INTRODUCTION

One of the most significant nagging problems Nigeria is facing is the struggle for good

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governance and sustainable development for all and sundry. The paper argues and contends that good governance and sustainable development are achievable through adequate enforcement of Economic and Social Rights (ES rights). Though there are however, prospects and some challenges confronting sustaining development through the instrumentality of ES rights, and the question often ask is whether there are mechanisms that can be put in place to solve this nagging problem especially underdevelopment and sustainability through ES Rights.

Significantly the problem of underdevelopment has been linked to high rate of corruption and mismanagement of public resources that permeated every institutions of government. Not surprising since independent eradication of corruption has formed one of the main project of every new government in Nigeria. The current President of the country, Muhammed Buhari has consistently avowed his administration commitment to eradication or curbing the menace of official corruption. What makes corruption significant to this paper relates to the consequence of the phenomenon on social and economic development in Nigeria.

The implication of corruption and bad governance can be underscored from the inability of most state governors to pay public servants' salaries ranging between three (3) to ten (10) months. Many worker's have died of hunger some turned beggars etc. Many citizens cannot secure gainful employment, no befitting accommodation and many wallow in serious sickness without adequate and affordable healthcare neither is there quality food nor available portable water in their homes.[1] This evidenced the assertion that economic and social conditions of largest majority of Nigerians have deteriorated. This situation of the country cannot be divorced from lack of good governance and corruption which has eaten deep down every facet of the country's political system. Yet, it has been consistently acclaimed that citizens enjoy constitutionally guaranteed fundamental rights (political rights) even though, the fundamental objects and directive principles of state policies which are the ideological mechanisms for achieving these fundamental rights; ensure good governance, accountability, as well as the welfare and security of citizens are non-justiciable.[2] The adversarial implication of the non-justiciability of ES rights implies that government has no compelling constitutional duty to pursue and implement the directive principles of state policy for the well being of the society. It is thus absurd to claim adequate protection against violation of fundamental human rights when the essential requirements for attaining the protection of the rights as enumerated in chapter II of the Nigerian Constitution just as in Chapter IV of the Indian Constitution are not justiciable.[3]

The author is thus inspired to investigate enforceability of ES rights in view of the level of corruption in the country which has inadvertently affects every segment of the country's socio-economic development. Imagine a report that between 2011 and 2015 a total of 1.3 Trillion Naira was stolen by the political leaders in Nigeria. According to analysis, if the stolen money had been judiciously used it would have change economic fortune of ordinary citizens, improve healthcare sector, fixed so many of the bad roads across the country, fixed most of the dead industries (thereby opening up employment opportunity for citizens) and

1. Balewa BAT, GOVERNING NIGERIA: HISTORY, PROBLEMS AND PROSPECTS, 26, (1994).
2. See generally Rowe P., THE IMPACT OF HUMAN RIGHTS LAW ON ARMED FORCES, 30, 76, (2006). and Ishay M., THE HISTORY OF HUMAN RIGHTS FROM ANCIENT TIMES TO THE GLOBALIZATION ERA, 66, (2004)
3. Jheelan, Navish, *The Enforceability of Socio-economic Rights*', 2, EURO. H. L. REVIEW, 146 – 157, (2007).

tackle insecurity phenomenon (such as the Niger Delter Militant/Avenger, and Boko Haram insurgence) etc. Though, conceptually, corruption appears to be ambiguous, it is a concept that emphatically demonstrates overall and holistic decadence in governance. Corruption has contributed to the failure of governmental efforts at actualizing the fundamental objectives and directive principles of state policy enshrine in the Nigerian Constitution.[4]

The above expositions brought into focus, the important role the Nigerian judiciary can play as the best option to promote and protect citizens' rights to equitable economic and social development. More so, the quest for obedience to rule of law has been one of the cardinal agenda in modern democracy which account for the citizens' interest in the judiciary and judicial process as source of hope for the hopeless.[5] Therefore, the significance of ES rights in achieving good governance cannot be overstated coupled with the fact that various movements towards the rule of law, human rights, power sharing, political pluralism, fight against corruption by political office holders etc ultimately imply that the judicial intervention, activism and public interest litigation will often be sought to pronounce on issues that border on or which cannot be separated neatly from policy making.

It is in this context that the paper argues that irrespective of non-justiciability of ES rights there seems to be inherent link between ES rights and fundamental rights. Thus, the author contends that ES rights should be made enforceable like human rights to compel government fulfillment of its constitutional obligations to citizens. It is against this background also that this paper seeks to investigate the linkage between ES rights and human rights on the one hand, and judicial synergy to enforce same in the emerging situation in Nigeria, drawing an inspiration from the practice in India. The right based approach is a conceptual framework which means that its propositions work to change the context within which judicial decisions are made.[6] This approach is founded on international human rights standard and it is directed towards promoting enforcing and protecting human rights standards into the discussion, policies, conventions and processes that address ES rights for development.

II. ECONOMIC, SOCIAL AND CULTURAL RIGHTS UNDER THE INTERNATIONAL AND REGIONAL INSTRUMENTS

It pertinent to note that ES Rights is anchored on the principle embedded in the Universal Declaration of Human and Peoples' Rights especially Articles 22-28.[7] They are part of rights enumerated therein, which concern a demand for positive obligation on the part of government to do something in order to protect its citizens.[8] These obligations include ensuring that citizens live and work in the conditions suitable to the basic level of human development and dignity.[9] Arguably, socio-economic rights are rights to which individual citizen is entitled

4. See the Nation 26 October 2016 1, 6
5. The author is not unmindful of allegation of corruption in the judiciary. This is shown from the recent arrest of some judges including two Supreme Court Justice by EFCC for corruption. However, the institution though weak, remains the only evil alternative for citizen to ventilate their grievances.
6. John O. A. & Bright O. O., *Poverty and Youth Unemployment 1987-2011*, 3(20), INT. JB L SOCIAL SCIENCE, 269 – 279, (2012).
7. Universal Declaration of Human and Peoples' Rights (adopted 10 December 1948)
8. Mureinik, Etienne, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8(4), 464 – 474, SOUTH AFRICAN J. H. R. (1992).
9. Holmes, S. and Cass S., THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES, 23 – 24,(1999).

and can exercise only in his/her relationship with other human being as members of a group and which can be made effective, only if government takes constructive steps to protect and safeguard the individual enjoyment of the rights. These rights include right to housing, work/employment, food, affordable healthcare, social security, rights to equal education and right to culture.[10]

Economic and social rights thus, are essential part of the normative international code of human rights embedded in the Universal Declaration of Human Rights (1948), and in many human rights treaties aimed at eradicating discrimination against the less privileged and vulnerable groups in society.[11] Complimenting UDHR is the International Covenant on Economic, Social and Cultural Rights, (ICESR) 1966. ICESR enumerates socio-economic rights such as; right to work, right to social security and social insurance, right to adequate standard of living including adequate food, clothing, housing and continuous improvement of the standard of living, right to health, and education.[12] There are several other international human rights instruments with provisions that directly address socio-economic rights. For instance, the Convention on the Elimination of all Form of Racial Discrimination (CEFRD) prohibits discrimination on the basis of racial or ethnic origin while the Convention on the Elimination of Discrimination against Women (CEDW) affirms the applicability of the full range of socio-economic rights for women.

At the regional level the provisions for protection of Economic and Social rights are duly incorporated in the African Charter on Human and Peoples' Rights, and the Rights of Women in Africa. Though, as international treaties, the conventions ought to be unequivocally binding as a matter of international law, but many countries of the world including Nigeria failed to domesticate the laws and consequently continue to discriminate against enforceability of Economic and Social rights. Luckily, in the Nigerian case of Ogugu v. State,[13] the Supreme Court affirmed that all human rights provisions in the African Charter are applicable and enforceable in Nigeria through the ordinary rules of court in the same manner as those fundamental rights set out in Chapter IV of the Nigerian Constitution 1999 as altered. This position was reaffirmed by the later decision of the Nigerian apex court in Abacha v. Fawehinmi[14] and just like Nigeria for example the Namibian court in *Kuaesa v Minister of Home Affairs & Others*,[15] affirmed that the African Charter on Human and Peoples' Rights had become binding on Namibia and formed part of the law of Namibia and, therefore, had to be given effect in Namibia. Arguably the above referred cases seem to support enforceability of economic and social rights even though such cannot be judicially enforced domestically due to the concept of non-justiciablity i.e. as shown from section 6(6)(C) of the Nigerian Constitution 1999 .

10. ibid
11. See Scheinin, M., ECONOMIC AND SOCIAL RIGHTS AND HUMAN RIGHTS, 29, (2001).
12. International Covenant on Economic, Social and Cultural Right, Articles 6, 7, 11, 12 and 13
13. (1994) 9 N.W.L.R. (pt. 366) 1 at 22 (Nigeria)
14. (2000) FWLR (pt. 4) 533 (Nigeria), *Fawehinmi* v. *Abacha*, (1996) 9 NWLR (pt. 475), 710, (Nigeria), where the Court of Appeal had opined that the African Charter was superior to any other municipal law in Nigeria
15. Case No. A 125/94, unreported, pp 78–9

III. ECONOMIC AND SOCIAL RIGHTS UNDER THE INDIAN AND NIGERIAN CONSTITUTIONS

At the domestic level of African continents, economic, social and cultural rights appears in the Constitutions of countries like Zambia[16], Ghana,[17] India[18] and Nigeria[19] following the same pattern as in the ICESCR but only the form of Fundamental Objectives and Directive Principles of State Policy (DPSP). The principles though sometimes expressed in form enforceable rights; are merely supposed to guide the state in the adoption of policies for their implementation. However, the enactment of the principles does not confer justiciability, thus cannot be subject of litigation for enforcement. This is irrespective of a manifestly clear failure on the part of those saddled with the responsibility to use state resources and policies to achieve ES rights of citizens. This position can be underscored from the Nigerian Constitution[20] which excludes the judicial power of review on DPSP, for instance the Nigerian Constitution provides:

The judicial powers vested in accordance with the provision of this section shall not, except otherwise provided by this Constitution, extend to any issues or questions as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in chapter II of this Constitution.[21]

And speaking from the perspective of Indian Constitution,[22] for example, the country constitution contains an extensive catalogue of fundamental rights and freedoms in Chapter III. However, as noted in the preceding section, the ESC rights provisions in chapter IV therein are protected in a rather limited and modest fashion. Most of the provisions, particularly Articles 31-51 are couched as guiding principles of state policies that are fundamental to the governance of the country, and the state are obliged to have regard to these principles in making laws.

Some African countries do not either entrenched economic and social rights nor express them as objective and directive principles of state policy in their constitutions.[23] This lacuna makes the enforcement of socio-economic rights against violation even more difficult in those countries. Be that as it evidence abound that a steadily increasing number of countries have chosen to include economic and social rights in their constitutions with varying (and

16. ZAMBIA Const. (1996), Part IX, Art., 112 lists the Directives of State Policy which include, creation of economic environmentalists the Directives of State Policy, which include, inter alia, the creation of an economic environment encouraging individual initiative and self reliance, obtain employment; clean and safe water, adequate medical and health facilities and decent shelter.
17. See GHANA Const. Ch. 6, Sec., 34-39, INDIAN Const. Ch. II, Art., 35-51
18. *Id*
19. *Id*
20. INDIAN Const., Art 37,
21. See NIGERIA Const. Sect. 6(6)(c); see also ZAMBA Const., Art., 111.
22. INDIAN Const. (as amended), (2007)
23. In the Kenya Constitution of 2008, there is not provision for socio economic rights, neither is the rights contained under fundamental rights provision and similarly, there is no chapter on directive principles of state policy.

sometimes unclear) levels of enforcement. However, South Africa,[24] Uganda,[25] Ghana[26] Rwanda[27] stand out as the most progressive countries in Africa within the realm of entrenching socio-economic rights provisions in their constitutions.[28] For instance, the South African Constitution, has a unique feature, it entrenches both civil and political rights and social and economic rights in the constitution and render both justiciable.[29] Indeed South Africa Constitutional Court has once declared that economic and social rights are justiciable.[30] The specifically enumerated economic and social rights are: right to work[31] right physical and mental health and receive medical attention when they are sick[32], right to education[33], cultural right[34] in its 1996 Constitution. For instance, in the case of South Africa v Grootboom,[35] the South African Constitutional Court held that;

> "… the measures of provincial government to provide systematic housing over a period of time were unreasonable, since no contingent plans were for temporary shelter of the homeless and destitute people. The Court also held that the state had failed to meet the obligation placed on it by section 26 and declared that the state housing programme was inconsistent with section 26(1) of the Constitution."

It is here submitted that the purpose of the constitution is not merely to protect extant rights but also to empower the vulnerable and disadvantaged persons and contribute to amelioration of social evils such as poverty, illiteracy, health and environmental hazards, unemployment and homelessness. Whereas, the Directive Principles of State Policies in most of these countries with written constitution ought to aim at creating an egalitarian society which affirms the citizens' freedom against abject poverty, homelessness, insecurity, physical environmental conditions that may hitherto prevent them from accompanying their human developments the contrary has been the case.[36] While the principles supposed to have been a creative part of most African countries constitutions, and fundamental to ensuring good governance, the common phenomenon militating against enforceability of the principles is their non-justiciability status. This in turn afford insensitive African governments a shield

24. SOUTH AFRICA Const., Art., 26-31 (1996)
25. UGANA Const. Art., 35-40, (1995).
26. GHANA Const. Art., 24-26 (1996)
27. RWANDA Const., Art., 37- 42, (2003) see also Art., 44, which empowers the court to protect and enforce rights according to the Constitution.
28. Mary A. G., *Rights in Twentieth-Century Constitutions*, 28, UNIVERSITY OF CHICAGO LAW REVIEW, 519, 527 – 28, (1992),, see also Wojciech S., *Post-Communist Charters of Rights in Europe and the U.S. Bill of Rights',*65, JOURNAL OF LAW & CONTEMPORARY PROBLEMS, 223, (2003). Sandra Liebenberg, *South Africa's Evolving Jurisprudence on Socio-Economic Rights, Law Democracy & Development*. 6(159) (2002), (http://www.communitylawcentre.org.za/Projects/Socio-EconomicRights/research/socio-economic-rights accesssed 23 June, 2013
29. Kirsty, M., CONSTITUTIONAL DEFENCE: COURTS AND SOCIAL ECONOMIC RIGHTS IN SOUTH AFRICA, (2009) 110-111
30. Ibid 110 see ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of Federal Republic of South Africa, 1996, 1996 4 SA 744 (CC) para 77
31. CAMEROONIAN Const., Art., 15
32. *Id,* Art., 16(1)
33. *Id,* Art., 17(1)
34. *Id,* Art., 17(2)
35. (2000) (11) BCLR 789 (c) (South Africa)
36. Casey, G., *Are there Un-enumerated Rights in the Irish Constitution?'*, 23(8), IRISH LAW TIMES, 123 – 127, (2005).

from been litigated against abdication of their constitutional responsibilities to people and enforce compliance and implementation. It is contended that though the directive principles still remain non-justiciable, their language are indisputably couched in the terms of positive obligations which government must fulfill and should ordinarily be justiciable.[37]

In contrast to the above proposition it has been argued that though government is expected to ensure affirmative action on socio-economic development for benefit of the disadvantaged group in society, it is not clear whether specific wording of the provisions of the DPSP indicates that the rights are enforceable against the state or against individuals and non state entities.[38] It is pertinent to observe despite the affirmative assertion that all human rights are universal, interrelated, interdependent and inseparable, the international protection of ESCR through courts' adjudicatory process has consistently continues to be unsuccessful compare to the civil and political rights (CPR) counterparts.[39] It has been rightly posited that:

The international community as a whole continues to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action.[40]

This has to certain extents remained the position in the contemporary African and in particular, Nigeria society today. A number of arguments which shall be discussed later in the paper have been continually advanced to support the contention regarding the international protection of ESCR. Incidentally, a counter argument has been advanced to the extent that the stated policy problems are not peculiar to ESCR and would, in reality, hold true for the implementation of a number of CPR, such as the right to life and freedom of movement.[41] In particular, it has been demonstrated that the idea that the nature of ESCR makes the determination of correlating duties problematic is merely the consequence of an oversimplification of the analysis of duties. The whole argument adumbrated above can be summed up and underscored from the observation of Leckie thus:

> "When someone is tortured…. Observers almost unconsciously hold the state responsible. However, when people die of hunger or thirst (or when they suffer because they are unjustly disinherited), the world still tends to blame….the simple inevitability of human deprivation, before placing liability at the doorstep of the state. Worse yet, societies increasingly blame victims of such violations for creating their own dismal fates.... [42] "

Without prejudice to our earlier discussion, linking ES rights and fundamental human rights for the purpose of justifying their justiciability is not an entirely novel concept. There

37. *Id*

38. NIGERIA Const. Sect. 17(3)

39. Hirschl, R.,' *Negative" Rights vs "Positive" Entitlements: A Comparative Study of Judicial Interpretation of Rights in Emerging Neo-Liberal Economic Order*' 22, HUMAN RIGHT QUATERLY, 1072-1073, (2000).

40. nited Nations Committee on Economic, Social and Cultural Rights, 'Statement to the World Conference' UN Doc. E/1993/22, 83 para 5

41. AE Yamin, *the Future in the Mirror: Incorporating Strategies for the Defence and Promotion of Economic, Social and Cultural Rights into Mainstream of Human Rights Agenda*, 27, HUMAN RIGHT QUARTERLY, 1214, (2005),

42. Leckie, L., *Another Step Towards Indivisibility: Identifying the Key Features of Violation of Economic, Social and Cultural Rights*, 81, HUMAN RIGHT QUARTERLY, 81, 82, (1998).

has been an implicit or explicit recognition of the right of humanity to ES rights since the Universal Declaration of Human Rights in 1948 and in the African Region the African Charter on Human and Peoples' Rights.[43] However the perception, advocacy and application of the two concepts and concerns have been diverse and varied overtime.[44]

The question then is; why is ES rights linked with its protection as enforceable of human rights issues? There are several possible answers. Most obviously, and in contrast to the rest of international human rights laws, a human rights perspective directly addresses ES rights impacts on the life, economic, health, peaceful environment, private life, and property of individual human rights rather than on other states.[45] It may serve to secure higher standards of living, based on the obligation of states to take measures to empower its citizens socially, economically and control pollution affecting individuals' private life. Above all it helps to promote the rule of law in this context: governments become directly accountable for their failure to provide basic necessities of life and for facilitating access to justice and enforcing and judicial decisions.[46] The significance of judicial synergy to enforcement of ES rights is well articulated in the Observation of Albie (Justice of Constitutional Court of South Africa) that:

An implication of placing social and economic rights in a constitution is to say that decisions which, however well-intended, might have the consequence of producing intolerable hardship cannot be left solely in the hands of overburdened administrators and legislators. Efficiency is one of the great principles of government. The utilitarian principle of producing the greatest good for the greatest number might well be the starting-off point for the use of public resources. But the qualitative element, based on respect for the dignity of each one of us, should never be left out. This is where the vision of the judiciary, tunneled in the unshakable direction of securing respect for human dignity, comes into its own.[47]

It is on this perspective the paper subscribed to the linkage between human rights and ES rights and the relevance of judicial synergy in securing the rights against neglect and violation. This is not to say that it is the constitutional responsibility of the judiciary to lean on the side of a section of society against another, be it powerful or weak, government or the governed, so also should the heartfelt sympathetic disposition of the judiciary to the claims of individual influence their disposition.

IV. ARGUMENTS AGAINST JUSTICIABILITY OF SOCIO-ECONOMIC RIGHTS

There have been arguments against justiciablity of Economic and Social rights,

43. Kingham, F., *Human Rights and Environmental Rights: Implications of a 'Rights based" Approach for Minning in Australia*", (Paper presented at the Queensland Environmental Law Association Conference 2003, Surfers Paradise, 8 May 2003). Available at http://www.sclqld.org.au/qjudiciary/profiles/fykingham/publications/accessed 18/12/2015

44. Mba, C. J., *Revisiting Aspects of Nigeria's Population Policy*, 17(1), AFRICAN POPULATION STUDIES, 23-36, (2002),

45. David Landau, *The Reality of Social Rights Enforcement*, 53(1), HARVARD INTERNATIONAL LAW JOURNAL, 408- 411, (2012),

46. Linda Stewart, *Adjudicating Socio-Economic Rights Under a Transformative Constitution*, 28(3), PENN STATE INTERNATIONAL LAW REVIEW, 489-491, (2010).

47. Albie Sachs, THE JUDICIAL ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS, THE GROOTBOOM CASE, www.ajol.info/index,php/jsdlp/.../112151 accessed on 26 October 2016

particularly, it has been asserted that the rights are so vague or uncertain in nature and character that their content cannot be adequately defined and as such they are impossible to adjudicate. Some have even focus on criticism of the judicial decisions on ES rights for not recognizing its immediate and direct effect on individual and judicial reluctance to provide normative clarity to the content of different ES rights.[48] This is against the backdrop of the prevailing reality of economic and social deprivations confronting a large number of Nigerian people.[49]

The justification for the proposed judicial synergy in enforcement of ES rights is predicated on the fact that socio-economic development in Nigeria has been below expectation despite the high and sustained rate of growth in the last decade.[50] The high and stagnating rate of unemployment in the rapid economic growth is worrying trend and has contributed to the high inequality been experienced in Nigeria. Statistical evidence established that unemployment rate recorded 13.3 percent in second quarter of 2016 from 2.1 percent in the three months to March reaching the highest since 2008.[51] Similarly, the existing social and economic protection programmes have limited coverage this shown from the poverty line of $ 2 (dollars) per person per day.[52] According to World Bank report, 84.5 percent of Nigeria lives in abject poverty and poverty disparity is fixed at 50 percent. National poverty status indicates that poverty is more severe in the rural areas. Whereas 52.8 percent of rural population lives below the national poverty line, 34.1 percent of urban population is categorized as poor.[53] This evidenced the extent of government failure in its obligation to the citizen despite huge amount of revenue realised from oil sector since Nigeria independence in 1960.

According to this view, while civil and political rights provide clear guidance on what is required in order to implement them, ESC rights only set out inspirational and political goals as obligations which government are expected to fulfill.[54] Some these arguments are discussed as follows:

i) ARGUMENT THAT ECONOMIC AND SOCIAL RIGHTS ARE NOT CONSTITUTIONAL RIGHTS

This view is expressed from the context of the distinction between 'civil and political rights' and 'social, economic and cultural rights'. Though, one of the dominant arguments here is the contention that the rights provide only protection against the government and as such are negative in conception. More so the rights do not demand that the government take

48. Craig Scott & Phillip Alston, *Adjudicating Constitutional Priority in a Transnational Context: A Comment on SOObramoney Legacy and Drootboons Promise* 16, S.AFR J Hum Rts., 206, (2006).

49. Simma, B., *The Implementation of International Covenant on Economic, Social and Cultural Rights*. in . THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: FORTY YEAR OF DEVELOPMENT, 23 – 24, (Baderin M. A.,and McCorquodale, R eds., 2007).

50. Yemi Kale and Sani I. Dogawa, *Compilation of Labour Force Statistics for Nigeria*, 6(1), CBN Journal of Applied Statistics, 183 - 197 (2015)

51. Trading Economics, National Bureau of Statistics 2016, www.tradingeconomics.com accessed 0n 22 October 2016

52. *Id*

53. *Id*

54. Steiner, H., & Rowe P., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS, 66, (2000).

affirmative action or engage in a protective function.[55] In another perspective, it has been argued that including socio-economic rights in a constitution exposes other rights to unnecessary jeopardy, because it creates the possibility or the inevitability that elected branches will fail to respect such rights and so encourage overall disrespect for constitutional limits.[56] Still other critics opposed including socio-economic rights in a constitution because they object either to the content of such rights or to the demands that such rights will place on governing institutions.

In response, it has been argued that the line between so-called negative and positive rights is unstable. On this view, all rights, whether to free speech or to free association, to movement, to personal liberty, to dignity of human person, require affirmative protection from the government, and so depend on the public expenditure of funds and resources.[57] It is notable, though those socio-economic rights provisions consistently appear in the 1960, 1979 and 1999 constitutions for Federal Republic of Nigeria. The traditional nature of these provisions ought to carry some weight even if the federal Constitution does not embrace them. Moreover, elsewhere the legitimacy of socio-economic rights has been confirmed over time by their inclusion in international conventions and in many national constitutions adopted in some countries. This is against the spirit of the Constitution which indicates the constitution's commitment to transform and sustain the society's socio-economic need for their well-being.

ii) ARGUMENT THAT COURTS CANNOT ENFORCE SOCIO-ECONOMIC RIGHTS

Another recurring criticism against justiciability of ES rights is the view that Nigerian courts are institutionally incapable of enforcing positive rights, in part because they cannot develop manageable standards for carrying out such rights, and in part because they cannot compel the political branches to respect and effectuate the standards that they seek to impose.[58] The argument takes a universalist perspective because courts as designed everywhere, whether common law or civil law jurisdiction, to lack the wherewithal and resources needed to interpret, to declare, to announce, to order, or to compel actions that touch on socio-economic rights. The institutional argument makes an indirect assault on socio-economic rights on the assumption that without the possibility of judicial enforcement, these provisions hold no rightful place in a constitution.[59] It is contended that even if socio-economic provisions are not enforceable "in the same, self-executing way as other rights," they nevertheless may serve other important constitutional purposes[60]: for example, such provisions may serve "as programmatic indicators" that can be used to interpret other justiciable rights and may inform a court's interpretation of due process or equality

55. Abraham, Henry and Barbara Perry, THE 'DOUBLE STANDARD', FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES, 7 – 29, (Abraham, Henry and Barbara Perry, eds., 1998).

56. Onigbinde, A. GOVERNANCE AND LEADERSHIP IN NIGERIA, (2007)

57. Alston, Philip, 'U.S. *Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84(2), AMERICAN JOURNAL OF INTERNATIONAL LAW, 365 – 393, (1990).

58. Holmes, S., and Cass S., THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES, (1999)

59. Forbath, William, *Social Rights, Courts and Constitutional Democracy: Poverty and Welfare Rights, in United States*', in ON THE STATE OF DEMOCRACY. 1 – 124, (Faundez, J., ed. 2007).

60. Uwais M., *Fundamental Objectives and Directive Principles of State Policy: Possibility and prospect,*" *in*, JUSTICE IN THE JUDICIAL PROCESS, 179, (Nweze, C. C., ed., 2014).

requirements.

The argument about developing manageable standards focuses on the myriad details that a court must consider in resolving questions that concern social and economic life of citizens. As the complexity of enforcement increases, so might the possibility of slippage between compliance and mandate, even where the mandate is expressed in open-ended standards. This seem to be against the rationale behind SER seen as rights relating to the citizens meeting the basic needs that are essentially significant for human welfare and survival. Which are also rightful entitlements to prevent deprivation, discrimination and a safeguard against poverty?

iii) ARGUMENT THAT JUDICIAL ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS IS ANTI-DEMOCRACY

The proponents of non-justiciability of economic and social have raised a challenge that even those who regard socio-economic rights as justiciable and so capable of judicial enforcement may question whether it is democratically legitimate for courts to enforce these provisions against legislative and executive arms.[61] The concern here is expressed within context of the doctrine of separation of powers, and so borders on questions of judicial capacity. In particular, it is posited that socio-economic rights cases raise complex issues concerning the allocation of scarce resources and the setting of competing priorities that are best left to the political branches which courts are not competent to decide.[62] Other argued in terms of democratic justification and political transparency. But the anti-democratic critique rings hollow when those whose interests are most at stake in the enforcement of socio-economic rights (typically people of limited means) lack equal or meaningful access to democratic processes.[63] Moreover, a great deal of the democratic argument on judicial enforcement of socio-economic rights assumes a single-court system in which a central constitutional court reviews the regulatory outputs of a national legislature or executive.[64] In Nigeria, federalism complicates the picture, making it important to disentangle discussions about democratic legitimacy, separation of powers, and federal-state relations.

Without prejudice to the above arguments, the determination of the content of every right, regardless of whether it is classified as 'civil', 'political', 'social', 'economic' or 'cultural', is vulnerable to being labelled as insufficiently precise.[65] This is because many legal rules are expressed in broad terms and, to a certain extent, unavoidably general wording. More importantly, under the rule of law and the separation of powers, defining the content and scope of a right is primarily the task of the legislative branch to be subsequently elaborated by administrative regulations.[66] It is opined that there is no conceptual obstacle to applying

61. Tushnet, Mark., *Social Welfare Rights and the Forms of Judicial Review*, 82(7), TEXAS LAW REVIEW, 1895 – 1920, (2004).

62. The Enforceability of Socio-economic Rights, 145

63. Ryan, James., *Schools, Race and Money*, 109(2), YALE LAW JOURNAL, 249-316, (1999).

64. *Id,* 256

65. See generally, M Green, *What We Talk About When We Talk About Indicators: Current Approach to Human Rights Measurements* 23, HUMAN RIGHT QUARTERLY,23-24, (2001),

66. Palmer, E., *Resource Allocation, Welfare Rights – Mapping the Boundaries of Judicial Control in Public Administrative Law*, 20(1), OXFORD JOURNAL OF LEGAL STUDIES, 63-88, 67, (2000).

67. Umar, M. Z., ETHICS, GOOD GOVERNANCE AND POLITICS OF DEVELOPMENT IN NIGERIA" in Readings in Public Administration, Department of Public Administration, (2008)

a similar legislative and administrative process to defining ESC rights by developing the same kind of general, abstract and universal standards. Legislatures can and should explain the scope of ESC rights.

V. SOCIO-ECONOMIC RIGHTS AND GOOD GOVERNANCE DYNAMICS

Good governance has taken on increasing importance in any democracy and an essential prerequisite for human development justifying the relevance of protecting economic and social rights of citizens. Indeed, there is international consensus on the basic components of good governance which transcend effective institutions and processes, the protection of human rights and democratisation, conflict prevention, civil society participation, combating corruption and the achievement of equitable socio-economic results.[67] Thus the core elements of good governance which are transparency, equal participation and accountability are well essential prerequisites for achieving economic and social development in a state.[68] Generally, governance, according to the World Bank Report (1989) is the exercise of political power in the management of a nation's affairs. Governance encompasses the state's institutional and structural arrangements, decision-making processes and implementation capacity, and the relationship between the governing apparatus and the governed- that is the people in terms of their standard of living.[69]

Good governance has to do with the leadership carrying out government business in an open, easy to understand and explicit manner, such that the rules made by government, the policies implemented by the government and the results of government activities are easy to verify by the ordinary citizens.[70] Accountability as a component of good governance thus demands that those who occupy positions of leadership in the government must give account or subject themselves to the will and desire of the people they lead. Unfortunately, this is lacking in the public domain in Nigeria.[71]

Governance which supposed to typically emphasizes leadership employing apparatus of the state and resources to promote social and economic development or to engage in those agendas that largely focused on the realization of the good things of life for the people have failed in this paradigm. Arguably, the astronomic level of corruption, mismanagement and insensitivity to the populace demand in Nigeria has denied citizens the benefit of good governance particularly adequate protection of their social and economic rights. This attitude is against the norms of democratic governance which demand high level of valued principles such as rule of law, accountability, and participation, transparency, human and civil rights.[72]

The absence of good governance in Nigeria has hinder government from providing adequately the basic obligations stated in the fundamental objectives and directive principles of state policy such as socio-economic opportunity, affordable health care, education, clean water, electric power, and physical security, a salutary environment, and decent transport infrastructure. The evidence of this can be explained from the inability of most states governors

68. Onigbinde, A., GOVERNANCE AND LEADERSHIP IN NIGERIA, 30, (2007).
69. WORLD BANK, WORLD DEVELOPMENT REPORT, 33, (1997).
70. Weiss, T., *Governance, Good Governance and Global Governance: Conceptual and Actual Challenges*, 21(5), THIRD WORLD QUARTERLY, 795 – 814, 797, (2000).
71. Umar, Ethics, Good Governance and Politics of Development in Nigeria , 62
72. Uwais, Fundamental Objectives and Directive Principles of State Policy:

Nigeria to pay workers' salary running to two or more months. The understanding of this reality in Nigeria points to the fact that Chapter II of the Constitution which is basically linked to good governance should be made justiciable.[73] This is logical because, where there is ineffective and inefficient leadership, corruption, lack of accountability and transparency, there is bound to bad good governance. It is thus unreasonable to consider Chapter II particularly socio-economic rights non-justiciable while government failed to raise their responsibility and challenges of socio-economic development of citizen in conformity with section 13 of the Constitution. It is the making of socio-economic rights justciability that citizens' life can be uplifted and see that the people as much as possible enjoy the public resources without ado as is the case in most advanced democracies.

In the absence of good governance, the country is bound to experience collapse or failure. Whereas a country ideally is meant to be an organization, composed of several agencies led and coordinated by the state leadership (constituted in the executive, legislative and judicial authorities) which has capacity and authority to make and implement the binding rules for all the people and applying force if necessary to have its way and where this is absence, judicial intervention as the last hope for the hopeless becomes the only veritable tool to safe the citizens.[74]

It is contended that though, governance and socio-economic development are separate concepts, yet they have a relationship. To be precise, it is governance that observes and executes ES Rights and defines the nature of its availability for the development of the country. In effect, when there is failure in governance the fundamental objective and directive principles of state policy which are constitutional obligations vested in the government deteriorates as has been the case in Nigeria,[75] it may therefore be concluded that to ensure effective protection of socio-economic rights, there must necessarily be some mechanisms of judicial enforcement to achieve the elements of good governance.

These elements include rule of law, accountability and transparency in the management of resources, political stability, provision of basic needs and services as well as absence of corruption. It is contended that the primacy of justiciablity of socio-economic rights rests on the ability of the judiciary to see beyond the perceptual vista of the non-justiciablity of socio-economic rights and appreciate their link with civil and political rights which are ordinarily justiciable to cherish ESC as goals that should be achieved. The preeminence of ensuring good governance is indeed rooted in the enforcement of socio-economic rights for achieving sustainable development and the role of the judiciary in this paradigm cannot be overemphasized.[76] This is however, dependent on the ability and capacity of courts to be proactive in determination of policy choices and outcomes that affect the direction and nature of development in the society. It is an incontestable fact that there is a strong correlation

73. *Id*

74. Balewa, Governing Nigeria: History, Problems and Prospects, 68

75. Abdu, H., *Consolidation of Democracy in Nigeria*: *The Role of Civil Society*, 3, ART AND SOCIAL SCIENCE RESEARCH, 16, (2012).

76. Lord Lester of Herne Hill QC and Colm O'Cinneide, THE EFFECTIVE PROTECTION OF SOCIO-ECONOMIC RIGHTS, in *Economic, Social and Cultural Rights in Practice: The Role of Judges in the Implementing Economic, Social and Cultural Rights*, 17-22, (Ghai, Yash & Jill C eds., 2004). and Sunstein, Cass, *Against Positive Rights: "Why Social and Economic Rights Don't Belong in the new Constitutions of Post-Communist Europe*, 2(1), EAST EUROPEAN CONSTITUTIONAL REVIEW, 35 – 38, (1993).

between the nature of governance and the protection of socio-economic rights in any society.

In view of this, socio-economic rights thus demand a positive and pragmatic action from the authority through formal and informal traditions and institutions for the common good of citizens, in line which provision of the constitution that places the duty and responsibility of all organs of government, and of all authorities and persons, exercising executive, legislative or judicial power to conform, to observe and apply the fundamental objectives and directive principles of state policy. However, the essence of relief that the fundamental objectives and directive principles of state policies are thought to have provided in chapter II is obliterated by the Constitution itself, which unequivocally provided in Section 6 (6) (C) that the Judicial Power vested in the Courts: Shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act omission by any authority or person as whether any law or any judicial decision is in comforting with the Fundamental objectives and directive principles of State policy set out in Chapter II of this Constitution.

The crisis of social and economy development in Nigeria reveal the potent threats to democracy and good governance. The inherent economic crisis has had varying impacts on socio-economic, political spheres and infringes fundamental rights of Nigerians.[77] Essentially, the adverse impact of socio-economic explains the level of poverty, unemployment, insecurity currently being experienced in Nigeria. It may thus be concluded that Nigeria still lacks the legal and bureaucratic means to check corruption and abuse of power necessary to ensure the protection of socio-economic rights, However, it is the paper position that judicial activism of court through it constitutional powers has the capacity for provision and protection of socio-economic rights to fill that gap. A virile socio-economic system will no doubt deal with the problem of poverty and unemployment.

VI. JUDICIAL SYNERGY ON ECONOMIC AND SOCIAL RIGHTS

i) JUDICIAL ACTIVISM

Judiciary plays an important role in a constitutional democratic state and performs functions that are crucial to the maintenance of rule of law, enforcement of fundamental rights and popular sovereignty.[78] The judiciary as represented by courts is invested with the power of judicial review perform monitoring, signaling, and coordination functions that facilitate the exercise of popular control over the government.[79] The relationship between

77. Ibe, S., "Beyond Justiciability: Realizing the promise of Socio-Economic Rights", African Human Right Law Journal (2007), 225

78. Fuller, Lon, 'The Forms and Limits of Adjudication', Harvard Law Review, 92(2), (1978): 353- 09

79. The courts in Nigeria, like in every democratic system, are the invested with judicial power, Section 6, 1999 Constitution of Nigeria. For judicial restatement, (see Bronik Motors Ltd v Wemat Bank (1983)1SCNLR 296 and Attorney General, Cross River State v Archibong (1985) 6 NCLR597)1 which has been defined as the power "for the determination of the civil rights and obligations of persons in cases of controversies brought before the courts by such regular proceedings as are established or recognized by law and custom."Nwabueze, B. O., THE PRESIDENTIAL CONSTITUTION OF NIGERIA, 294, (1982): 294. See also, *Abraham Adesanya v. President of the Federation of Nigeria* (1981)2, B.O Nwabueze, JUDICIALISM IN COMMONWEALTH AFRICA 1 – 12, (1977). This power extends to all inherent powers and sanctions of a court of law and to all matters between persons in Nigeria and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person as provided in section 6(6) of the Nigerian Constitution 1999.

judicial power and popular rule is not antagonistic, but symbiotic. Thus any judicial action on economic and social rights would support popular sovereignty by mitigating the hardship of development and good governance that lies at the heart of democratic government.

The robust structure of the judiciary in the scheme of governance couple with its outstanding agility combined with superlative constitutional interpretative power place the institution in the best position with opportunity to be proactive in the enforcement of ES rights. Thus, judicial activism in the perspectives of socio-economic rights presupposes the judges interpreting laws to meet the demands of substantive justice, irrespective of the bare letters of the law and the Constitution. It implies the judges bringing its head out and demonstrating that it hears the cry of the oppressed, sees the oppressive bravado of the oppressor and interprets the law to show that oppression and arbitrariness do not pay the oppressed and the society. [80]

It is here asserted that judicial activism of the courts is one area in which courts can proactively employ to ensure the justiciability of Socio-economic rights. This is because it affords the court ground to apply literal and purposeful interpretation of the constitution/ statute and adherence to judicial precedent particularly, interpretation of ES Rights in favouring progressive social and economic policies that will ensure greater equity in social relations.[81] This can be reinforced by a rejection of the traditional restraints on the exercise of judicial power and includes judicial decisions suggestive of social engineering, which may intrude into executive and legislative powers thereby negating a strict adherence to the principle of separation of powers. These in event justify the task of court in enforcing socio-economic rights within the following:

i. The court's powers to engage in judicial review;

ii. Constitutional provisional resources to do it better; and

iii. That the court's practice of judicial activism is justified.

Constitutional protection of socio-economic rights can occur directly or indirectly. A prominent example of the direct model of protection is the South African constitution, whose Bill of Rights, apart from civil and political, contains socio-economic rights as well. On the other hand, indirect constitutional protection occurs through the application or interpretation of civil and political rights, most commonly through the application of equality and fair process norms.[82]

Instructively Litigation is a separate and independent means to enforce and implement ES rights, as it is with civil and political rights. The belief that ES rights should not be granted any kind of judicial or quasi-judicial protection, and should be left to the discretion of political branches of the State, is one of the main reasons why ES rights have been devalued within the legal hierarchy. While courts and litigation should not be seen as the only means for realizing ES rights, the absence of an effective method of recognizing justiciability.[83] It is also worth reminding ourselves that completely excluding courts and tribunals from considering violations of ES rights is incompatible with the idea that, "an independent

80. DAILY INDEPENDENT, November 1, 2007, 2

81. Suleiman I. N.,, THE NIGERIAN LAW DICTIONARY, 226, (1996).

82. See generally, Liebenberg, S., THE PROTECTION OF ECONOMIC AND SOCIAL RIGHTS IN DOMESTIC LEGAL SYSTEM, *in Economic, Social and Cultural Rights: A Textbook*, 61, (Eide A., Krause C., & Alan R, 2001).

judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments are essential to the full and non-discriminatory realization of human rights".

Nigeria courts have not been so proactive in construing chapter II particularly the rights to socio-economic rights in the constitution justiciable. The argument has always been that ideally, all the provisions of a constitution ought to be justiciable and enforceable, but it is not all the provisions of the India and Nigerian constitutions that are justiciciable and enforceable.[84] This is one of the peculiarities of the Constitution especially, Chapter II of the 1999 constitution of the Federal Republic of Nigeria or Chapter IV of the Indian Constitution which is rendered SE Rights non justiciable. Section 6(6)(c) of the Nigerian Constitution provides thus: The judicial power vested in accordance with the foregoing provisions of this section shall not, except as otherwise provide by this constitution, extend to any issue or question as to whether any act or omission by any authority or person as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter 11 of this constitution.[85]

Be that as it may, the non-justiciable status of chapter II of the Nigeria constitution was tested and judicially confirmed in the *Archbishop Anthony Okogie v. AG Lagos State,*[86] it was held that: while Section 13 of the Constitution makes it a duty and responsibility of the judiciary among other organs of government to conform to and apply the provisions of Chapter 11, section 6(6)(c) of the same constitution make it clear that no court has jurisdiction to pronounce any decision as to whether any organ of government has acted or is acting in conformity with the Fundamental Objectives and Directive Principles of State Policy. It is clear therefore that section 13 has not made chapter 11 of the Constitution justiciable.

However, it is likely that the Nigerian courts have embraced the AFCHPR notion that there exists no watertight compartment of civil/political and socio-economic rights. This argument underscores the claim that socio-economic rights are not a distinct compartment of 'rights'. For instance in the case *Oronto Douglas v Shell Petroleum Development Company Limited*[87] the Court of Appeal in Nigeria upheld the justiciability of an action brought on the basis of Article 24 of the African Charter (Ratification and Enforcement) Act.[88] The important thing to note is that the provisions of article 24 of the African Charter (or at least its spirit) are similar to the provisions of section 20 of the 1999 Nigerian Constitution.[89] In the same vein, the Federal High Court Benin City in the case of *Gbemre v Shell Petroleum Development Company Nigeria Limited*[90] the Court did not have any difficulties with entertaining an

83. Davis, Dennis, *The Case Against The Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles*, 8(4), SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS, 475 – 490, (1992).

84. Okeke G. N. & Okeke C., *The Justiciability of the Non-Justiciable constitutional policy of Governance on Nigeria*, 7(6), IOSR JOURNAL OF HUMANITIES AND SOCIAL SCIENCE, 8 -17, (2013).

85. Okere, B.O., *Fundamental Objectives and Directive Principles of State policy Under the Nigerian Constitution*, 32, INTERNATIONAL COMPARATIVE LAW QUARTERLY,214 – 215, (1983).

86. (1981) 2 NCLR 337 at 350

87. (1999) 2 NWLR (Pt 591) 466

88. ACHPR, Art., 24, guarantees the right to a satisfactory environment.

89. *Id,* Section 24 provides that the state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria. The fact that the provision falls with the non-justiciable fundamental objectives and directive principle of state policy alone, did not deter the decision by the Court of Appeal.

90. *Id*

action based on article 24 of the African Charter (Ratification and Enforcement) Act.

Notwithstanding the above, the Nigeria judiciary has consistently exercised more restraint in employing it interpretative power in making ES rights justiciable. This can be fathomed from several other judgments delivered by courts. In *AG Ondo v AG Federation,*[91] the Supreme Court held that those Objectives and Principles provided for under chapter II of the constitution remain mere declarations. In view of the foregoing, it is rather obvious that chapter II of the Constitution is non-justiciable, but there are ways by which Chapter II of the constitution can be made justiciable and these are contained in the very section 6(6)(c) that made chapter II of the Constitution nonjusticiable. Similar position was upheld in *Federal Republic of Nigeria v. Aneche*[92] Niki Tobi (JSC) observed as follows: In the paper's view that section 6(6)(c) of the Constitution is neither total nor sacrosanct as the subsection provides a leeway by the use of the words "except as otherwise provides by this Constitution.

In similar pedestrian Indian Supreme Court exercise restraint against the potential danger of breaching the doctrine of separation of powers when enforcing ESCR in *Olga Tellis v. Bombay Mun. Corp*,[93] the Supreme Court of India refused prescribing that the government of India make houses available for all of its citizens and *Balco Employees' Union v Union of India*,[94] the Supreme Court in examining the validity of a State's decision to be divested from its shares in the public manufacture of aluminum; in this case, the Court notoriously declared its incompetence to deal with policy issues. This mean that if the Constitution otherwise provides in another section, which makes a section or sections of Chapter 11 justiciable, it will be so interpreted by the courts. More importantly many scholars conceived this cautious stance as a signal of the abandonment of the hitherto prevailing model of judicial activism.

However there are instances where the India judiciary seems to be more proactive in realm of accepting justiciability of Economic and Social Rights. This is establish from several judgments of the Indian Supreme Court and for instance in the case of M*aneka Gandhi v. Union of India*,[95] the Court, applying directive principles in its interpretation, found under the right to life and liberty the right to travel abroad. This was followed by a series of cases in which socio-economic elements fortified the minimum core of the right to life. In *Francis Coralie Mullin v The Administrator, Union Territory of Delhi*[96] case, the Court found certain socio-economic entitlements under the right to life; in *Bandhua Mukti Morcha v Union of India*[97] it declared unconstitutional the inhumane conditions of work as contrary to the right to life; in *Olga Tellis v Bombay Municipal Corporation*[98] the eviction of pavement dwellers without due process and with no provision for alternative accommodation was found unlawful on the same grounds.

The author is of the opinion that Nigeria court ought to exercise judicial activism and

91. (2002) 9 NWLR (Pt 772), 22
92. (2004) 1 SCNJ 36 at 78
93. 1985 SCR. 51 (India)
94. AIR 2001 SCW 5135
95. (1978) 1 SCC 248 or AIR 1978 SC 597 or (1978) 2 SCR 621
96. I981 AIR 746 OR 1981 SCR (2) 516
97. 1992 AIR 38 OR 1991 SCR (3) 524
98. (2007) CHR 236, (1987) LRC (const.) *Soobramoney v. Minister of Health, Kwazulu-Natal*; 12 B.C.L.R. 1696 (1997) (S. Afr.).

learn from other jurisdictions globally. In India for instance (like Nigeria) apart from fundamental rights, Part IV of their constitution includes a set of directive principles encompassing socio-economic rights; these directive principles were originally envisaged as distinct from fundamental rights, and inferior in status and legal effect to them. However, India Supreme Court has taken proactive measure within its interpretative power to justify the justiciability of socio-economic rights. For instance the Supreme Court of India breathed substantive life into directive principles and commenced their creative interpretation.[99] The substantive due process doctrine, considered integral to the chapter of fundamental rights, was also asserted and a Public Interest Litigation concept (PIL) was judicially developed to allow easier access to justice for everyone. This was part of a struggle to achieve 'social justice'.[100]

It is the contention of this paper that case law involving judicial reviews challenging public authority's allocation of resources indicates that the mere fact that socioeconomic rights involve resource allocation issues need not be an automatic bar to enforcement. It is an established fact that courts, albeit in the administrative law arena, have overturned public authorities' resource allocation decisions, when the issue of limited resources has *not* influenced that authority's decision. It must be admitted therefore that in reality it is uncommon for public authorities to operate with unlimited expenditure/unlimited resources, or to make decisions without taking into account cost (either implicitly or explicitly).

Taking a clue from the judicial stand of India Supreme Court however, it remains evident that although it may be difficult to enforce socio-economic rights with its complex redistributive element, resource allocation issues alone should not render them non-enforceable in all cases. The foregoing points was also made in the case of Damish v Speaker House of Assembly of Benue State,[101] where it was held that even though the rights contained in Chapter II are not justiciable, they contain guidelines as to what the courts should do when confronted with the problem of interpretation of the constitution.

Paradoxically, the consequence of this long-standing notion that ESC rights are non-enforceable has been an absence of any effort on the part of the judiciary in many countries to define principles for their construction.[102] Therefore, the very fact that domestic law is deficient in protecting ESR because it rendered same non-justiciable the use of African Charter on Human and peoples' Rights in Nigeria may in and for itself assist in a judicial finding of linkage between SER and political rights. This underlines the critical importance of a judicial activism framework that affords citizens a sufficient degree safeguard against potential violation of socio-economic rights.

Due to the purely rhetorical value ascribed to these rights, and to the lack of attention paid to their interpretation by the judiciary and legal academics, fewer concepts have been developed that would help to understand rights such as the right to education, the right to an adequate standard of health, the right to employment, the right to adequate housing or the right to food. However, the lack of practical elaboration of many of these rights does not

99. Muralidhar, S., 'Economic, Social and Cultural Rights: An Indian Response to the Justiciability Debate', in *Economic, Social and Cultural Rights in Practice: The Role of Judges in the Implementing Economic, Social and Cultural Rights*, 23 – 33, (Ghai, Yash & Jill C. eds., 2004).

100. Bhagwati, Prafullachandra, *Judicial Activism and Public Interest Litigation*, 23, COLUMBIA JOURNAL OF TRANSNATIONAL LAW, 561 – 578, (1984-1985).

101. (1983) NCLR 625

102. Ibe, Beyond Justiciablity: Realizing the Problems of Socio-economic Rights, 227

justify the claim that because of some essential or hidden trait, ESC rights, as a whole category, cannot be defined at all. Critics claim that the content of ESC rights cannot be defined, so little effort has been invested to define their content.

ii) PUBLIC INTEREST LITIGATION

Addressing the plight of citizens in India and Nigeria present a compelling tests for the value of public interest litigation especially within the context of ES rights in the Constitution. It is useful to note that the term 'public interest litigation,' refers to the use of litigation for the public good. Indeed it is described interchangeably as public law litigation, strategic litigation, test case litigation, impact litigation, social action litigation, social change litigation, civil rights litigation, or human rights litigation.[103] Some commentators emphasize the role of litigation in obtaining court-ordered results that impact social change, social reform, or systemic policy change that looks for an impact beyond the individual plaintiffs or groups that initiated the litigation, in other words define public interest litigation by its potential impact.[104]

The extensive acceptance of the normative importance of legal rights to institute an action for the enforcement of socio-economic rights means demand for a comprehensive discussion of conceptual dimensions of public interest ligation and particularly it judicial perception. Incidentally an extension of major arguments against the justiciability of socio-economic rights is the realm of locus standi for its enforcement. Indeed in all cases involving justiciable rights there are clear and common elements. Essentially, the right-holder (or somebody acting on his or her behalf) should be able to lodge a complaint before an impartial and independent body when he or she considers that the duties arising from the right have not been complied with.

It is trite law that the requirement of sufficient legal basis for a party or parties moving the jurisdiction of court must in law, be the existence of locus standi[105] (legal standing) to bring the action. Thus, locus standi has being judicially defined in the case of Attorney General of the Lagos State v Attorney General of Federation [106] per Niki Tobi JSC thus: A legal right in my view is a right recognized by law and capable of being enforced by the plaintiff. It is a right of a party recognized and protected by a rule of law, the violation of which will be a legal wrong done to the interest of the plaintiff, even though no action is taken. The determination of the existence of legal right is not whether the action will succeed at the trial but whether the action denotes such a right by reference to the enabling law in respect of the commencement of the action.

There is however problem with locus standi that intertwined with the concept of the role of judiciary in the process of governance and further that judicial actions is primarily aimed at preserving legal order by confining the executive and the legislative institutions within their constitutional limit and the constitutional protection and preservation of individual

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103. Peter Schuck, *Public Law Litigation and Social Reform*, 102, YALE LAW JOURNAL, 1763- 1769, (1993).

104. James A. Goldston, 'Public Interest the Opportunities and Challenges of Using Public Interest Litigation to Secure Access to Justice for Roma Minorities in Central and Eastern Europe: Roots, Prospects, and Challenges', Human Rights Quarterly, 28, (2006): 492, 296

105. *Abraham Adesanya v. President of the Federal Republic of Nigeria* (1981) 2 NCLR 358

106. *Attorney General Lagos State v. A.G. of the Federation* (*Supra*), 187 see Tunde Okeowo; *The Problem with Standing to Sue in Nigeria*, 39(1) JOURNAL OF AFRICAN LAW, 9, (1995)., *Attorney General, Kaduna State v. Hassan* (1985) 2 NWLR (pt 8) 483

member of society their fundamental rights against illegal and unwarranted encroachments.[107] Incidentally, the Nigerian case of Fawehinmi v Akilu & Anor[108] provides a liberal, dynamic and wider interpretation to the application of locus standi. In the case, the Supreme Court liberally interpreting and widening the scope of locus standi held that; in the area of criminal law, every Nigerian is his brother's keeper and that any person including a legal practitioners can bring an application for an order of mandamus to compel the Director of Public Prosecutions to exercise his discretion to prosecute an alleged crime or in default permit a private prosecution of it. This was aptly expressed by Uwais JSC, as he then was, thus: There can be no doubt that by section 342 and 343 of the criminal procedure law…. Every citizen of Nigeria or any person for that matter has a right to bring private prosecution… if the Attorney General does not wish to do so.[109]

Significantly therefore, legal right of action is based on the nexus between rights and remedies that are well engrained in our law and as old as the concept of judicial activism. The existence of a right necessarily includes the ability to seek redress. However, the difficulty is in the determination of whether the rights exist for the enforcement of socio-economic rights who has standing to enforce them appears to have been remedied with the enactment of the Fundamental Enforcement Procedure Rules 2009.

It is contended that a driving assistance especially on the issue of locus standi (legal rights) to institution action for the enforcement of SER has been addressed under the Fundamental Enforcement Procedure Rules. The Rules enjoy courts to encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of locus standi. In particular, human rights activists, advocates, or groups as well as any non-governmental organisations, may institute human rights application on behalf of any potential applicant. Thus in human rights litigation, the applicant may be; anyone acting in his own interest; anyone acting on behalf of another person; anyone acting as a member of, or in the interest of a group or class of persons; anyone acting in the public interest, and association acting in the interest of its members or other individuals or groups.

Contrary to the Nigerian position, public interest litigation was developed in Indian through proactive disposition of Indian judiciary.[110] This was achieved by both interpreting existing fundamental human rights provision widely and by creating new fundamental rights and gradual modification of the traditional requirement of legal standing for any public participation in justice administration.[111] It was argued that the need for the development of public interest litigation was more pressing in a country like India where a great majority of people were either ignorant of their rights or were too poor to approach the court.[112] The court justified such extension of standing in order to enforce rule of law and provide justice

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107. Susu B A., *Locus Standi, the Constitution (1979), and Confusion in the Court,* XDC(2) NIGERIAN BAR JOURNAL, 83, (1983).

108. (1987) 1 NWLR pt 67, p.797 SC

109. Ibid, at 847

110. Surya Deva , *Public Interest Litigation in India: A Critical Review*, 1, CIVIL JUSTICE QUARTERLY 19 – 20, (2009), http://ssrn.com/abstract=1424236 accessed on September 1, 2015

111. Christine M. Forster and Vedna Jivan, '*Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience,* 3(1) Asian Journal of Comparative Law, 27, (2008).

112. *Supra* note 104, 18

to disadvantaged sections of society.[113] Thus, on merging representative standing and citizen standing, the Supreme Court in *Gupta v Union of India* held:

Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right . . . and such person or determinate class of persons is by reasons of poverty, helplessness, or disability or socially or economically disadvantaged position, unable to approach the Court for any relief, any member of the public can maintain an application for an appropriate direction, order or writ.[114]

Surya, who has been extensively referred to in this paper rightly asserted that three factors contributed to the significant development of public interest litigation in India firstly; the constitutional framework relating to fundamental human rights and directive principles of state policy,[115] secondly; the several constitutional provisions concerning the powers of the Supreme Court helped the Court in coming up with innovative and unconventional remedies, which in turn raised social expectations and thirdly; the rise of public interest litigation corresponds to the extent and level of judicial activism shown by the Indian Supreme Court and High Courts.[116] Indian judiciary has taken advantage of the constitutional device power of judicial review, its power of having the final say on the interpretation of the

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113. Aharon Barak, '*Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARVARD LAW REVIEW, 107 – 108, (2002).

114. G*upta v. Union of India* (1981) Supp S.C.C. 87, 210, See also *PUDR v. Union of India*, AIR 1982 SC 1473; *Bandhua Mukti Morcha v. Union of India* (1984) 3 S.C.C. 161

115. INDIA Const. Ch. III and Ch. IV (1996) see generally See generally Jain, ''The Supreme Court and Fundamental Rights'' in Verma and Kusum (eds), Fifty Years of the Supreme Court of India, pp.22–37, 51–52

116. *Supra* notes 104 & 106, Surya, demonstrates Indian courts' judicial activism within the context of PIL form, such cases include: *Forum v. Union of India* (1996) 2 S.C.C. 405 on the constitutionality of the Government's privatization, Delhi Science, and *Balco Employees Union v. Union of India* AIR 2001 SC 350; *Centre for Public Interest Litigation v. Union of India*, AIR 2003 SC 3277 on disinvestment policies, The Indian Express, September 24, 2002 defacing of rocks by painted advertisements, *M.C. Mehta v. Union of India*, (1996) 4 S.C.C. 750 the danger to the *Taj Mahal from a refinery, Almitra H. Patel v. Union of India*, AIR 2000 SC 1256 on pollution of rivers, *M.C. Mehta v. Union of India*, (1996) 4 S.C.C. 351 relocation of industries out of Delhi, *PUCL v. Union of India*, (2001) (7) S.C.A.L.E. 484; *PUCL v. Union of India*, (2004) (5) S.C.A.L.E. 128 on lack of access to food, *Kishen Pattnayak v. State of Orissa* (1989) Supl.(1) S.C.C. 258, on deaths due to starvation, *M.C. Mehta v. Union of India AIR* 2002 SC 1696 on the use of environment-friendly fuel in Delhi buses *M.C. Mehta v Union of India* (1997) 8 S.C.C. 770 on regulation of traffic, *Shiv Sagar Tiwari v. Union of India*, (1996) 6 S.C.C. 558 out of turn allotment of government accommodation, *Murli Deora v. Union of India*, (2001) 8 S.C.C. 766 on prohibition of smoking in public places, *Common Cause v. Union of India*, (1996) 6 S.C.C. 530, arbitrary allotment of petrol outlets, *Vineet Narain v. Union of India*, (1996) 2 S.C.C. 199 on investigation of alleged bribe taking, *M.C. Mehta v. State of Tamil Nadu*, AIR 1997 SC 699 employment of children in hazardous industries, *Narendra Malava v. State of Gujarat*, (2004) (10) S.C.A.L.E. 12; *PUCL v. State of Tamil Nadu*, (2004) (5) S.C.A.L.E. 690 on rights of children and bonded labours, *CPM v. Bharat Kumar*, AIR 1998 SC 184; *T.K. Rangarajan v. State of Tamil Nadu*, AIR 2003 SC 3032 on extent of the right to strike, *Parmanand Kataria v. Union of India*, AIR 1989 SC 2039; *Paschim Banga Khet Mzdoor Samity v. State of West Bengal*, (1996) 4 S.C.C. 37; *Kirloskar Bros Ltd v ESIC*, (1996) 2 S.C.C. 682; *Air India Stat. Corp v United Labour Union*, (1997) 9 S.C.C. 377 on right to health, *Mohini Jain v. State of Karnataka*, (1992) 3 S.C.C. 666; *Unni Krishnan v. State of Andhra Pradesh*, (1993) 1 S.C.C. 645 on right to education,113 sexual harassment in the workplace, *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011; *Apparel Export Promotion Council v. A.K. Chopra*, AIR 1999 SC 625 on and *CEHAT v. Union of India*, AIR 2001 SC 2007; *CEHAT v. Union of India*, AIR 2003 SC 3309 on female feticide and infanticide through modern technology. See generally Surya (n 1) 33-34.

constitution and power to test not only the validity of laws and executive actions but also of constitutional to achieve this objective.

It is argued and proposed that Nigerian courts take clue from India judiciary taking advantage of public interest litigation provided in the Fundamental Rights Enforcement Procedure Rule 2009 in such a way that courts' actions reflect what people expect from the judiciary as the last hope for the hopeless at any given point of time. The paper posited that rather than being forced to fit civil and political rights under the heading of justiciable rights and socio-economic non-justiciable on the other hand within the context of locus standi what the plaintiff merely need to demonstrate is an entitlement to enforce a particular legal duty. Notwithstanding the discussion above so far, it is well established position that most constitutional and human rights norms are not absolute and are subject to limitation, balancing or regulation. To carry out these obligations, judges must developed tests to scrutinize the exercise of legislative or regulatory powers within the limitation to still further protect the violated right of a citizen. Thus, a foundational element of public interest litigation is its critical role in raising awareness and educating the public of the injustices that are being challenged through litigation as a means of changing public opinion and achieving greater social change.

VII. CONCLUSION

The question of the nature of socio-economic rights as legally justiciable has, ultimately, an evident of political tinge. Enforceable socio-economic rights could provide Courts with enhanced powers, proving a potential threat to politicians and economists. Moreover, social welfare rights are usually inextricably linked with huge costs and executive policy-making. Yet these possibilities have no patent basis in human rights or laws. At the end of the day, political constraints and ideologies are unsuccessfully camouflaged under theoretical and complex legal arguments. Their legal disguise cracks when we take into account the role and character of human rights norms; it cracks even more when we consider the cautious stance most Courts have adopted in dealing with social welfare rights. The disguise collapses and what emerges is the need for brave, substantive political will. The question is whether or not we are ready for it.

As has been seen above, statutory regulations, case law and jurisprudential concepts, all contribute to interpreting and clarifying the content and scope of rights. Nevertheless, in their absence, there are other ways to give a degree of substance to the content of ESC rights and guaranteeing that they are respected, protected and fulfilled. Importantly it concluded that any judicial enforcement of socioeconomic rights must aim to protect the wide range of conditions that marginalises individuals. If the judiciary is left to develop socio-economic rights protection using their linkage to civil and political rights notion will undoubtedly enable the courts to stretched the protected areas not within the 'core' of the meaning of the right. Human rights are the rights essential to life and dignity of the individual in a democratic society. The exact limits are debatable there is no trace of socio-economic rights in the Convention if left not justiciable without which many of the other rights would be a mockery. Though, in doing so, they will face legitimate criticism that their activism is infringing into area of legislative competence.

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LABOUR LAW REGULATION OF STRIKES IN NIGERIA : A REFLECTION

ANDREW E. ABUZA*

ABSTRACT : Since Nigeria came into being the government has enacted numerous statutory laws on regulation of strikes to secure industrial harmony. It is rather sad that strikes have continued unabated in Nigeria despite the fact that some of these statutory laws have existed in Nigerian statute books for more than 35 years. In this way, there is non-compliance with these laws by both workers' trade unions and federations of trade unions in Nigeria. Worse still, the government has failed to take concrete actions to fully enforce these laws. This article reflects on the regulation of strikes in Nigeria. It is the view of the writer that governmental efforts to tackle the menace of incessant strikes as represented by these statutory laws have not yielded the desired results. The writer suggests that there is need for the government to rise to the challenge of faithfully enforcing the provisions of these statutory laws. Also, it is the suggestion of the writer that these statutory laws should be amended to impose still penalties for non-compliance with same. Finally, it is the view of the writer that non- legal solutions should be warmly embraced, including the formation of a genuine labour Political Party that would take over political power from the present ruling capitalist class in Nigeria.

KEY WORDS : Regulation of Strikes, Workers' trade unions, Federations of trade unions, Industrial harmony.

I. INTRODUCTION

The strike tactic has a very long history. Towards the end of the 20th dynasty, under Pharaoh Ramses III in ancient Egypt on 14 November 1152 BC, the artisans of the Royal Necropolis at Dier el Medina organised the first known strike or workers' uprising in recorded history. [1] It so terrified the Egyptian authorities, as such rebellion was virtually unheard of, that they gave in and raised the wages of the artisans.[2] Strike is part of the collective

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1. The event was reported in detail on a Papyrus at the time which has been preserved, and is currently located in Turin. See Aleksandra Smolar, 'Towards Self – limiting Revolution: Poland 1970-89' in Roberts Adam & Garton Ash Timothy (eds), *Civil Resistance and Power Politics: The Experience of Non- violence Action from Ghandi to the Present* (Oxford: Oxford University Press, 2009) 127-143. The strike is narrated by John Romer, *Ancient Lives: The Story of Pharaoh's Tomb-makers* (London: Phoenix Press, 1984), pages 116-123. See also EF Wente, 'A Letter of Complaints to the Vizier To', 9 1950, quoted in Smolar above.

2. *Ibid.*

bargaining process typically reserved as a threat of last resort during negotiations between the industry and the workers' trade union, [3] which may occur just before, or immediately after, the collective agreement [4]expires. In Nigeria, strikes date back to the period when Nigeria was under British colonial rule. Strikes by workers' trade unions and Federations of trade unions in Nigeria have engendered industrial disharmony. These strikes have, sometimes, completely paralysed academic, health and economic activities in Nigeria. Productivity does not take place in industries when there are strikes by workers' trade unions and federations of trade unions.

Lack of productivity or drop in productivity in Nigerian oil industries due to strike by workers' trade unions and federations of trade unions in the Nigerian oil industries brings about a substantial drop in national revenue since crude oil production is the main stay of the Nigerian economy. The resultant effect is that the government may not be able to execute developmental projects, including infrastructural development due to lack of sufficient funds. Yet Nigerians, including the workers expect the government to provide infrastructures and other basic amenities of life. Aside from lack of productivity or low productivity and the consequent loss of revenue to the employers in general and government in particular, strikes by workers' trade unions and federations of trade unions engender loss of lives of innocent Nigerians.

It so happens that over the years the situation depicted above compelled the Nigerian government to enact numerous labour laws [5] to regulate strikes by workers' trade unions and federations of trade unions with a view to securing industrial harmony. One major statute in this regard is the TDA which was first enacted in 1941 as the Trade Disputes (Arbitration and

Inquiry) Ordinance 32 of 1941. The TUA which was first enacted in 1938 as the Trade Unions Ordinance of 1938 is another noteworthy statute here.

Despite the legislative prohibition of strikes as well as the penal sanctions attached to same by these statutes strikes by workers' trade unions and federations of trade unions

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3. In Nigeria, statute defines a trade union as 'any combination of workers or employers whether temporary or permanent, the purpose of which is to regulate the terms and conditions of employment of workers, whether the combination in question would or would not apart from this Act, be an unlawful combination by reason of any of its purposes being in restraint of trade and whether its purposes do or do not include the provision of benefits for its members'. See section 1(1) of the Trade Unions Act (TUA) Cap 437 Laws of the Federation of Nigeria (LFN) 1990 (now Cap T14 LFN 2004). Thus, in Nigeria there is in existence both workers' trade unions and employers' trade unions. The Nigeria Union of Teachers (NUT) and National Union of Road Transport Workers (NURTW) are notable workers' trade unions in Nigeria. While the Road Transport Employers Association of Nigeria (RTEAN) and Dock Employers Association of Nigeria (DEAN) are notable employers' trade unions in Nigeria. Note that the TUA principally regulates the formation, organisation, operation and dissolution of trade unions in Nigeria. Also, it is the guiding principle for the formation of federations of trade unions in Nigeria, their rules and powers as well as the kind of relationship they should have with their members and employers

4. It can be defined as any agreement in writing for the settlement of dispute and relating to terms of employment and conditions of work concluded between employers or association of employers and an organisation representing workers. See section 47(1) of the Trade Disputes Act Cap 432 LFN 1990 (now section 48(1) of the Trade Disputes Act Cap T 8 LFN 2004 (T D A).

5. Labour law can be defined as the field of law governing the relationship between the employers and employees, especially the law governing the dealings of employers and unions that represent employees.BA Garner (ed), *Black's Law Dictionary* (7th ed) (St Paul MN: West Publishing Co 2004) at 890.

continue unabated in Nigeria. The fact is that strikes by these labour organisations have become incessant in Nigeria. Hardly two weeks go by in Nigeria today without one form of strike or the other. In this way, there is non-compliance with these statutes by workers' trade unions and federations of trade unions. A lot of people in Nigeria are actually upset by this ugly situation. Worse still, there is lack of enforcement of these statutes by the Nigerian government.

The menace of incessant strikes in Nigeria suggests that Nigeria's system of industrial or labour relations is bedeviled by industrial disharmony with capacity for adverse impact on trade unionism and the political economy of Nigeria. Without doubt, the continuation of this trend could undermine not only the realisation of the Transformation Agenda of President Goodluck Jonathan's administration for the overall socio-economic development of Nigeria but also Nigeria's nascent democracy.

This article reflects on the regulation of strikes in Nigeria, analyses statutes enacted by the Nigerian government to regulate strikes and relevant case-laws, identifies obstacles to the full implementation of these statutes, highlights the practice in other countries and offers suggestions, which if implemented would enable the Nigerian government accomplish its goal of effective regulation of strikes with a view to the enthronement of industrial harmony a condition precedent to the socio-economic development of Nigeria.

II. MEANING OF STRIKE

In Nigeria, statute provides for a definition of strike. For instance, the TDA defines strike as: [6]

The cessation of work by a body of persons employed acting in combination or a concerted refusal under a common understanding of any number of persons employed to continue to work for an employer in consequence of a dispute done as a means of compelling their employer, or any person or body of persons employed, to accept or not to accept terms of employment and physical conditions of work;

And in this definition:

(a) 'cessation of work includes deliberately working at less than usual speed or with less than usual efficiency; and

(b) 'refusal to continue to work' includes a refusal to work at usual speed or with usual efficiency.

Four points can be identified as key features of the definition of strike contained in the provision above as follows:

(i) any strike which is not in consequence of a trade dispute is not a strike within the meaning of the TDA.[7] Thus, a 'political or protest strike' cannot qualify as a strike in Nigeria. To be specific, the January 2012 strike and mass protest of the Nigeria Labour Congress

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6. TDA, section 48(1).

7. Sec also OVC Okene, 'The Legal Regulation of Strikes in Nigeria: A Critical Appraisal' in *Modern Practice Journal of Finance and Investment Law* (MPJFIL) (2001) (5) 4 at 606. Note that section 48(1) of the TDA defines a trade dispute as any dispute between employers and workers, which is connected with the employment or non-employment or the terms of employment and physical conditions of work of any person.

(NLC), Trade Union Congress (TUC) and their affiliates [8] against the increase in the pump price of petrol or fuel from 65.00 naira (₦) to ₦141.00 per litre can be considered to be a 'political or protest strike' and therefore would not qualify as strike under the definition of strike above. [9]

(ii) the definition of strike as contained in the provision above is broad and or comprehensive For example, a 'work to rule' or 'go slow' is considered as a strike under the definition of strike above since it is deliberately working at less than usual speed or with less than usual efficiency.

(iii) to constitute a strike, there must exist a common cessation of work and the stoppage of work must be deliberate. In this way, there would be no strike if a group of workers stopped working as a result of an external event such as a bomb scare by the radical Islamic sect called 'Boko Haram' or apprehension of danger.

(iv) a sympathy strike by members of one trade union supporting members of another trade union in its strike action would amount to a strike under the definition of strike above.

III. BRIEF HISTORY OF STRIKE IN NIGERIA

Nigeria came into being on 1 January 1914 following the amalgamation of the Colony of Lagos and Protectorate of Southern Nigeria and the Protectorate of Northern Nigeria to form the Colony and Protectorate of Nigeria by Lord Fredrick Lugard who was appointed the first Governor-General of Nigeria by the British colonial master of Nigeria.

On 22 June 1945, the first general strike in Nigeria took place. [10] It went on for 45 days. The strike which was led by Michael Imoudu struck the most devastating blow against colonialism. [11] The next important strike was the 1947 United Africa Company (UAC) workers-led strike in Burukutu where some of the workers were shot dead. Another noteworthy strike during the colonial period was the 1949 strike of coal miners, when the native policemen killed 21 miners and wounded as many as 55 workers at the Iva valley mines in Enugu.[12]

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8. Note that the NLC and TUC are the two notable federations of trade unions in Nigeria

9. For details, see AE Abuza, 'Strike in Nigeria: Not yet Victory for Nigerian workers' in *Commercial and Property Law Journal, Delta State University, Oleh Campus, Oleh* (2006) (1) 1 pages 72 - 74.

10. Owei Lakemfa, 'One hundred years of Trade Unionism in Nigeria' in *Vanguard* (Lagos) 13 August 2012 at 48.

11. *Ibid*.

12. These strikes border on economic grievances which at the same time were turned to political struggles. The general strike of 1945 was the largest workers strike in Africa involving about 42,000 to 200,000 workers. The workers who succeeded in bringing together different trade unions and striking for about ten weeks were able to withstand colonial terrorism and generated World-wide sympathy from many anti- colonists. It also brought the working class and African consciousness to a public foray. The strike was partly successful as most of the workers' demands for an increase in the cost of living allowance (COLA) were met in 1946 and back -dated to 1945. The apparent success of the strike acted as a catalyst to other bodies of workers, whether organised or unorganised to resort to strikes. Infact, between 1940 and 1952, it is on record that some 225 strikes took place in Nigeria. Available at: http://www.sunnewsonline.com/../ work forces 28-03-2011 001 –htm, accessed on 23 November 2011. See also MB Dalhatu, 'Public Servants, Trade Unions and Industrial Relations in Nigeria' in *Nigerian Journal of Labour Law and Industrial Relations* (NJLIR) (2007) (1) 2 pages 78-79 and Owei lakemfa, 'One hundred years of Trade Unionism in Nigeria' in *Vanguard* (Lagos) 14 August 2012 at 32.

It was on 1 October 1960 Nigeria was granted political independence by Britain. In 1963, Nigeria became a Republic. The country's first Republic can be said to have commenced on 1 October 1963. Nnamdi Azikiwe of the National Council of Nigeria and Cameroon later re-named National Council of Nigerian Citizens (NCNC) became Head of State (HOS). While Tafawa Balewa of the Northern Peoples Congress (NPC) was Prime Minister of Nigeria. In 1964, there were two crippling general strikes led by Imoudu and Wahab Goodluck against the politicians.[13] The strikes were aimed at forcing the government to respect the ballot box and its results as well as address the problem of corruption amongst public officers and lack of insentivity towards the plight of Nigerian workers. Actually, corruption amongst public officers was a major reason advanced for the overthrow of the Balewa civilian administration by Major Kaduna Nzeogwu and other soldiers in the military *coup d'tat* on 15 January 1966. This brought about military rulership of Nigeria. It was on 1 October 1979 the military handed-over the reigns of the government of Nigeria to a civilian government.

Nigeria's second Republic lasted between 1 October 1979 and 31 December 1983 under the civilian administration of Shehu Shagari of the National Party of Nigeria (NPN). Workers' main battle during this period was over the issues of minimum wage, pension and basic car allowance. Infact, it was over these issues that Nigerian workers started an indefinite general strike on 11 May 1981.[14] This strike paralysed the country. It was so effective that Shagari had to personally meet with Hassan Sunmonu's leadership of the NLC before the strike was called-off.[15] The military putsch of 31 December 1983 brought the second Republic of Nigeria to a close.

The aborted third Republic of Nigeria under military President Ibrahim Badamasi Babangida (IBB) was short-lived. It should be recalled that in 1988 a coalition of 14 trade unions organised a successful general 'protest strike' to protest the increase in the cost of petroleum products. At that time, the regime of IBB had banned the NLC.[16] It eventually agreed to a negotiated settlement of the industrial action under Ukandi Damachi while top regime officials like Olu Falae, its secretary to government led the government delegation.[17]

IBB was compelled to hand-over the reigns of the Federal Government of Nigeria (FGN) to Ernest Shonekan as a result of great pressure mounted on him to step down from office following his annulment of the 12 June 1993 presidential election results - the election was alleged to have been won by Moshood Kashimawo Olawale Abiola of the Social Democratic Party (SDP). Shonekan's administration was short-lived, as it was sacked by military *coup d'tat* about six months later and General Sanni Abacha became Nigeria's HOS. When Abacha died in June 1998, General Abdulsalami Abubakar took over the reigns of the FGN. It was Abubakar who handed-over the reigns of the FGN to the civilian administration of Olusegun Obasanjo of the Peoples Democratic Party (PDP) on 29 May 1999 signaling the beginning of Nigeria's fourth Republic. Obasanjo's administration lasted till 29 May 2007 when he handed-over the reigns of the FGN to Umaru Yar' Adua of the PDP. Yar'Adua died in office about two years later. This paved the way for the incumbent Vice-President Goodluck

13. Lakemfa, *Vanguard, Ibid.*
14. Owei Lakemfa, 'One hundred years of Trade Unionism in Nigeria' in *Vanguard* (Lagos) 15 August 2012 at 32.
15. *Ibid.*
16. *Id at 33.*
17. *Ibid.*

Jonathan to assume the office of President of the Federal Republic of Nigeria (FRN). Following the April 2011 presidential election, Goodluck Jonathan was sworn in on 29 May 2011 as President of the FRN for a four–year term having been declared winner of the election above by the Independent National Electoral Commission (INEC).

It is rather sad to note that since 29 May 1999 there has been an upsurge in the number of strikes. Between 2001 and 2014 various labour unions, including the Academic Staff Union of Universities (ASUU), National Association of Resident Doctors (NARD), NUT, NLC and TUC have embarked on strikes and 'protest strikes'. The grievances included failure to implement collective agreements, hike in the pump prices of petroleum products, non-payment of arrears of salaries and allowances and failure to implement the National Minimum Wage (Amendment) Act 2011 which approved the sum of ₦18, 000.00 to be paid to the least worker as national minimum wage. A noteworthy strike in 2014 was the Doctors' nation-wide strike between 1 July 2014 and 24 August 2014 over poor conditions of service, amongst other grievances. [18] One thing which is very apparent is that strikes in Nigeria, as disclosed before, have become incessant. This is adverse to trade unionism and industrial harmony a condition precedent to the socio-economic development of Nigeria.

A vital point to make at this juncture is that incessant strikes by workers are not peculiar to Nigeria. It is consistent with the practice in many countries, including United States of America (USA), Britain, Bangladish, India, China, Greece, Spain, Italy, Trinidad and Tobago, Guinea, Philippines, France, Kenya, Malawi and South Africa. To be specific, on 10 August2012, Mine workers of the World's number three platinum producer-Lonmin in its Marikana Mine of Johannesburg in South Africa embarked on strike. About 34 miners were shot dead by Police on 16 August 2012 in a bid to break the strike of the miners who were armed with spears, machetes and hand-guns. President Jacob Zuma of South Africa had declared one- week national mourning for the killed miners and instituted a probe into the cause of the carnage.[19] Also; about January 2014 miners in South Africa numbering about 70,000 started a strike. The strike which brought about 45 percent cut in Global Platinum supply was called-off on 24 June 2014 following a deal struck between the miners and the platinum companies. It was indeed the largest and most expensive strike in the history of South Africa.[20]

IV. CAUSES OF INCESSANT STRIKES

Eleven major reasons can be identified as causes of incessant strikes as follows:

(i) the refusal of employers to implement agreements with workers' trade unions.

(ii) the non-enforceability of collective agreements by the courts. Ogunniyi rightly points out that: '… In Nigeria, collective agreement has so far been treated largely as a gentleman's agreement or an extra-Legal document with no force'. [21] A Nigerian Case that can

18. Available at: *http.//www.ekekeee.com/Nigeria-doctors-embark-indefinite-strike-next-month, accessed on 13 November 2014.*

19. *Vanguard* (Lagos) 20 August 2012 at 4; *Vanguard* (Lagos) 21 August 2012 at 2; and Vanguard (Lagos) 28 August 2012 at 16.

20. See Channels Television Newstrack on 25 June 2014 broadcasted between 10:00pm and 11:00pm.

21. See Oladosu Ogunniyi, *Nigerian Labour and Employment Law in Perspective* (2nd edition) (Lagos: Folio Publishers Ltd 2004) at 414.

be pin-pointed with grief on the matter is *African Continental Bank Public Limited Company v. Nbisike*, [22]where the Nigerian Court of Appeal (CA) held that collective agreements concluded between one or more trade unions, on the one hand, and one or more employers' associations, on the other hand, are as a general rule unenforceable. The approach of the Nigerian Courts on the matter is in consonance with the practice in some other countries. For example, in *Ford Motors Company Limited v. Amalgamated Union of Engineering and Foundry Workers,* [23] an English Court held that parties to collective agreement do not intend the arrangement to be legally binding. Good enough, the Nigerian Constitution has recently conferred on the National Industrial Court (NIC) the Jurisdiction to enforce collective agreements in Nigeria.[24]

(iii) the formulation and implementation of harsh economic policies that are anti-workers and peoples by the government. These include the policy of deregulating the downstream oil sector, retrenchment of workers, commercialisation of education, devaluation of the naira and the incessant increment in the pump prices of petroleum products. It should be recalled that between 2000 and 2005 labour in Nigeria embarked on four 'protest strikes' on issues related to pricing of petroleum products. Also, between 9 and 16 January 2012 workers in Nigeria led by NLC and TUC embarked on 'protest strike' and mass protest over the increase of the pump price of fuel from ₦65.00 to ₦141.00 by the President Goodluck Jonathan's administration. [25] In France, the trade unions' one-day strike on 12 October 2010 was to protest government's unpopular pension reforms. [26] Similarly, on 30 November 2011 about two million British workers embarked on strike to protest unpopular pension reforms. [27]

(iv) lack of mutual respect for both employers and workers.

(v) non-implementation, on the part of government in particular and employers in general, of statutes on improvement of workers' salaries, wages and allowances. A noteworthy statute in this regard is the Nigerian National Minimum Wage (Amendment) Act 2011. In Malawi, the junior judiciary workers strike which started on 9 January 2012 was called in a bid to force government to implement a salary increment duly approved by the Malawian National Assembly (NA) and the Judicial Service Commission in compliance with the Judicature Administration Act. [28]

(vi) failure on the part of government to implement promises made to workers on increment in their salaries and wages. It is no longer a secret that the FGN had reneged on the promise of 25 percent increment in the wages of Nigerian workers.

(vii) the unreasonable or unrealistic demands of workers. In South Africa, the demand of 300 percent pay rise by mine workers during their strike which started on 10 August 2012 was in the view of many South Africans unreasonable or unrealistic.[29]

22. [1995] 8 Nigerian Weekly Law Reports (NWLR) (part 416) 725.
23. [1969] 2 Queens Bench (QB) 303 or [1969] 1 Weekly Law Reports (WLR) 339.
24. See Constitution of the Federal Republic of Nigeria (CFRN), 1999 Cap C23 LFN 2004 as amended by the Constitution (Third Alteration) Act 2010 (Third Alteration Act), section 254C (1)(J)(i).
25. The Guardian (Lagos) 17 January 2012 at 1.
26. Available at: *http://www.economist.com/mode17312113? Story= id =17312113 & fsrc = rss*, accessed on 21 October 2010.
27. Cable Network News (CNN) on 30 November 2011 broadcasted between 3:00 and 4:00pm.
28. Available at: *http://www.newstimeafrica.com/archives/24048*, accessed on 5 March 2012.
29. *Vanguard* (Lagos) 20 August 2012; *Vanguard* (Lagos) 21 August 2012; and *Vanguard* (Lagos) 28 August 2012, *supra* note 19.

(viii) absence of elected political leaders who genuinely have the interest of workers and the masses at heart. Many of the elected government leaders including those of the opposition political parties have adopted the policy of private sector–driven economy and some other obnoxious capitalist policies inimical or anti-thetical to workers' interests and aspirations. The over-taxation of public servants in many states of Nigeria, including Delta State is a noteworthy example in this regard.

(ix) lack of political will to enforce the statutory laws on strike.

(x) inadequate sanctions against offenders of the law on strike. Under section 18(2) of the TDA, the prescribed sanction for non-compliance with the statutory procedure for the settlement of trade disputes is, in the case of an individual, a fine of ₦100 or imprisonment for six months and in the case of a body corporate, a fine of ₦1,000.00. These sanctions are not stiff to deter non-compliance with the strike law. A trade unionist or a worker or trade union might consider it more convenient to pay the fine than adhering to the statutory provisions on strike. It is only when the penalty for an offence is stiff that it can induce compliance with the law.[30]

(xi) failure on the part of both employers and the workers' trade unions to enter into prompt and fruitful dialogue over workers grievances devoid of issuing of commands and instructions.

V. EFFECTS OF STRIKES

Six major effects of strike can be given as follows:

(i) strikes bring about loss of man-hours. [31]

(ii) strikes bring about loss of lives of innocent citizens. For example, during the Kenya Doctors strike which started on 5 December 2011 sick citizens in the Hospitals and other health institutions suffered neglect and lack of medical attention. The resultant effect was that some of the patients died from the ailment which plagued them. [32]

(iii) strikes engender loss of revenue to individuals, private organisations and the government. Businessmen and the traders are denied their right to economic activity during strikes. With the banks, airports, motor-parks and sea-ports closed following a general strike by workers, business-men and traders may not be able to move around for their businesses and obtain needed finances to transact their businesses. The resultant effect is loss of revenue or income from their businesses. For its part, the government losses revenue from its organisations when workers of same embark on strike. To cut matters short, the entire country losses money arising from strikes. Economists put cost of the January 2012 fuel price hike 'protest strike' to Nigeria for five days at ₦720 billion. [33] At the end of the week-

30. AE Abuza, 'The Problem of Vandalization of Oil Pipelines and Installations in Nigeria: A Sociological Approach' in Delsu *Law Review-Environmental Law Edition* (2007) (2) 2 at 277.

31. Note that as a result of 7,025 industrial disputes which occurred in 1992 alone, Nigeria lost a total of 47 million man-hours. *Daily Sunray* 27 January 1993 at 17, quoted in BK Girigiri, 'Globalization and Industrial Relations in Nigeria: Evidence from 1986-2006' in NJLIR (2007) (1) 2 at 100.

32. See African Independent Television (AIT) News on 17 December 2011 broadcasted between 4:30pm and 6:00pm. Also available at: http.//allafrica.com/./201112150.086 html, accessed on 5 March 2012.

33. Channels Television Newstrack on 12 January 2012 broadcasted between 4:00 and 5:00pm

long strike, Nigeria lost ₦733.5 billion. [34] To be specific, the banks lost ₦400 billion, Information Communication Technology (ICT) sector lost ₦159.5 billion, Maritime industry lost ₦96 billion, Aviation sector lost ₦18 billion while manufacturing companies lost about ₦10 billion.[35]

(iv) strikes undermine civil and criminal justice. A noteworthy example is the junior judiciary workers strike in Malawi which lasted from 9 January 2012 to 16 March 2012. On civil justice, claimants could not start their new cases filed in court or litigate cases already before the court during the strike. On criminal justice, persons being remanded in Police or Prison custody were not availed their rights to seek bail before the court due to the strike. The bottom line of the whole thing is that strike affects right to access to court guaranteed to citizens under the constitution. [36]

(v)strikes engender hunger, starvation and other untold hardship or sufferings on the generality of the masses. [37]

(vi) strikes lead to increases in criminality, prostitution and unwanted pregnancies. Most times, strikes compel most people in Nigeria, including students and other youths to stay at home. Many of them become idle as a consequence of strike. The result is that some of the youths may take to criminality such as stealing, robbery and kidnapping in order to make ends meet. For their part, the female students may go into full-scale prostitution in a bid to meet up with their needs. The unlucky ones may get pregnant in the process which was the original bargain. Most times, the victims are deserted by the men who got them pregnant.[38] It may be necessary to recall here the popular saying thus: 'an idle mind is the devil's workshop.'

VI. REFLECTION ON REGULATION OF STRIKES IN NIGERIA

Discussions on regulation of strikes in Nigeria have focused on the Trade Disputes Act 2004, Trade Disputes (Essential Services) Act 2004, Trade Unions Act 1990, National Industrial Court Act (NICA) 2006 and the Constitution of the Federal Republic of Nigeria 1999.

i) The Trade Disputes Act 2004

The TDA, as disclosed before, was first enacted in 1941 as the Trade Disputes (Arbitration and Inquiry) Ordinance 32 of 1941 when Nigeria was under British colonial rule.[39]

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34. *The Guardian* (Lagos) 17 January 2012 at 1.

35. *Ibid*.

36. See, for example, the CFRN 1999, sections 6 & 36.

37. Note that most often, markets and shops are closed during general strikes. The resultant effect is that most people cannot get foodstuffs to buy, thereby exposing them to hunger and starvation. Trekking of long distances and staying at home during strikes embarked upon by road transport workers impose hardship and sufferings on the generality of the populace.

38. Note that the new Criminal Law of Lagos State of Nigeria, 2012 makes it an offence for a man to desert a woman he impregnated Available at: *http://channelstv.com/home/2012/06/27*, accessed on 1 November 2012. This enactment is acceptable.

39. It is the first statute on settlement of trade disputes in Nigeria. This enactment which gives maximum support to collective bargaining empowers the government to intervene in the settlement of trade disputes. But this power above can only be exercised with the consent of the parties. For instance, the government can only appoint a conciliator or refer a trade dispute for arbitration with the consent of the parties. There was a right to strike and lock-out at the time the enactment was

Part 1 of the TDA (Part 1 of the Trade Disputes Act 1976 or Trade Disputes Act 1990) provides the procedure for the settlement of trade disputes in Nigeria as follows:

(i) where there exist an agreed means for the settlement of a trade dispute, the parties to the dispute shall first attempt to settle it by that means.[40]

(ii) where no agreed means exist for the settlement of a trade dispute, the parties are obliged to meet under the presidency of a mediator mutually agreed upon with a view to the amicable settlement of the dispute.[41]

(iii) where the mediator is unable to settle the trade dispute within seven days, the dispute shall be reported to the MELP by either of the parties within three days at the end of the seven days.[42]

(iv) where the MELP is not satisfied that the requirements of sections 4 and 6 of the TDA have been substantially complied with, he shall issue to the parties a notice in writing specifying the steps which must be taken to satisfy those requirements and may specify in

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enacted in the sense that these activities were not prohibited by the enactment or any other law. It has been indicated earlier that on 15 January 1966 there was a military *coup d'etat* in Nigeria which swept away from power the Balewa's government. The military took over the reigns of the FGN under the headship of General Aguiyi Ironsi. His regime was, however, short-lived as a palace coup which took place about six months later brought in lieutenant-Colonel Yakubu Jack Gowon as head of the Federal Military Government of Nigeria (FMGN). This was about June 1966. In 1967, a civil war broke out in Nigeria when the Eastern region under Colonel Odumegwu Ojukwu as military Governor attempted to secede from Nigeria. By mid 1968, prices of essential commodities and services had risen sharply. Workers could not meet their needs. They made calls for increase in their wages which said calls were considered unpatriotic by the military rulers because of the huge financial demands of the civil war. Workers reacted by embarking on strikes. Some employers in turn, locked-out their workers and proceeded to employ new employees to replace the striking workers. The military authorities responded by promulgating the Trade Disputes (Emergency Provisions) Decree 21 of 1968 which suspended the Trade Disputes (Arbitration and Inquiry) Ordinance 32 of 1941, later Act of 1941. Section 16 of the Decree, for the first time in Nigeria, restricts the rights of workers to take part in a strike and of employers to lock-out their employees. Either party to a trade dispute is compelled to declare it formally to the Commissioner of labour (now Minister of Employment, Labour and Productivity (MELP)), who can appoint a conciliator to assist both parties to reach a settlement of the trade dispute. Infact, the Decree introduces a quasi-form of compulsory arbitration of trade disputes which, no doubt, is an abridgment of the freedom to bargain collectively, in place of the hitherto voluntary system. It needs to be stressed here that the consent of the parties is no longer required before the Commissioner above can appoint a conciliator or set up an arbitration tribunal for the disputes.The following year, that is, on 12 December 1969 the military government under Gowon promulgated the Trade Disputes (Emergency Provisions) (Amendment 2) Decree 53 of 1969 because of the unbridled wave of strikes after the first Decree. This Decree which re-enforced the first Decree expressly and totally prohibits strikes and lock-outs throughout the Federation of Nigeria with a provision for a sanction of imprisonment for five years without option of a fine for any contravention. The provisions of the two Decrees above which were put forward and regarded as war-time measures were made permanent in 1976 with the promulgation of the Trade Disputes Decree 7 of 1976. Section 13(1) of this Decree as amended in 1977 has the net effect of banning strikes and lock-outs throughout Nigeria. There is compulsory arbitration of trade disputes under the Decree which later became known as the Trade Disputes Act 1976. This Act subsequently became the Trade Disputes Act 1990 which, as disclosed before, is now the TDA. See Dada John Omoniyi, 'Strike Action and Industrial Disputes in Nigeria: The Socio-Economic Effects on National Development' in *Ekiti State University Law Journal* (2013) (5) at 116.

40. TDA, section 4(1).

41. *Ibid,* section 4(3).

42. *Ibid,* section 6 (1).

the notice the time within which any particular steps must be taken. [43]

(v)where after the expiration of the period specified in the notice issued or if no period is specified, after the expiration of 14 days following the date the notice is issued, the dispute remains unsettled and the MELP is satisfied that the steps specified in the notice have been taken or that either party is refusing to take those steps or any of them, he may proceed to exercise such of his powers, namely, appointment of a conciliator to settle the dispute under section 8 of the TDA, reference of the dispute for settlement to the Industrial Arbitration Panel (IAP) if conciliation fails under section 9 of the TDA, reference of the dispute for settlement to the National Industrial Court (NIC) under section 17 of the TDA where essential service [44] workers are a party or where arbitration would not be appropriate and reference of the dispute for settlement to a board of inquiry under section 33 of the TDA, as may appear to him appropriate. [45]

(vi) where the MELP apprehends a trade dispute, he shall inform the parties of his apprehension and of the steps he proposes to take for the purpose of resolving the dispute.[46] Such steps the MELP may take include: the appointment of a conciliator under section 8 of the TDA; or a reference of the dispute or any matter relating thereto for settlement to the IAP under section 9 of the TDA; or a reference of the dispute to a board of inquiry under section 33 of the TDA. [47]

The TDA provides in its section 18(1) (section 13(1) of the Trade Disputes Act 1976 or section 17 (1) of the Trade Disputes Act 1990) as follows:

An employer shall not declare or take part in a lock-out and a worker shall not take part in a strike in connection with any trade dispute where –

(a) the procedure specified in section 4 or 6 of this Act has not been complied with in relation to the dispute; or

(b) a conciliator has been appointed under section 8 of this Act for the purpose of effecting a settlement of the dispute; or

(c) the dispute has been referred for settlement to the Industrial Arbitration Panel under section 9 of this Act; or

(d) an award by an arbitration tribunal has become binding under section 13(3) of this Act, or

(e) the dispute has subsequently been referred to the National Industrial Court under section 14(1) or 17 of this Act; or

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43. *Ibid,* section 7(1).

44. Essential services in Nigeria include the public service of the Federation of Nigeria or of a State which shall include service in a civil capacity of persons employed in an industry or undertakings whose services are consumed by the armed forces, enterprises that supply electricity, power, water, fuel of any kind, workers in sound broadcasting or postal services, telegraphic cable or telephone communications, ports and harbour dock-workers, the Central Bank of Nigeria, the Security, Printing, and Minting Company and anybody licensed to carry-out banking business under the Banking Act. TDA, section 48(1).

45. *Ibid,* section 5(1).

46. *Ibid,* section 5(2).

47. *Ibid.*

(f) the National Industrial Court has issued an award on the reference.[48]

The TDA also provides in its section 18(2) thus:

Any person who contravenes subsection (1) of this section shall be guilty of an offence and be liable on conviction-

(a) in the case of an individual, to a fine of ₦100.00 or to imprisonment for a term of six months.

(b) in the case of a body corporate, to a fine of ₦1,000.00.

The TDA goes further to provide in its section 42(1) that:

Any employee who takes part in a strike is not entitled to any wages or other remuneration for the period of the strike and any such period does not count for the purpose of reckoning the period of continuous employment and all rights dependent on continuity of service are prejudicially affected accordingly.

Orifowomo argues that there is a loophole in the strike law above that is being exploited by workers to embark upon legal strikes. [49] The loophole, according to him, is that whereas the public policy makes strikes illegal after a dispute has been reported and is being subject to dispute settlement processes, strikes can still legally and logically occur before the disputes are reported and settlement commenced. [50]

The writer does not share the view-point of the learned writer above. His mindset is far from correct. It is submitted that there is no such loophole in the strike law above which workers can exploit to embark on a legal strike. For section 18(1) above prohibits any strike in connection with any trade dispute where the procedure specified in section 4 or 6 of the TDA has not been complied with in relation to the dispute.

Put differently, going by the provisions of section 18(1) above workers in Nigeria are prevented from embarking on strike and employers in Nigeria are prevented from imposing a lock-out where negotiations have not taken place; while negotiations or arbitral proceedings are in progress; and where industrial tribunals have finally determined the issue in controversy. The net effect of section 18(1) of the TDA is the virtual prohibition of strikes and lock-outs in Nigeria. Thus, there is no right to strike by Nigerian workers under the TDA. This is consistent with the views expressed by the leading writers on labour law in Nigeria. To be specific, Emiola states that: 'the truth is that at no point and under no circumstances can

48. The decision of the NIC is final going by section 20(3) of the TDA. But under section 20(3) of the TDA as amended by the Trade Disputes (Amendment) Decree 47 of 1992 an appeal from the decision of the NIC shall lie as of right to the CA on questions of fundamental rights as contained in chapter IV of CFRN 1999. This is also the position under section 243(2) of the CFRN 1999 as amended by the Third Alteration Act. In *National Union of Electricity Employees and Anor v. Bureau of Public Enterprises* (2010)7 NWLR (part 1194) 538 pages 544-545 the Supreme Court of Nigeria (SCN) declared Decree 47 of 1992 void on the ground that its conferment of exclusive jurisdiction in the NIC over trade disputes was to exclude the wide powers bestowed on State High Court (SHC) by section 272 of the CFRN 1999 and thereby made it inconsistent with the Nigerian Constitution. This decision is wrong as an enactment of the NA can restrict or curtail the general jurisdiction bestowed on the SHC by the Nigerian Constitution. See AE Abuza, 'Jurisdiction of the National Industrial Court in Nigeria: An Analysis of the Issues Involved' in *Ahmadu Bello University Journal of Commercial Law* (ABUJCL) (2008-2009) (4) 1 pages 23-24.

49. OA Orifowomo, 'An appraisal of the Right to Strike under Nigerian Labour Laws' in *Ife Juris Review* (2004) (1) 2 pages 380-391.

50. *Ibid*.

workers take strike action as weapon of coercion against their employer. The result is that the Nigerian worker has lost forever the right to strike.' [51]

For his part, Uvieghara argues that 'section 17(1) of the Trade Disputes Act 1990 does not leave any room for a lawful strike.' [52] He submits that its effect is to prohibit strike completely. [53] While Chianu states that 'the prevailing view remains that, any form of strike is prohibited under the TDA. [54]

The decision of Dahiru Saleh a Judge of the Federal High Court (FHC), Abuja in *Adams Oshiomhole v. Attorney General of the Federation* [55] is very instructive here. His lordship held that the January 2002 NLC strike over increase in the prices of petroleum products which said strike was politically motivated is pursuant to sections 3,4,5,6,7 and 8 of the Trade Disputes Act 1990, an act against the provisions of section 17(1) of the Act and therefore illegal. The NLC complied with the order of interim injunction issued against same by the Court and immediately discontinued the strike.

It is significant to note here that the approach of the TDA is in line with what obtains in other countries, including Ghana and Tanzania. Both countries mentioned above equally have stringent Laws relating to collective bargaining which make lawful strikes virtually impossible in these countries. For example, under the existing Law in Ghana, [56] if a trade union wishing to call a strike is locked in a labour dispute with an employer who wishes to call a lock-out, both must first inform the Minister of Employment. Strikes and lock-outs are permissible in Ghana only when the Minister above has been informed and has not referred the dispute to arbitration within four weeks.

However, as Obeng-Fosu rightly points out, there has been no occasion when the Minister above has failed to refer a dispute notified to him to arbitration.[57] Therefore, all the strikes and lock-outs that have taken place have been illegal because these industrial actions have occurred before the legal procedure had been exhausted. [58]

In a similar vein, the law relating to collective bargaining in Tanzania,[59] requires all disputes between trade unions and employers or employers' organisations to be reported to the Labour Commission before any party takes industrial action, that is, strike or lock-out. Once a dispute is referred to the Commission above, it is then transferred to the Industrial Court for adjudication. The decision of the court is final and any industrial action taken after that decision is illegal. Indeed the law in Tanzania does not allow strikes under any circumstances.[60]

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51. A Emiola, *The Nigerian Labour Law* (2nd edition) (Ibadan: Ibadan University Press, 1982) at 255. Quoted in Omoniyi, *supra* note 39 at 118.
52. EE Uvieghara, *labour law in Nigeria* (Lagos: Malthouse Press Ltd 2001), pages 388-450.
53. *Ibid*.
54. E Chianu, Employment Law (Akure: Bemicov Publication Nigeria Ltd 2004), pages 280-281.
55. [2003] Federation Weekly Law Reports (FWLR) (part 66) 554 555. See also *Vanguard* (Lagos) 17 January 2002 at 2.
56. See generally The Trade Unions Ordinance 1941 as amended and the Industrial Relations Act 1965.
57. P Obeng-fosu, *Industrial Relations in Ghana, the Law and Practice* (Accra: Ghana University Press, 1991) at 75.
58. *Ibid*.
59. See generally the Employment and Labour Relations Act 2004 of Tanzania.
60. See B Rutinwa, *Legal Regulations of Industrial Relations in Tanzania: Past Experience and Future Prospects* (Cape town: Labour Unit, University of Cape town, 1995), pages 8-16 & pages 29-32,

What flows from the foregoing is that the law in Ghana and Tanzania like the TDA above does not allow strikes under any circumstances. It must be noted here that the effective denial of the right to strike necessarily affects freedom of labour associations. [61] As a Canadian Judge pointed out: [62]

The freedom to bargain collectively of which the right to withdraw services is integral lies at the very centre of the existence of an association of workers. To remove their freedom to withhold their labour is to sterilise their association.

a) Problems of the Trade Disputes Act 2004

(i) The TDA provides for a long process of settling trade disputes in Nigeria. Infact, the Nigeria Employers

Consultative Association (NECA) complains about the long process of settling trade disputes in Nigeria.[63] Worugji states that the provision for both mediation and conciliation may cause undue delay in the settlement processes.[64] He points out, for instance, that the movement from mediation to conciliation and back to conciliation in some cases seems to undermine the nature and seriousness of some disputes.[65] For his part, Dauda [66] also maintains that the TDA allows dispute to drag for a long-time. It, specifically, allows the MELP to delay arbitration for almost three months, before final decision is taken. This is dangerous for management of industrial crisis in Nigeria. The learned author states that industrial crisis should be resolved with dispatch for organisational and national interest.

(ii) The TDA provides in its part 1 the procedure for settling only trade disputes. Section 1(2) of the TDA defines the dispute that is required to be settled in the said part 1 as the trade dispute in question. To cut matters short, the Act is silent on the procedure for settling intra and inter-union disputes in the workplace. This is unacceptable, as intra and inter-union disputes are also veritable sources of industrial unrest in Nigeria.

(iii) The TDA confers dictatorial and wide discretionary powers on the MELP. This is susceptible to abuse. Akanle rightly criticises the conferment of wide discretionary powers on public officers. [67] Under the TDA, it is the MELP that refers trade disputes for settlement to the IAP and NIC, on appeal. He may choose not to refer a particular trade dispute to IAP and NIC, on appeal where the government has vested interest and it would be unfavourable to government to do so. Furthermore, the TDA gives to the MELP the power to refer an award back to the IAP for reconsideration and shall not exercise his power to notify the

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quoted in 'XIX Article 19, Freedom of Association and Assembly-Unions, NGOs and Political Freedom in Sub- Saharan Africa' a *Report* written by Bonaventure Rutinwa published by Article 19- The Global Campaign for Free Expression, London in March 2001 at 50.

61. *Id* at 32.

62. Per JA Cameron, Re Retail Wholesale Union and Government of Saskatchewan [1965] 19 DLR (4th) 609 639, quoted in *Ibid*.

63. Ogunniyi, *supra* note 21 at 280.

64. Eme IN Worugji, 'Settlement of Trade Disputes under the Nigerian Labour Law: The Missing Links' in University of Maiduguri Law Journal [2003] (5) at 9.

65. *Ibid*.

66. YA Dauda, 'Employment of Independent Arbitrators in the Management of Trade Disputes and Industrial Crisis in Nigeria' in *NJLIR* [2007] (1) 1 pages 32-33.

67. Oluwole Akanle, 'Pollution Control Regulation in Nigerian Oil Industry' published as *Occasional Paper 16* by Nigerian Institute of Advanced Legal Studies, Lagos 1991 at 14.

parties of the award, publish a notice setting out the award and so on as well as confirm the award until the award has been reconsidered by the IAP. Of course, the award of the IAP is like a recommendation subject to the ratification or approval of the MELP. It may be okay where the government is not a party to a trade dispute. But in a situation where the government is a disputing party, it would certainly amount to the government being a judge in its own cause contrary to the nemo judex incausa sua rule under the common Law a part of received English Law in Nigeria and embedded in section 36 of the CFRN 1999 which guarantees the right to fair hearing to all Nigerians where the MELP is allowed to exercise, for example, this power of confirmation of the award of the IAP. According to Adeogun, for the IAP to retain its character as an adjudicatory body, its award should without any qualification become binding on the parties immediately upon its publication, leaving it to the parties to decide whether or not an appeal should be made to the NIC. [68]

(iv) The TDA does not allow the trade unions to select their members or representatives for conciliation and arbitration in IAP freely. Under the Act, the MELP appoints the Chairman and Vice-Chairman of IAP. It provides that four persons out of the ten members of the IAP nominated for appointment into the IAP must be nominated by the organisations appearing to the MELP as representing the interests of the employers and workers. [69] This is subjective and susceptible to abuse.

(v)The TDA does not categorically make a clear distinction between individual employment disputes and collective employment disputes. Kanyip correctly posits that the Act is only concerned with the collective employment disputes.[70] This is unacceptable as individual employment disputes, otherwise known as individual trade disputes, are also veritable sources of industrial unrest or strike by workers' trade unions. Such individual employment disputes include the mass retrenchment of workers by an employer contrary to Nigerian Labour Law.

(vi) The TDA is silent on the necessity of a notice of trade dispute being served on the government which is under a statutory duty to take steps to resolve such declared trade dispute before it could lead to a break-down of industrial peace.

(vii) There is no statutory insistence on internal disputes settlement mechanism or body in all sectors of the Nigerian economy by the Act. Worugji points out that such a body would be under a duty to report the dispute to the agency that shall have the statutory mandate to take further steps in the settlement of any dispute.[71]

(viii) The TDA is silent on the action to be taken by the MELP upon the receipt of the report of the Board of Inquiry.

(ix) The TDA is silent on the time-line within which the Board of Inquiry is to make its report. This lacuna is susceptible to misuse. It may, for instance, be capitalised upon to delay the submission of the report of the board. This, certainly, would not augur well for the system of settlement of trade disputes in Nigeria.

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68. AA Adeogun, 'Towards a Better System for Settling Trade Disputes' in *Nigerian Law Journal* (NLJ) (1976) (10) at 1.

69. TDA, section 9(2).

70. BB Kanyip ,' Trade Unions and Industrial Harmony: The Role of the National Industrial Court and Industrial Arbitration Panel' in *Nigerian Bar Journal* (NBJ) [2003] (1) 2 pages 218-235.

71. Worugji, *supra* note 64 at 9.

(x) The TDA is silent on the fate of any person who after payment of the fine upon conviction for the offence of acting in breach of the terms of a settlement signed by trade dispute parties pursuant to settlement effected by a conciliator continues to act in breach of the said terms of settlement.

(xi) The TDA does not state in its section 9(1) that upon the receipt of a report under section 8 (5) of the TDA concerning the failure of the conciliator to reach a settlement of the dispute within seven days of his appointment or that same will not be able to bring about the settlement by negotiation, the MELP shall refer the dispute for settlement to the IAP. Whereas section 9 of the TDA is titled 'Reference of dispute to arbitration tribunal if conciliation fails', section 9 (1) of the TDA provides that the MELP shall refer a dispute for settlement to the IAP upon receipt of a report under section 6 of the TDA which deals with the report of a mediator that he was unable to effect settlement of a dispute within seven days of the date on which same was appointed.

(xii) The definition of essential services in the TDA is elastic. It is wide enough to cover almost all employees in the public service. The approach of the International Labour Organisation (ILO) Committee on freedom of association is better. It considers essential services as only those services the interruption of which would endanger the life, personal safety or health of the whole or part of the whole population. Its definition in section 232(1) of the Lesotho Labour Code 1992 is in tune with the view of the Committee above. [72]

b) Solutions to the Problems of the Trade Disputes Act 2004

(a) The process of settling trade disputes in the TDA should be shortened. In order to effect a speedier machinery for settlement of disputes, the parties, as Worugji suggests, should be free to choose either mediation or conciliation so that once there is failure to reach a settlement by either method, the dispute goes straight to the IAP. [73]

(b) The procedure for settling intra and inter- union disputes should be provided for in the TDA.

(c) The dictatorial and wide discretionary powers conferred on the MELP should be expunged from the TDA to ensure the independence of the IAP and enhance the respectability of the decisions of same. [74]

(d) Trade unions of the employers and workers should be allowed to select six out of the ten members of the IAP freely. This is bound to eliminate the accusation of government's domination of the arbitration panel.

(e) The TDA should be amended to provide for the necessity of a notice of trade dispute being served on the government being the regulator of industrial or labour relations in Nigeria and which is bound statutorily to take steps to resolve such a declared trade dispute.

(f) The TDA should be amended to insist on internal disputes settlement mechanism or body in all sectors of the Nigerian economy.

(g) The TDA should be amended to provide for the action the MELP can take upon receipt of the report of the Board of Inquiry and whether or not dissatisfied parties can have a right of appeal over such action.

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72. Available at: *http://itcilo.it/259.htm,* accessed on 14 July 2009.

73. Worugji, *supra* note 71.

(h) The TDA should be amended to provide a time-line or time-frame within which the report of the Board of Inquiry is to be made.

(i) The TDA should be amended to provide that any person who after conviction in respect of the offence of acting in breach of the terms of settlement signed by disputing parties as stated above continues to fail to comply with the terms of settlement shall be guilty of a further offence and shall be liable on conviction to one year imprisonment or a fine of ₦100, 000.00 in the case of an individual or ₦200, 000.00 in the case of a body corporate for each day on which the offence continues.

(j) The TDA should be amended in its section 9(1) to provide that the MELP shall refer a dispute to IAP upon receipt of a report by the MELP under section 8(5) of the TDA.

(k) The TDA should be amended to define essential services as only those services the interruption of which would endanger the life, personal safety or health of the whole or part of the whole population such as services in the power, health and security sub-sectors of Nigeria's political economy.

ii) The Trade Disputes (Essential Services) Act 2004

Section 1(1) of the Trade Disputes (Essential Services) Act [75] empowers the President of the FRN to proscribe any trade union whose members are employed in essential services, if the President is satisfied that the union: (a) is or has been engaged in acts calculated to disrupt the economy or acts calculated to obstruct or disrupt the smooth running of any essential service or (b) has, where applicable, willfully failed to comply with the procedure specified in the Trade Disputes Act 2004 or the Act above in relation to the reporting and settlement of trade disputes.[76]

It should be noted that it was pursuant to the powers conferred on the President and HOS by the section above that the General Sanni Abacha's military regime issued the Trade Disputes (Essential Services Proscription) Order of 1996 which proscribed the Non-Academic Staff Union of Educational and Associated Institutions (NASU), ASUU and the Senior Staff Association of Universities, Teaching Hospitals, Research Institutes and Associated Institutions (SSAUTHRIAI) all trade unions in the universities of Nigeria. A germane point to stress is that the Trade Disputes (Essential Services Deregulations, Proscription and Prohibition from Participation in Trade Union Activities) Decree 24 of 1996 considers members of these unions engaged in teaching and the provision of educational services in tertiary institutions as rendering essential services. [77] In this way, the Abacha's regime extended the label 'essential services' to include all workers of Nigerian Universities in its bid to mussle ASUU and other protesting sister unions.

Otobo correctly points out that Nigeria has the widest definition of essential services on account of its politicisation by successive military regimes which since the mid – 1970s

74. Ogunniyi, supra note 63 at 349.

75. Cap T9 LFN 2004. It was first enacted in 1976 as Trade Disputes (Essential Services) Decree 1976. The Decree later became the Trade Disputes (Essential Services) Act 1976 and subsequently became the Trade Disputes (Essential Services) Act Cap 433 LFN 1990.

76. In *National Union of Electricity Employees v. Bureau of Public Enterprises,* supra note 48 the SCN held that the Act was a piece of legislation reasonably justifiable in a democratic society and made to protect the interest of public safety and order and therefore not inconsistent with section 40 of the CFRN 1999 which guarantees the right to freedom of association to all Nigerians.

77. See Preamble of the Decree.

expected the classification itself to be a sufficient anti-strike medicine instead of more sensible and compensation policies. [78] This situation is unacceptable. Aside from limiting the number of workers permitted to adopt the strike option, it also discourages many Nigerians from picking up appointments in the public service.[79]

a) Problems of the Trade Disputes (Essential Services) Act 2004

i. The Act confers wide discretionary powers on the President of the FRN in its section 1 (1). This is susceptible to misuse. As earlier disclosed, Akanle rightly criticises the conferment of wide discretionary powers on public officers. For instance, the President may seek sanctuary under the provision above to proscribe any trade union that is opposed to unpopular policies of the government such as the hike in the pump prices of petroleum products and mass retrenchment of workers, amongst others.

ii. Non-compliance with the provisions of the TDA with respect to reporting and settlement of trade disputes is a crime under the TDA for which the offenders shall be penalised with terms of imprisonment and or fines as the case may be. To proscribe a trade union on the ground of non-compliance as stated in the Act when same is already liable to be penalised under the TDA offends the rule against double jeopardy.

b) Solutions to the problems of the Trade Disputes (Essential Services) Act 2004

(a) The wide discretionary powers conferred on the President in section 1(1) of the Act should be expunged from same. The exercise of the powers of His Excellency to proscribe a trade union for acts capable of disrupting the smooth running of the Nigerian economy should be made subject to the approval of the Senate of the National Assembly of Nigeria.

(b)Non-compliance with the provisions of the TDA with respect to reporting and settlement of trade disputes as one of the grounds for the proscription of a trade union should be expunged from the Act.

iii. The Trade Unions Act 1990

The TUA, as disclosed before, was first enacted in Nigeria as the Trade Unions Ordinance in 1938. It later became the Trade Unions Decree 31 of 1973 and subsequently became the TUA. Paragraph 14 in the first schedule to the TUA is to the effect that a trade union shall provide in its Rules book or Constitution a provision that no member of the union shall take part in a strike unless a majority of the members have in a secret ballot voted in favour of the strike. On 30 March 2005, the Trade Unions (Amendment) Act (TUAA) 2005 was enacted under the civilian administration of Olusegun Obasanjo to further amend the TUA. The TUAA 2005 amended section 30 of the TUA as follows:

30(6) No person, trade union or employer shall take part in a strike or lock-out or engage in any strike or lock-out or engage in any conduct in contemplation or furtherance of a strike or lock-out unless:

(a) the person, trade union or employer is not engaged in the provision of essential services.

(b) the strike or lock-out concerns a dispute that constitute a dispute of right;

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78. See D Otobo, 'The Generals, NLC and Trade Union Bill'. Available at: *http:// www.nigerdeltacongress.com/garticle,*accessed on 30 January 2012.

79. *Ibid.*

(c) the strike or lock-out concerns a dispute arising from a collective and fundamental breach of contract of employment or collective agreement on the part of the employee, trade union or employer;

(d) the provisions for arbitration in the Trade Disputes Act Cap 432 laws of the Federation of Nigeria, 1990 have first been complied with; and

(e) in the case of an employee or a trade union, a ballot has been conducted in accordance with the rules and constitution of the trade union at which a simple majority of all registered members voted to go on strike.

(7) any person, trade union or employer who contravenes any of the provisions of this section commits an offence and is liable on conviction to a fine of N10, 000.00 or six months imprisonment or to both the fine and imprisonment.

(8) the provision for arbitration in the Trade Disputes Act Cap 432 Law of the Federation of Nigeria, 1990 shall apply in all disputes affecting the provision of essential services and the determination of the National Industrial Court in all such disputes shall be final.

(9) for the purpose of this Act,

(a) 'Disputes of right' means any labour dispute arising from the negotiation, application, interpretation of a contract of employment or collective agreement under this Act or any other enactment or law governing matters relating to terms and conditions of employment.

(b) 'Essential Services' shall be as defined in the first schedule to the Trade Disputes Act Cap 432 Laws of the Federation of Nigeria, 1990.

It can be seen clearly from the foregoing provisions that workers in essential services are totally prohibited from embarking on strike. They are required to adhere to the provisions for arbitration in the TDA in all disputes affecting the provision of essential services and the determination of the NlC in all such disputes shall be final.

a) Problems of the Trade Unions Act 1990

(i) The Act prohibits almost all public sector workers from embarking on strike going by the definition of essential services in section 48(1) of the TDA.

(ii) The Act creates the false impression that non-essential service workers can embark on strike where the strike concerns a dispute of right or a dispute arising from a collective and fundamental breach of contract of employment or collective agreement on the part of the employee, trade union or employer. But a critical perusal of section 30 (6) – (9) of the TUA as amended by the TUAA would reveal that any such strike can only be embarked upon after complying first with the provisions for arbitration in the TDA. Put differently, compulsory arbitration before the IAP is a condition precedent to such strike. It should be recalled here that the TDA makes it a crime for any person to disobey the award of the IAP as confirmed by the MELP. [80] Where there is an appeal against the award of the IAP to the NIC, the decision of the NIC is final save on questions of fundamental rights contained in chapter IV of the CFRN 1999 [81] and it is a crime to embark on strike thereafter under section 18(2) of the TDA. Evidently, the compliance with the provisions for arbitration means workers cannot embark on strike. The net effect of section 30(6) of the TUA as amended by the TUAA 2005, in actual fact, is the ban on strikes in Nigeria.

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80. TDA, section 14(4).

81. CFRN 1999 as amended by the Third Alteration Act, section 243 (2) & (3).

(iii) The Act makes use of the term-'labour dispute' but fails to define same. Thus, it is not clear what the Act means by the term above.

(iv) The Act is silent on how the simple majority votes of all registered members of a trade union should be obtained in order to embark on a strike. Is it that all registered members of a trade union, for example ASUU, must be gathered in a hall in order for the ballot to be conducted or that such ballot should be conducted and votes of registered members taken at the branches of the trade union, for example Delta State University Branch of ASUU? This situation is unacceptable.

(v) The Act as amended by the TUAA 2005 prohibits 'any conduct in contemplation or furtherance of a strike' in its section 30(6). Albeit, section 42(1) of the TUA which guarantees the right of workers to peaceful picketing is still intact. Regardless, section 30(6) above has by implication banned peaceful picketing in Nigeria. Picketing is a conduct engaged in by workers in contemplation or furtherance of a strike. Workers certainly do not picket while working conscientiously. They picket only in furtherance of a strike.[82] The provision of section 30(6) above to the extent that it prohibits 'any conduct in contemplation or furtherance of a strike or lock-out' is inconsistent with sections 39 and 40 of the CFRN 1999 which guarantee the right to freedom of expression and right to peaceful assembly and association, respectively. TUAA 2005 is therefore void to the extent of its inconsistency with the CFRN 1999. This contention is fortified by an insightful provision in section 1(3) of the CFRN 1999 and the decision of the Nigerian Court in *Efunwape Okulate v. Gbadamasi Awosanya.* [83]

b) Solutions to the problems of the Trade Unions Act 1990

(a) The Act should be amended to prohibit totally only public sector employees in the health, power and security sub-sectors of Nigeria's political economy from embarking on strike.

(b) The Act should be amended to make arbitration voluntary for workers in non-essential services.

(c) The Act should be amended to provide for a right of workers in non-essential services to strike subject to minimum service to be agreed upon by trade unions of both workers and employers. This is consistent with the approach in other countries. It should be recalled that on 2 August 2007 the NA of France passed a new law requiring striking public transport workers to maintain a minimum level of service.[84]

(d) The Act should be amended to define labour dispute.

(e) The Act should be amended to explain how the simple majority votes of members of a trade union should be obtained in order to embark on a strike.

(f) The provision in section 30(6) of the TUA as amended by TUAA 2005 which prohibits 'any conduct in contemplation or furtherance of a strike' should be expunged from the Act.

iv) The National Industrial Court Act 2006

NICA 2006 in its section 7(1) confers on the NIC exclusive original jurisdiction over-all labour and employment related matters. Under section 7(1) (b) of the Act, the NIC is the

82. Chianu, *supra* note 54 at 284.

83. [2000] Federation Weekly Law Reports (FWLR) (part 25) 1666 1671.

84. Available at: *http: www. org/. / sark-a /shtm*, accessed on 14 July 2009.

organ imbued with authority to grant any order of injunction to restrain any person or body from taking part in any strike, lock-out or any industrial action, or any conduct in contemplation or in furtherance of a strike, lock-out or any industrial action. The approach of the NICA 2006 is in tune with the practice in some other countries. For instance, in India the National Industrial Relations Court is bestowed with the authority to grant injunctions if necessary to prevent injurious strikes. [85]

A relevant Nigerian case here is *African Petroleum Public Limited Company v. Francis Fola Akinnawo* [86] where Honourable Justice Olukayode Ariwoola, JCA delivering the Leading

judgment of the CA to which the other two justices of the CA who sat in the case concurred declared that the implication of conferring exclusive jurisdiction in trade disputes or labour matters on the NIC by the NICA 2006 is to exclude the wide powers of the SHC, thereby resulting into a conflict with the provisions of the CFRN 1999.

Although, the learned Justice Ariwoola did not declare NICA 2006 null and void for being inconsistent with the CFRN 1999, His Lordship seemed to have held that the Act was null and void to the extent of its inconsistency with the provisions of the CFRN 1999. The writer has resentment about the judgment of His Lordship. A major criticism to note is that the Honourable Justice failed to avert his mind to the fact that an enactment of the NA, as disclosed before, can curtail or restrict the general Jurisdiction bestowed on the SHC by the CFRN 1999.[87]

a) Problems of the National Industrial Court Act 2006

(i) The Act establishes the NIC as a superior court of record (SCR) in Nigeria. This was contrary to section 6(5) of the CFRN 1999 which listed the courts that had SCR status in Nigeria. The NIC was not one of the courts listed in the section above. It was the enactment of the Third Alteration Act that became the saving grace as it amended the CFRN 1999 to list in its section 6(5) (cc) the NIC as a SCR.

(ii) The Act does not confer on the NIC jurisdiction to try criminal matters which relate to trade or labour disputes and or arise from any of the civil causes or matters for which jurisdiction has been conferred on the NIC. Under the NICA regime, the power to commit for contempt is the only criminal jurisdiction conferred on the NIC in its section 10. Good enough, the concern raised above has been taken care of by the Third Alteration Act which amended the CFRN 1999 to confer jurisdiction on the NIC over criminal matters as stated above. [88]

(iii) The Act does not provide any time-line within which the NIC is to give its decisions. Under section 20(2) of the TDA, the NIC has 30 working days to determine any trade dispute from the day it begins to consider same. This provision was repealed by NICA 2006 in its

85. See Indian Industrial Relations Act 1971, chapter 72. Also available at: *http://en.m.wikepedia.org/industrial relations,* accessed on 14 August 2014.

86. [2012] NWLR (part 1289) page 100 at 105.

87. See, for example, section 251 (1) (s) of the CFRN 1999 which authorities the NA, by an enactment, to confer on the FHC such jurisdiction, civil or criminal and whether to the exclusion of any other court or not. See also EE Uvieghara, Nigeria Labour Law: The Past, Present and Future' in *Inaugural Lecture Series,* University of Lagos Press 1987 at 45, quoted in OD Ejere, 'The High Court's Jurisdiction to Hear and Determine Inter or Intra Union Dispute is not completely ousted by the Trade Disputes Act as amended and the 2006 NIC Act' in *NJLIR* (2007) (1) 2 at 65.

88. See CFRN 1999 as amended by the Third Alteration Act, section 254 C (5).

section 53 without providing any time-line within which the NIC is to determine any labour dispute. Thus, the NIC was not obliged to deliver its decisions not later than 90 days after the conclusion of evidence and final addresses as enjoined by section 294(1) of the CFRN 1999 since it was not one of the courts created by the Nigerian Constitution. Good enough, this problem has been taken care of by the Third Alteration Act which amended the CFRN 1999 to list the NIC as one of the courts created by the Constitution above. In this way, the court is now required to deliver its decisions in writing not later than 90 days as stated above.

v) The Constitution of the Federal Republic of Nigeria 1999

The CFRN 1999 came into force on 29 May 1999. On 4 March 2011, the Third Alteration Act was enacted under the civilian administration of President Goodluck Jonathan to further amend the Nigerian Constitution. The Constitution re-establishes the NIC with both civil and criminal jurisdiction.[89] It vests on the NIC exclusive original jurisdiction in all labour and employment related matters. [90] The Constitution emphasises that the NIC shall be a SCR [91] and have all the powers of a High Court (HC).[92]

Section 254 C (1) of the CFRN 1999 as amended by the Third Alteration Act like section 7(1) (b) of NICA 2006 empowers the NIC to grant an order of injunction restraining a strike, lock-out or any industrial action, or any conduct in contemplation or in furtherance of a strike, lock-out or any industrial action. It was based on the provision above that the NIC granted an order of interim injunction on 6 January 2012 restraining the NLC, TUC and their affiliates from embarking on an indefinite nation-wide strike and mass protest starting from 9 January 2012 over the increment in the pump price of fuel from ₦65.00 to ₦141.00 per litre on 1 January 2012 by the President Goodluck Jonathan's administration.[93]

a) Problems of the Constitution of the Federal Republic of Nigeria 1999

(i) The Constitution avoids the use of the term-'labour dispute.'

(ii) The Constitution makes use of the terms-'trade dispute', 'trade union dispute' and 'employment dispute' but fails to define these terms. [94]

(iii) The Constitution excludes non-legal practitioners sitting as judges of the NIC. [95] This is unlike the position under the NICA regime where the Court is made up of both legal and non-legal practitioners.[96] the absence of non-legal practitioners such as professional civil servants or expert industrialists in the membership of the NIC is of grave concern. Industrial relations matters, in actual fact, are not strictly legal matters to be left alone to legal practitioners to handle.

(iv) The Constitution unlike the NICA 2006 is silent on the fate of labour disputes pending before the regular courts at the time of the amendments introduced by the Third

89. CFRN 1999 as amended by Third Alteration Act, section 254 A (1).

90. *Ibid*, section 254 C (1). See also the decision of the Nigerian CA in *Nigeria Union of Teachers (NUT), Niger State v. Conference of Secondary School Tutors(COSST), Niger State Chapter and 15 Ors* [2012] 10 NWLR (part 1307) page 89 at 114.

91. *Ibid,* section 6(5) (cc).

92. *Ibid,* section 254 D (1).

93. *The Guardian* (Lagos) 10 January 2012, pages 1 & 2.

94. See CFRN 1999 as amended by the Third Alteration Act, section 254 C (1).

95. See *Ibid*, section 254 B (4).

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

Alteration Act. In this way, the regular courts can continue to handle cases on labour disputes.

(v) The Constitution gives to the NIC a period not later than 90 days after the conclusion of evidence and final addresses to give its written decisions. This time-frame is too long. The Court is expected to be a speedier machinery for the resolution of industrial crisis in Nigeria.

b) Solutions to the problems of the Constitution of the Federal Republic of Nigeria 1999

(a) The Constitution should be amended to warmly embrace the term-'labour dispute' as well as provide for the definition of same.

(b) The Constitution should be amended to provide for the definition of the terms- 'trade dispute', 'trade union dispute' and 'employment dispute'.

(c) The Constitution should be amended to provide that in addition to the requirement of being a legal practitioner for at least ten years, a holder of the office of a judge of the NIC must be a professional civil servant or expert industrialist. In the alternative, the position under NICA 2006 where there are both legal and non-legal practitioner judges constituting the membership of the NIC should be retained. This is in tune with what obtains in other countries, including Trinidad and Tobago[97] and Britain.[98]

(d) The Constitution should be amended to provide that prior to the commencement of section 254 C (1) above any action in court inconsistent with the terms of the section above shall abate and be null and void.

(e) The Constitution should be amended to give to the NIC a period not later than 60 days within which its written decisions must be given after the conclusion of evidence and final addresses. This is in consonance with the approach adopted in section 285 (7) of the CFRN 1999 as amended by the Constitution of the Federal Republic of Nigeria (First Alteration) Act 2010 where the appellate court hearing an appeal from the decision of an election tribunal is given 60 days from the date of delivery of judgment of the tribunal within which to hear and determine the appeal.

VII. ARE THE STATUTORY LAWS ON REGULATION OF STRIKES IN NIGERIA EFFECTIVE?

The question above is the last issue that would elicit the response of the writer. Every statutory law has an aim or intended effect. It's effective where the aim or intended effect has been met. Thus, the expression 'effectiveness of the functioning of Law' means the compatibility of the intended and realised effects of legal regulations.[99] Gasiokwu, for one, points out that effectiveness of law '… is the resultant effect of the influence of law in society'.[100] This is characterised by the relationship between factual result of the functioning of legal norms and those social aims for which the legal norms were created.[101] The aim or

97. See AE Abuza,'An Examination of the Jurisdiction of the National Industrial Court in Nigeria' in NJLIR [2008](2) 4 at 23.

98. See Tom Harrison, *Employment Law* (Sunderland Tyne and Wear: Business Education Publishers Ltd 1999), pages 9-10 and Inns of Court School of Law *Employment Law and Practice* (4th edition) (London: Blackstone Press Ltd 2000), pages 20-21.

99. See Adams Podgorecki, *Law and Society* (London: Routledge and kegan Paul, 1974) at 249.

100. MOU Gasiokwu, *Sociology of Law* (Uwani-Enugu: Chenglo Ltd 1999) at 84.

101. *Ibid*.

intended effect of these statutory laws on regulation of strikes in Nigeria is to stop the menace of incessant strikes in Nigeria. Inspite of the fact that some of these laws have been existing in Nigeria's statute books for more than 35 years now, the menace of incessant strikes still continues unabated. As earlier disclosed, hardly two weeks go by in Nigeria without a report or incidence of strike. All these boil down to the fact that these laws have not been effective. The factors responsible for the ineffectiveness of these laws are as follows:

(i) defective transmission of knowledge about the laws. Many workers and their leaders in Nigeria are oblivious of the existence of these laws. Legal precepts cannot be effective if same remain socially unknown.[102] There is need to step up public enlightenment campaigns geared toward educating the mass of the workers and their leaders on the dangers associated with strikes. The Radio and Television gingles, warning against such dangers are steps in the right direction. These must, nevertheless, be complemented by the issuing of leaflets, pamphlets and other materials which must be written in the different local languages in Nigeria. The services of town criers must also be secured to give information on such dangers.

(ii) degree of understanding of these statutory laws is low. These laws are couched in high sounding English legal terminologies that are not straight-forward. In this way, the laws are not well understood by the majority of the workers and their leaders. These laws should be simplified by re-drafting same in simple, correct and straight-forward English language. In addition, these laws should be re- drafted in the different local Nigerian Languages to realise full comprehension of same.

(iii) ineffectiveness of legal institutions created to execute these laws. The functioning of law cannot be separated from the institutions which execute the law. The efficient working of these institutions, leads to the effects intended by Parliament. On the contrary, the inefficient working of these institutions, that is, delay, deficient and over complex procedures, vagueness as to competence, inappropriate facilities, lack of experts, a tendency towards biased decisions or even bribery in extreme situations, has the result of hardly realising the legislative objectives.[103] It may be necessary to mention here the Executive and Judicial branches of government. There is lack of enthusiastic enforcement of the statutory laws by the Police and other regulatory bodies of the former. This may stem from the lack of sufficient political will on the part of the former to prosecute and punish strikers as required by the law. Despite numerous incidence of strike in Nigeria, there are only a few cases [104] where the violators of the law have been successfully prosecuted and penalised even though there have been many reports of arrest of strikers and or their leaders. Infact, there has not been known of a single successful prosecution of the strikers for disobedience of court injunctions on strike. [105]Again, each time workers in Nigeria embark on strike the Executive branch of government often times threatens to apply the rule of 'no work no pay' contained in section 43(1) of the TDA. But after the strike is eventually suspended or called-off, the strikers are allowed to earn their full pay without any deduction. The 9-16 January 2012 'protest strike' on fuel

102. *Id* at 85.

103. *Id* at 88.

104. Note that 11 employees of National Electric Power Authority (NEPA) were tried by the Miscellaneous Offences Tribunal under the Special Tribunal (Miscellaneous offences) Decree 20 of 1984 for causing a nation-wide black-out by going on strike in September 1988. The Tribunal sentenced them to life imprisonment. This sanction produced ripples among the populace and led to popular demand for their release. The jailed employees were later released after spending 24 months in jail. See Ogunniyi, *supra* note 74 at 345.

subsidy removal is a noteworthy example in this regard. A wise suggestion to make here is that these laws need to be enthusiastically enforced so that their deterrent value can be appreciated. The greatest problem militating against the effective discharge of the duties of the Police and other law enforcement officers has to do with corruption. The Police in Nigeria are well known for collection of bribe. [106] Little wonder, it has been posited elsewhere that the police has failed the nation. [107] Corrupt enforcement officers must be made to face the full wrath of the law. The Judiciary is also afflicted with this disease called 'corruption'. Some of the Judges in Nigeria take bribe. Joseph Daudu a Senior Advocate of Nigeria (SAN) and former President of the Nigerian Bar Association (NBA) states that 'there is a growing perception backed by empirical evidence that justice is purchasable and it has been purchased on several occasions in Nigeria.[108] Besides, most of the judges are members of the ruling capitalist class. They administer justice according to the capitalist jurisprudence and they exist to ensure that everybody conforms to the requirement of bourgeois law which seeks to preserve and defend the prevailing capitalist relations.[109]

(iv) low degree of socialisation. The degree of respect for legal norms is determined by the degree of socialisation. Where a group or an individual accepts the norms of the given legal system to a high degree, no supplementary motivations such as promise of profit or fear of punishment are necessary to secure the behaviour defined by the norms. The degree of socialisation in criminal law is expressed by avoiding unlawful behaviour. [110] Strike is an unlawful behaviour as declared by Nigerian statutory laws and case-laws. This unlawful behaviour is on the rise in recent times. All agencies of socialisation must re-double their efforts to socialise both old and new members of the Nigerian working class on the dominant legal norms.

(v) lost of confidence in the Executive and Legislative branches of government. Most Nigerians, particularly the working people have lost confidence in these governmental organs. Despite the abundant natural resources of Nigeria, there is little or nothing to show for same. Indeed, most workers are denied the enjoyment of basic amenities of life. Above all, their wages or salaries are insufficient to meet their needs. This has engendered a situation of anomie. Sometimes, workers engage in strikes to register their dissatisfaction with the system. Strike is linked to anomie. Those involved may have down tools since the State can no longer guarantee their survival and happiness. The 9-16 January 2012 'protest strike' on hike in fuel

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105. Note that despite an interim injunction granted by Babatunde Adejumo, President of NIC against the 9-16 January 2012 'protest strike' by NLC and TUC over hike in the pump price of fuel from ₦65.00 to ₦141.00 per litre on 1 January 2012, the NLC and TUC proceeded with the 'protest strike'. Yet Abdulwaheed Omar and Peter Esele, both leaders of the two federations of trade unions were not imprisoned for contempt of the court by the NIC. See *The Guardian* (Lagos) 10 January 2012, pages 1 & 2.

106. See *The Guardian* (Lagos) 7 August 2005 at 1.

107. *Sunday Diet* (Lagos) 28 December 1997 at 30.

108. *Vanguard* (Lagos) 20 September 2011, pages 5-6. Note that the pervasion of justice by Judges has been on since the emergence in society of classes-from Marxian perspective. Prophet Amos, infact, condemns this act of bribe-taking by Judges. See Book of Amos, Chapter 5 verses 7 and 12 in the Christian Holy Bible-New International Version (NIV) (Colorado Springs: International Bible Society 1984), pages 646-647.

109. See generally Ola Oni, Towards a Socialist Political System for Nigeria (Ibadan: Progress Books Ltd 1986). Quoted in Abuza, *supra* note 30 at 276.

110. Gasiokwu, *supra* note 103.

price is a noteworthy example in this regard. Both organs above must rise to the challenge of faithfully discharging their constitutional responsibilities to Nigerian workers in particular and the entire citizenry in general.

(vi) inadequate sanctions. As disclosed before, many of the statutory laws on regulation of strikes provide penalties which are not stiff to deter non- compliance with provisions of same on settlement of trade disputes.

VIII. OBSERVATIONS

It is clear from the foregoing reflection on regulation of strikes in Nigeria that the statutory laws on regulation of strikes have been ineffective in tackling the menace of incessant strikes. Thus, governmental efforts to tackle the menace of incessant strikes as represented by these statutory laws have not yielded the desired results. The menace of incessant strikes poses a grave danger to the survival of Nigeria's nascent democracy. It has not only undermined, but also impeded Nigeria's practice of democracy. Also, it has impacted negatively on the country's system of economic management. Of course, the menace of incessant strikes has capacity to impact negatively on political and economical stability. Instability in Nigerian politics and economics would discourage both foreign and domestic investments in Nigeria's economy. This is bound to stall economic growth without which there can be no economic development. In this way, the goal of Nigeria to be a global economic player in the year 2020 would be a mirage.

The ineffectiveness of Nigerian statutory laws on regulation of strikes may be attributable to so many factors, including non-compliance by workers' trade unions and federations of trade unions with the statutory laws on regulation of strikes, lack of enforcement of Nigerian statutory laws on regulation of strikes by the government and inadequate sanctions, amongst other short-comings in these statutory laws.

One thing which is very apparent is that legal solution is not the anti- dote to the menace of incessant strikes in Nigeria. Experience in Nigeria as in other countries, has been that whatever the law may say it cannot suppress spontaneous cessation of work by employees in order to compel the employer to concede some new terms of employment. [111]The stance of Freund and Hepple on the matter is very instructive. According to them '… workers will go on strike whatever the law says about it … no government however strong can suppress concerted stoppages of work'. [112]Akpan's expression is even more pungent. He declares that:

> Let the punishment be capital, workers will continue to exercise (the right to go on strike), after all (sic), the freedom of workers to even combine was acquired through toil and blood bath. Let the workers who exercise this right be tied to the stakes and burnt, the right to strike will always arise from the ashes of their own holocaust. [113]

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111. E Chianu, 'Effect of Strikes on Individual Employment Contracts' in *Modus International Law and Business Quarterly* (MILBQ) (1997) (2) 3 pages 20-26.

112. Khan O Freund and Hepple, Law against Strike (London: Fabian Research Series 1972), quoted in Hakeem Ijaiyi, 'The Legal Rights and Obligations of Doctors in Nigeria' in *Nigerian Bar Journal* (NBJ) (2003) (1) 4 at 582.

113. Akpan , 'Right of Workers' 71, quoted in Chianu, *supra* note 54 at 285.

What all these boil down to is that legal and non-legal solutions to the problem of non-compliance with the Nigerian statutory laws on regulation of strikes by worker's trade unions and federations of trade unions in Nigeria must be found with a view to the enthronement of industrial harmony in Nigeria a condition precedent to the realisation of the Transformation Agenda of the President Goodluck Jonathan-led FGN for the over-all socio-economic development of Nigeria.

IX. RECOMMENDATIONS

The bane of statutes is inadequate enforcement of these statutes. Labour statutes are no exceptions. A critical recommendation that is worthy of note is that failure to enforce statutory laws on regulation of strikes should be seriously and urgently addressed by the Nigerian government. This is necessary so as not to create the impression that the Nigerian government itself is not serious with the extermination of the menace of incessant strikes from Nigeria's body polity. Amongst other critical recommendations are: [114]

(i) there is need for statutory insistence on internal dispute resolution mechanism in both private and public sectors of Nigeria's political economy. To this end, the TDA should be amended to insist on such internal dispute resolution body as stated above. This is in consonance with the practice in other countries. For example, in India statute provides for the establishment of an internal disputes settlement body called the 'Works Committee' in any industrial establishment in which one hundred or more workmen are employed. [115]

(ii) the statutory laws on regulation of strikes should be amended to provide for stiff penalties so as to deter non-compliance with or disregard for the provisions of same.

(iii) workers and employers in Nigeria should embrace mediation, conciliation, arbitration and adjudication in resolving trade disputes.

(iv) the government and employers in general must learn to implement collective agreements.

(v) workers and employers in Nigeria should imbibe the practice of prompt and fruitful dialogue devoid of issuing of commands or orders in resolving trade disputes.

(vi) the government and employers in general must discontinue the practice of calling workers to dialogue with same after taking unilateral decisions affective the welfare of workers

(vii) the IAP and NIC as creations of statutes should be neutral and independent in the discharge of their statutory responsibilities and avoid a situation where a party alleges partially or corruption against same in order to gain respectability.

(viii) organisations of workers and employers should be involved in the formulation and implementation of policies and programmes of government.

(ix) government must strive towards the provision of basic amenities of life to the

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114. For details on these critical recommendations on the menace of incessant strikes, see Abuza, *supra* note 9 pages 97- 98.

115. See Indian Industrial Disputes Act 1947 as amended by the Industrial Disputes (Amendment) Act 1965, section 3(1) & (2). Also available at: *http://www.advocatehoj.com/library/bareac,* accessed on 14 August 2014. The 1947 enactment above is the main legislation dealing with the investigation and settlement of all industrial disputes in India.

workers, including food, housing, transportation, electricity, potable water and health services at cheap and affordable prices.

(xi) government must take urgent measures to tackle rising poverty, bribery and corruption, amongst public officers, insecurity and decay in infrastructures. It is correct to aver that 'strikes are merely symptoms of more fundamental adjustments, injustice and economic disturbances; treating symptoms rarely reaches the roots of the disease….' [116]

(xii) government and employers in general must learn to address workers' grievances promptly rather than waiting till the last minute before taking panicking or 'Fire brigade' measures such as obtaining order of interim injunction from the court to halt strikes.

(xiii) workers must position themselves toward higher productivity as salaries and allowances are bound to rise naturally with increase in national wealth arising from higher productivity.

(xiv) workers must refrain from making unreasonable or unrealistic demands.

(xv) workers must elect credible persons as leaders of their unions. The emergence of union leaders who are prepared to sell workers' rights for mere 'pot of porrage' must be discouraged. The circumstances surrounding the suspension of the 9-16 January 2012 'protest strike' by NLC and TUC suggest that the labour leaders had sold out. [117] It should be recalled that Esele was appointed by President Goodluck Jonathan into the Petroleum Investment Board on 17 January 2012 few hours after the 'protest strike' was suspended by organised Labour [118]

(xvi) workers must work very hard towards the formation of a genuine Labour Party that would take over political power from the ruling capitalist class whose members have perpetrated exploitation, oppression and other acts inimical to the interests of Nigerian workers. The aspiration of workers to produce the President of the FRN must be given the highest consideration it deserves. A sense of belonging is likely to be the outcome when a member of the new Labour Party emerges as the next country's President. This would certainly make the average worker to be committed to the Nigeria project. Of course, with a labour government fully in charge of Nigeria's political economy, the incidence of strike is bound to reduce significantly. For such a government would work assiduously towards the extermination of workers exploitation, casualisation of workers and other numerous economic challenges currently being experienced by Nigerian workers. [119] It is, however, skeptical whether workers' candidates would emerge triumphant at polls in view of the bourgeois nature of Nigerian politics or elections and the fact that electoral malpractices such as rigging, snatching of ballot boxes and papers at gun point as well as falsification of election results substantially determine victory at the polls. President Goodluck Jonathan's regime must institute genuine political or electoral reforms that would herald free, fair and credible elections in Nigeria. All efforts must be made to discourage Nigerian workers from adopting

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116. CW Doten, quoted in JP Casey, 'The Injunction in Labour Disputes in fire' in *International and Comparative Quarterly* (ICQ) (1968) (18) page 347 at 385, note 53, quoted in Chianu, *supra* note 54 at 276.

117. Tunji Braithwaite and other human right activists alleged that labour betrayed Nigerians. *The Guardian* (Lagos) 17 January 2012at 5.

118. Available at: *http://www.nairaland.com/848258/tucpresid...,* accessed on 14 July 2012.

119. Abuza, *supra* note 114.

revolutionary approach in tune with the 1917 'Boshevik' or workers revolution in Russia, 1949 Chinese revolution and 1959 Cuban revolution to address grievances against employers. A level playing ground must be provided for all candidates at elections. The situation where party nomination forms for the offices of Governor and President are sold for between ₦20 and ₦30 million, whether such sums are contributed by pseudo and corrupt friends or associates must be condemned. Also, the idea of anointment or endorsement of candidates at elections whether by the National Working Committee or Governors of a political party must be jettisoned very fast. Candidates vying for elective positions must be allowed to contest elections at little expense otherwise Nigeria might be seen to be operating aristocracy, that is, government of the rich or bourgeoisie instead of democracy that is approved by the Nigerian Constitution.[120]

X. CONCLUSION

This article has reflected on the regulation of strikes in Nigeria and has also identified short-comings in the various laws considered. It has also discussed the causes of incessant strikes and effects of strikes in Nigeria. It has equally highlighted the practice in some other countries and made suggestions and recommendations, which if implemented would engender a brighter prospect for the regulation of strikes and constitute a devastating blow to the hydra-headed problem of incessant strikes in Nigeria and consequently lead to the enthronement of industrial harmony desired passionately or greatly by Nigerians for the socio-economic development of their country.

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120. See, for example, section 14(1) of the CFRN 1999 which declares that the Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice.

ANNALS OF JUVENILE JUSTICE IN INDIA: PROLOGUE TO THE TRAVELOGUE

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ANSHU MISHRA**

'The child is the father of the man'[1]

ABSTRACT : Juvenile delinquency is a serious concern in India. It ruins the future of the young lives of hundreds. The year 2015 marks the most eventful in the field of juvenile justice system in Independent India. The Indian Parliament has passed *the Juvenile Justice (Care and Protection of Children) Act,* 2015 in the wake of the Delhi Gang Rape. The long title of the Act is self-explanatory and refers to the responsible reasons behind the new enactment.[2] It has replaced the earlier juvenile delinquency law. However, rapid changes in socio-economic life, unprecedented stress on materialistic culture, the rapid increase in social mobility, and weakening of the traditional means of social control are also responsible, to some extent, for the rise of juvenile delinquency in India. Like other countries of the world, in India too, children commit the offences. Crimes committed by children have increased from 1% to 1.2%.[3] The growing recognition of the need for national and international crime policies to be based on sound knowledge has led to evaluate criminal policies and to improve them for measuring the criminal behavior of juveniles. The present paper examines the concerns of the law to fulfil the purpose of Restorative Justice and to understand the ontological dimensions of the conception of 'juvenility by revisiting reforms in the 'juvenile justice system.'

KEY WORDS : Juvenile delinquency, Juvenile Justice System, the Indian Penal Code, Restorative justice

I. INTRODUCTION

The problem of Juvenile delinquency is omnipresent and becoming more complicated day by day. The pace of industrialization and urbanization has affected awkwardly in masses to the children in all over the world. A child is born with innocence and he/she should be nurtured with tender care and attention to grow in a positive environment. The physical,

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1. William Wordsworth, *My Heart Leaps Up* (collection in his famous poem).
2. An Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, herein under and for matters connected therewith or incidental thereto.
3. Crime in India, National Crime Records Bureau, MHA, GOI, New Delhi, 2014 and 2015.

mental, moral, and spiritual development of the children make them capable of realizing their fullest potential while performing their responsibilities in the society. This learning process starts right from the family. Children are the pillars of a progressive society and considered the future builders of the modern world. The new era of information technology and scientific advancement has indulged people more and more in outer space that has diverted the proper attention of family members from their responsibility towards the children. It has resulted in the dissolution of the family and negligence of children. With the fast-changing socio-economic scenario, higher aspirations among the youth, and the increasing participation of women in the workforce, roots of the traditional joint family system has been eroding very fast the character of children. When the family system becomes dysfunctional, it is at risk for juvenile. The family helps in learning and provides optimum environment to the children.

But, unfortunately, the child is becoming the main victim of such a developmental process that is taking place in every walk of human life. Changes in family structure and its functions accompanied by the economic transformation and reduction in the number and spacing for the children, a shift of economic functions from the family to other work environments, and modernizing of the family substantially modified the roles of children. In the last twenty years, family dissolution has become more common in most of the countries. It has badly affected India too. The increased number of juvenile crime, violence, and victimization constitutes one of the most crucial challenges of the new millennium. In the last decade in India, cases registered against Juvenile in conflict with the law and its rate under various Sections of the *Indian Penal Code,* 1860 have increased from 1822602 to 2949400[4]; 13.6 per cent increase in crimes against children between 2015 and 2016 as against 5.3 per cent in crimes against children between 2014 and 2015 has been noted.[5] The current position indicates that the growing juvenile population is worrying at national and international level. Juvenile delinquency has become an issue of global concern and a subject of discussion among social practitioners, legal scholars, psychologists and politicians.

The juvenile justice system has a long history of shifting paradigms from punishing to rehabilitating those considered wayward, troubled, or delinquent children. The concept of Juvenile Justice is a new one to the legal system. The philosophy underlying the juvenile justice system has been to rehabilitate rather than to punish youthful offenders. There should be a separate correctional system different from the adult offenders who are in direct conflict with the law. Keeping in view, the Union Legislature of India relooked into the matter and passed new law i.e. *the Juvenile Justice (Care and Protection of Children) Act,* 2015. However, the new legislation was enacted in hurry having two reasons, namely, first-increasing global awareness towards children, a shift from welfare regime to the right regime,[6] and second, an upward movement in the registration of criminal offences against the children. Nevertheless, over the last two decades, several legislations are made in terms of juvenile justice. [7]

4. Registrar General & Population Commissioner, *GOI*, 2015.

5. Supra Note 3 *:* Crime in India, NCRB, 2015-2016.

6. Ved Kumari, *Juvenile Justice System in India:* From Welfare to Rights*,* p. , 2nd edn., 2015, Oxford India Paperback.

7. The Juvenile Justice (Care and Protection of Children) Act 2000; the Commission for Protection of Child Rights (CPCR) Act 2005; the Juvenile Justice (Care and Protection of Children) Amendment Act 2006; the Juvenile Justice (Care and Protection of Children) Amendment Act 2010 ; the Protection of Children from Sexual Offences Act 2012 (POCSO) and the Juvenile Justice (Care and Protection of Children) Act 2015 .

II. INTERNATIONAL CONCERNS OVER JUVENILE JUSTICE : A ROAD MAP

Children have always been considered a special class of citizens. Children are the future of the nations, supremely important national assets[8] and the greatest gift to humanity[9]. Their liability may not be at par as to the others. Harper[10] J, quoted a remark of Colin Howard that:

> 'no civilized society regards children as accountable for their actions to the same extent as adults……. The wisdom of protecting young children against the full rigour of the law is beyond argument. The difficulty lies in determining when and under what circumstances should it be removed.[11]

The seriousness of Juvenile delinquency attracted the attention of world leaders. The United Nations has consistently been championed the cause of rights in the youth justice procedure and its disposal. Its constant effort has resulted in many key international conventions, agreements, and guidelines that have set forth a number of principles and minimum standards for the welfare of the children. At the international forum, the child has been recognized as a separate group, since long. Therefore, keeping in view, the wider interest of the child, right from the Geneva Declaration of the Rights of the Child, 1924 up to the UN Convention of the Rights of the Child 1989, serious concerns have been shown globally and protective measures have been made by the nation-states in their domestic law to make child an humble, responsible, and sensitive citizen of the country.

Geneva Declaration,[12] a historic document, recognises and affirms the existence of rights specific to the children and the responsibility of adults towards children. It advocated that child offenders should be transformed, not penalized. However, no right has been recognized under this declaration in favour of the Children, nevertheless, it has created some obligations upon the adults and focused on the certain inherent fundamental rights. This declaration was approved by the General Assembly of the League of Nations where nation signatories had promised to incorporate the principles of the document in their domestic law. This declaration summarized the fundamental needs of the children into five points, which are as follows:

1. The child must be given the means requisite for its normal development, both materially and spiritually;
2. The hungry child must be fed; the child that is sick must be nursed; the backward child must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored;
3. The child must be the first to receive relief in terms of distress;
4. The child must be put in a position to earn a livelihood, and must be protected against

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8. *Laxmi Kant Pandey v Union of India* (1984) 2 SCC 244.
9. *Bandhua Mukti Morcha v Union of India* (1997) 10 SCC 551.
10. *R* (A Child) v *Whitty* (1993) A Crim. R 462.
11. Colin Howard, *Criminal Law,* p 343 , 4th edn. 1982, Law Book Company.
12. In 1924 on September 26, the League of Nations adopted the Geneva Declaration; 'by the present declaration of the Rights of the Child, commonly known as 'Declaration of Geneva,' men and women of all nations, recognising that mankind owes to the child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed'.

every form of exploitation;

5. The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men.

This declaration failed to give an explicit definition of the child rights on the one side, while on the other, declared a subject possessing rights. The United Nations recognised the importance of the new generation and realized because of physical and mental immaturity, the need of social safeguards and care including legal protection, before as well as after birth, mankind owes to the child the best it has to give. Consequently, 'the Declaration on the Rights of the Child 1959' was proclaimed despite the Universal Declaration of Human Rights 1948. This declaration proclaimed some implicit rights under Principle-Ten [13]. The same area was discussed in Beijing meet in 1985, which examined the Standard Minimum Rules for the Administration of Juvenile Justice and attention has been drawn to four sets of civil, political, social, economic and cultural rights of every child. Thereafter, the UN Convention on the Rights of the Child 1989 passed wherein children were considered as rights-possessors rather than rights-seekers. The UN Convention of the Rights of the Child forms a normative basis for the understanding and measurement of child well-being. It was an emergence of a new paradigm towards the human rights of the child.[14]

The Convention on the Rights of the Child 1989 (hereinafter CRC) is the most significant, extensive and widely accepted international treaty by the States across the regions and exists today except one[15]. The Convention on the Rights of the Child is the first binding international human rights instrument incorporating in the same text social, cultural, economic, civil and political rights as provided in second generation human rights covenants[16]. Following to the ratification of the convention, member states have regularly to report to, and to be scrutinized by the UN Committee on the Rights of the Child. Within the process, the committee publishes reports that name and shame a country's procedures that it believes fail to abide by the convention's principles. The CRC defines a child[17] and requires all State parties to enact legislation and to take other necessary action to bring the convention into action[18]. The Convention prohibits all kinds of discrimination.[19] Article 3(1) states that:

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13. In 1959 on November 20 proclaimed by UN General Assembly resolution, (*A/RES/14/1386); it reads:* the child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, and in full consciousness that his energy and talents should be devoted to the service of his fellow men (Principle-Ten).
14. Geneva Declaration had no legal binding upon the nation-states, nonetheless, this declaration is a milestone and called as the first International Human Rights document in the history to address the children's rights.
15. Goran Melander, *Preface to Concluding Observations of the UN Committee on the Rights of the Child: Third to Seventeenth Session* (1993-1998) xiii (Leif Holmstrom ed., 2000), 195 countries have ratified this convention except the United States.
16. International Covenant on Civil and Political Rights 1966; International Covenant on Economic, Social and Cultural Rights1966.
17. Convention on the Rights of Child, Article 1 reads -a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.
18. Convention on the Rights of Child, Article 4.
19. *Ibid,* Article 2.

> '[I]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative or legislative bodies, the best interest of the child shall be a primary consideration.'

It permits children to express their views, opinions, thought, conscience, religion, association, and peaceful assembly[20]. It talks about the inherent right to life,[21]education[22], health care[23] and an adequate standard of living[24]. The Convention also protects from physical and mental violence, injury or abuse, neglect or negligent treatment, or exploitation including sexual abuse.[25] The CRC asserting that it must be administered in a manner consistent with the child's human dignity and in conformity with the present Convention[26]. The juvenile justice is among the most detailed provisions of the Convention[27]. Article 40 (1) requires countries to set specific rules and procedures for children who are accused or convicted of crimes, including setting a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.

Thus, the UNCRC was the first international instrument to adopt a coherent child rights approach to the international legal regulation of the deprivation of liberty for children. It operates as an umbrella for a set of three rules concerning to juvenile justice. They are-

1. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), 1985
2. The United Nations Guidelines for the Protection of Juvenile Delinquency (the Riyadh Guidelines), 1990 and
3. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules),1990

The UN initiative for the rights of children has continued as reflected also in the Hague Convention on Protection of Children and Co-operation in Respect of Inter Country Adoption (1993) and the United Nations Millennium Development Goals (2000) that has devoted four out of eight goals to children[28]. In the same spirit, the General Assembly conducted a special session in 2002 to adopt a vital child rights' document- '*A World Fit for Children*,' while incorporating all the international instruments under it.

III. LAW RELATING TO JUVENILE JUSTICE IN FOREIGN JURISDICTIONS: A COMPARATIVE APPROACH

Law relating to juvenile offenders has a long history throughout the world community.

20. *Ibid* , Articles 13 -16 .
21. *Ibid* , Article 6.
22. *Ibid,* Article 28.
23. *Ibid,* Article 24.
24. *Ibid* , Article 27.
25. *Ibid* , Article 19.
26. *Ibid* , Article 28(2).
27. *Ibid* , Articles 37 to 40.
28. We must spare no effort to free all of humanity, and above all our children and grandchildren, from the threat of living on a planet irredeemably spoilt by human activities, and whose resources would no longer be sufficient for their needs (Resolution adopted by the General Assembly on 18th September 2000, A/55/L.2) .

The Code of Hammurabi (2270 B.C.); the Roman Civil Law; Canon (Church) Law; the early Jewish Law, and the Talmud set forth conditions under which immaturity of children had been taken into account while imposing punishment. Under fifth-century Roman law, children below the age of seven years were classified as infants and not held criminally responsible. Muslim Law also called for leniency in punishing youthful offenders, and children under the age of 17 were to be exempt from the death penalty. Hindu oriental texts are also in favour of moderate approach for child criminality. During the early part of the twentieth century, reformers became concerned with the underlying cause of juvenile delinquency and considered the adversarial system inappropriate for handling juvenile criminals.[29]

(a) United Kingdom

United Kingdom has a date back history of the Juvenile Justice System. In England, most of the youth justice initiatives were placed along a shifting continuum between welfare and justice approaches. As a consequence, for the last two centuries, significant historical events revolved around attempts to reform criminal justice, and replaced 'children' or 'young offenders' from the traditional criminal justice system. However, England has signed and ratified almost all the International covenants, treaties and conventions which confer several rights to juveniles. It has never been overly harsh dealing with juvenile offenders. Before the enactment of the Criminal Justice Act 1994, the youth justice system in England, has been procedure by several legislations intending to prevent the offences of children and young people[30]. These legislations were deciding the liability, accountability, age, quantum of punishment and reformative measures etc. The Criminal Justice Act 1993 has been one of them which brought a sea change in the criminal justice system in England, but an incident[31] happened in England in the same year that forced the authorities for re-thinking to bring changes in Juvenile Justice. In the 1990s, attitudes changed in the United Kingdom and a more punitive approach was adopted. Many of incidents were responsible for this change in

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29. Morton J. Horwitz, *The Transformation of American Law 1870-1860: The Crisis of Legal Orthodoxy,* 233 (1922)

30. See, the Probation of Offenders Act 1907, it established the probation service as an official criminal justice organisation, thereby allowing Magistrates to sentence offenders for supervision in the community, it was explicitly aimed at replacing punishment for young offenders initially; the Children Act 1908, established the first separate Juvenile Court, focusing on both justice and more welfare-based disposals, specifically, it abolished custody for children under 14-years-old and required the police to provide remand homes; the Prevention of Crime Act 1908 extended the use of Borstal nationally for males between 16 and 20-years-old, serving indeterminate sentences between 1-3 years; the Children and Young Persons Act 1933 which is one of the clearest moves towards a welfare perspective for young offenders; the Criminal Justice Act 1993 abolished the death penalty for under 18-yearolds, it also raised the age of criminal responsibility to what now seems a very low 8-years-old, the Home Office approved Schools replaced reformatories and industrial Schools, which along with the introduction of voluntary units for child offenders and those beyond parental control represented the same overlap between *parens patrie* and status offences that existed in all juvenile justice systems at the time.

31. In 1993, two 10-year-old boys took two-year-old James from a shopping centre. That afternoon, they led him around Liverpool, repeatedly assaulted him, finally beating him unconscious and leaving him on a railway track, where he was cut in half by a train. After a police hunt for the killers, Jon Venables and Robert Thompson were arrested and charged with his murder. They were 11, when they stood trial in an Adult Court in November 1993. They were sentenced to be detained indefinitely at Her Majesty's pleasure. The trial judge, Mr. Justice Morland, recommended that they serve a minimum term of eight years. The Lord Chief Justice then recommended that the minimum should be 10 years.

attitude. The Criminal Justice Act 1993 started to reverse the Criminal Justice Act 1991, with a greater focus on punitivism and a return to justice solutions over welfare. Thus, in the late 1980s, the UK had adopted positive approach for the rehabilitation and reintegration of juvenile offenders. The use of juvenile custodial measures was significantly low, due to a more widespread use of diversion, both in trial and custody. However, the juvenile justice system was modified and the jurisdiction of the Juvenile Courts, renamed Youth Courts, was extended to include 17-year-olds. The number of known youth offenders, aged 10-16 years, fell and the juvenile prison population dropped significantly.

In 1996, a significant development came for Youth Justice followed by the '*No More Excuse*' in 1997.[32] This movement favours the responsibilisation and lastly ends from custodial to educational establishment with the Taylor Report.[33]

(b) United States

The history of development of criminal justice system in United States has not been new. The treatment of juveniles in the criminal justice system has evolved and changed in a variety of ways that intersect issues of age of the child. But, the modern system of delivery of justice for juveniles has been developed in the twentieth century in the United States.[34] In 18th-century, children were treated much as the same as adult criminals in case when they violate the law. It seems that the law in the United States was heavily influenced by the Common Law of England. Parents were under obligation to control their children. The punishments were the same as of the adult criminal offenders. There was no distinction under the law based on the age of the offender. No legal term '*delinquent*' was known to the legal field in the United States. In the 19th century, the American Judicial Procedures continued to follow subjecting children to the same punishments as adult criminals. Youth, who committed serious offenses, could be subjected to prison sentences, whipping, and even the death penalty. Thus, the Criminal Codes applied to all persons, adults and children alike. Originally, there were no separate laws or courts, nor special facilities for the care and protection of children who were in trouble with the law. But, in the late of the nineteenth century, the treatment of juveniles in the United States started to be changed. Social reformers began to create special facilities for troubled juveniles, the reformers supported to protect juvenile

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32. Misspent Youth Report, published by the Audit Commission, the Commission criticised the youth justice system as too costly, inefficient and ineffective and recommended for greater interagency co-operation in national government and local practice; 'No More Excuses', White Paper is remembered mainly for its emphasis and impact on moving the youth justice agenda towards young offenders taking personal responsibility and focus system efficiency carried through from Misspent Youth, and the end of *parens patrie* in England effectively.

33. Taylor's interim report in February 2016 dealt largely with the state of custodial provision for children. The Taylor Review's vision was for custodial disposal centers to be run by 'head teachers' with the autonomy & flexibility and perhaps most importantly, from a rational, criminological perspective in its approach to youth justice.

34. In the United States, the first attempt was made by the Congress in 1974 by enacting the *Juvenile Justice and Delinquency Prevention Act.* This was the first comprehensive Act in US combining the Federal leadership, state planning and community based service based to promote systematic improvement. It emphasized to encourage States to develop plans and programmes that would work on a community level to discourage juvenile delinquency. The *Juvenile Delinquency Prevention and Control Act* was a precursor to the extensive *Juvenile Justice and Delinquency Prevention Act* that replaced it in 1974. This Act provided for established the office of Juvenile Justice and Delinquency Prevention, the run way Youth programme and the National Institute for Juvenile Justice and Delinquency Prevention.

offenders by separating them from adult offenders. They also focused on rehabilitation trying to help young offenders avoid a future life of crime.

The juvenile justice system has grown and changed substantially since 1899 by establishing the Juvenile Court. The creation of Juvenile Court accompanied by several changes that continuing in either the same of a similar form to the present day. There was lack of formal process and constitutional due process in the juvenile justice system. But, gradually in different phases, necessary changes have been made in Juvenile Justice System in the United States.[35] In 1967, the U.S. Supreme Court, in a landmark decision determined that the Constitution requires that youths charged with delinquency in juvenile court, have many of the same due process rights guaranteed to adults accused of crimes, including the right to an attorney and the right to confront witnesses against them.[36] The Supreme Court now has extended additional constitutional rights to youth, including the right to have the charges against them proven beyond a reasonable doubt and the right against double jeopardy in series of cases[37]. Today's juvenile justice system still maintains rehabilitation as its primary goal and distinguishes itself from the criminal justice system in important ways. Thus, in the US, juvenile offenders cannot receive the death penalty, or receive a life sentence without parole except in the case of homicide. However, law reform in the United States has greatly increased the chance of adolescents being transferred to the criminal court, which has jurisdiction over criminal cases involving adult defendants.

IV. REMINISCENCE OF JUVENILE JUSTICE IN INDIA

India is one of the largest homes to 472 million children in the age group of 0-18 years, constituting almost 39 per cent of the nation's population[38]. The future of India vests with these youth citizens of today and adults of tomorrow. But, the plan of formulation and implementation of the law for Juvenile Justice has been evolved in the beginning of the twentieth century in India[39]. However, in ancient India, child health care policy is found in detail since the Vedic period. The *Rigveda,* and *Samhitas*, not only, mention after birth care rights of the child but they also mention about pre- birth care such as the very conception, the conditions favoring high-quality progeny for desirable couple partners to produce high-

35. Balancing protection and punishment 1899-1996; arguing for formality in an Informal Process 1996-1975; the balance tips towards punishment 1975-2003 and children at the dawn of the 21st Century 2003- onwards.

36. *In re Gault,* 387 U.S. 1, 20 (1967).

37. *Gallegos v* Colorado, 370 U. S. 49 (1962); *Kent v. United States*, 383 U.S. 541 (1966); *In re Winship,* 397 U.S. 358 (1970); Breed v Jones, 421 U.S. 517 (1975); In *Roper v. Simmons* 543 U.S. 551 (2005) case, the Supreme Court ruled it unconstitutional for a youth under 18 years old at the time of his or her crime to receive a death penalty sentence and reversed the *Stanford v. Kentucky* 492 U.S. 361 (1989) ruling, which allowed youth who were at least 16 years or older at the time of their crimes to receive death penalty sentences; the U.S. Supreme Court in case of *Graham v. Florida* 560 US 48 (2010) ruled that sentencing a juvenile to life without the possibility of parole for a non-homicidal crime is in violation of the Eighth Amendment. The ruling requires that states give juveniles a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation and recently the U S Supreme Court in *Miller v. Alabama* 567 U S 460 (2012) made it unconstitutional to sentence someone who was under the age of 18 at the time of the crime to mandatory life without parole. A Judge has to take into consideration the age of the offender before sentencing him or her to life without parole.

38. 2011 Census Data, Office of the Registrar General & Census Commissioner, India.

39. Ved Kumari, *Current Issues in Juvenile Justice in India*, 41, JILI 404 (1990).

quality progeny, and the period of fertility etc in order to achieve cultured eugenics. A comprehensive description of nutrition and nourishment of the fetus and its formation are described in Vedic folklore too.[40] *Sixteen Samskara*[41] (rites) are described under the *Dharmshstra* that advised to perform (especially from the neo-natal period to childhood), that help the physical, mental and spiritual development of a child in all respects.

The present criminal justice system of Indis is new one in many respects from the traditional system[42]. In modern age, Juvenile Justice finds its place in between 1850 to 1919. *The Apprentice Act*, 1850 is the first legislation to mark the beginning of the juvenile justice system in India concerning some vocational training to rehabilitate the Juveniles[43]. Like many other common law countries, in India, juveniles were treated like adults, and various sanctions were provided for their wrongs. The Indian Penal Code 1860 exempted the child offenders in all cases of offences.[44] The Indian Jail Committee[45] had favoured the vital need for the treatment of child and adolescent offenders. Its recommendations prompted the various enactments - the Madras Children Act, 1920; the Bengal Children Act, 1922 and Bombay Children Act, 1924 (amended in1948 and 1959). Later, after independence, despite the Constitutional protections[46] given to children, the Central legislation- the Children Act, 1960 was passed by the Parliament followed by the Children (Amendment) Act, 1978 preceded by the Probation of Offenders Act 1958. India had no independent common legislation by the end of the 80s except the provisions of Criminal Procedure [47] to deal with the cases of juvenile offenders independently.

However, the voices were raised constantly at different forum for the separate law[48]. The

40. K Bharati and V.V.L. Prasuna, *Ancient Indian Knowledge of Maternal and Child Health Care: A Medico- Historical Introspection of Ayurveda*, Journal of Ind. Med. Heritage, Vol. XXXIX (2009), Pp 221-240.

41. P. V. Kane, *History of Dharmashastra*, Vol. I, Chapter VI.

42. T. D. Sethi, *Precursers of Juvenile Courts in India,* 25 JILI 502,(1983).

43. The Apprentice Act, 1850 followed by the Reformatory Schools Act, 1897 and series of Children Acts passed in 1920 and onwards. The Act comprised of provisions for providing vocational training to convicted children as Apprentices to teach them trade, craft or employment for their rehabilitation.

44. The Indian Penal Code reads:

    Section 82- Nothing is an offence which is done by a child under seven years of age.

    Section 83- Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge the nature and consequence of his conduct on that occasion.

45. Report on the Indian Jail Committee 1919-1920, Appendix –IX, Note on the Treatment of child and adolescent offender.

46. Articles 14, 15(3), 21 A, 24, 39(e), 45, 46 and 47 of the Constitution of India.

47. Section 27 the Code of Criminal Procedure 1973 provides that any person who at the date of appearing before the court is under 16 years of age is not punishable with death or imprisonment for life and Section 318 says that if the accused, though not of unsound mind, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial; and, in the case of a Court other than a High Court, if such proceedings result in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit.

48. Justice Bhagwati, CJ spoke for the same "……we would suggest that instead of each State having its own children's Act different in procedure and content from the Children's Act in other States, it would be desirable if the Central Government initiates Parliamentary Legislation on the subject , so that there is complete uniformity in regard to the various provisions relating to children in the entire territory of the Country (*Sheela Varse v. Union of India*, AIR 1986 SC 1773)"; in academic deliberations.

Union Legislature could not succeed to enact a uniform legislation relating to juvenile justice for the whole country on the ground that the subject matter of such legislation fell in the State List of the Constitution. Finally, for a new juvenile justice system in the country, in conformity with the United Nations Beijing Rules, 1985, the Parliament exercised its power under Article 253 of the Constitution of India read with Entry 14 of the Union List.

(a) The Juvenile Justice Act, 1986

The Juvenile Justice Act had introduced a uniform juvenile justice delivery system containing adequate provisions to deal with all the aspects relating to juveniles.[49]. Keeping in view the Beijing Rules[50] 1985, India enacted this Act. This Act consisted of sixty-three sections and seven chapters. This Act repealed the earlier Acts- the Children Act 1960 and other various laws enacted by the States and covered the entire fields relating to the care, protection, custody, trials, punishment, treatment, and rehabilitation of neglected and delinquent juveniles. [51]. The Act defined the expression 'Delinquent Juveniles' to mean a juvenile who has been found to have committed an offence[52]. A 'Juvenile' means a boy who has not attained the age of 16 years and a girl who has not attained the age of 18 years[53]. The term 'Offence' has been defined to mean an offence punishable under any law for the time being in force[54] . This Act suffered from a flaw that on a combination of reading Sections 2(e) and 2(n), that is to say that there was no distinction between the offence committed by a major and a minor while defining the terms delinquent juvenile and offence. The age limit of Juvenile was the same as it was under the Children Act. Nonetheless, this Act had some salient features such as-

1. The Act categorized the juvenile, and delinquent juveniles;
2. The Act provided two-track for adjudication, sentencing and custody for all juveniles;
3. The Act laid down a uniform framework for the delivery of juvenile justice for the country to protect the rights and interest of the juveniles;
4. Juvenile Homes were established for the reception of neglected juveniles and Special Homes for the reception of delinquent juveniles under Sections 9 and 10;
5. No juvenile could be put in Police lock-up or jail;
6. Differential approaches were adopted for neglected juveniles, and delinquent juveniles under Chapter III and IV;
7. Juvenile Welfare Board was formed to deal with the neglected juveniles and the juvenile

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49. A review of the working of the existing Children's Act would indicate that much greater attention is required to be given to children who may be found in situation of social maladjustment, delinquency, or neglect (the Statement of Objects and Reasons of the Bill).

50 In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity (clause 4.1).

51. An Act to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication of certain matters relating to, and disposition of, delinquent juveniles-the Preamble of the Act.

52. Section 2(e), the Juvenile Justice Act, 1986.

53. *Ibid*. Section 2(h).

54. *Ibid*. Section 2(n).

Court was the adjudicating authority for the delinquent juvenile under Section 4 and 5

8. Juveniles were kept in an Observation Home during pending inquiry under Section 11;
9. Definition of juvenile was fixed 16 years for boys and 18 years for girls; and
10. It set out the basic provision for the proper and fair administration of criminal justice in case of heinous crime done by Juvenile offenders.

However, soon after the ratification of the Convention of Rights of the Child 1989 by the Government, the Juvenile Justice Act, 1986 appeared to be outdated. The Act was otherwise the same in its substance as the Children Act 1960 and ignored the trauma of children to certain extent. The flaws under the Juvenile Justice Act 1986 were needed rectification. The child rights approach and changed perception of 'childhood' propounded by the Convention of Rights Child 1989 impelled the Government to enact the Juvenile Justice (Care and Protection of Children) Act, 2000.

(b) The Juvenile Justice (Care and Protection of Children) Act, 2000

In 2000, the Parliament enacted the Juvenile Justice (Care and Protection of Children) Act 2000 in consonance with the standards prescribed under the various international instruments to give more emphasis on the care and protection of the children in order to visualize child friendly juvenile justice system[55]. The Act was amended twice in 2006 and 2011 to address the gaps in its implementation and make it more efficient. The Act had covered the entire area of juvenile justice system. In this Act, the term 'Juvenile' or 'child' had been defined as 'a person who has not completed eighteenth year of age.[56] However, keeping both the terms 'child' and 'juvenile', the Act had created a doubt. The segregated approach for the two categories of children, namely, 'juveniles in conflict with law' and 'children in need of care and protection' was continued[57]. Terms like 'delinquent' and 'neglected,' as well as many other negatively connoted terms like 'arrest,' 'trial,' 'police' and 'jail' were replaced by this Act. It abolished the 'Juvenile Courts, but the Juvenile Justice Board remained to adopt a child-friendly approach in the adjudication process. The Board consisted of a Metropolitan Magistrate or a Judicial Magistrate of the first class, and two social workers of which at least one should be a woman.[58] Further, the assistive role of social workers in the Juvenile Courts under the Juvenile Justice Act 1986 was transformed into the full-fledged role of Board members, and they also have had active involvement in health, education or welfare activities of children for at least seven years. The Juvenile Justice Act, 2000 (as amended in the years 2006 and 2011), added many new measures such as-

1. Raising the age of childhood uniformly to 18 years, both for boys and girls;
2. Age determination has been recognized as a distinct proceeding under the Sections 7, 7A and 49;

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55. An Act to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection by providing proper care and protection and treatment by catering to their development needs, and by adopting a child-friendly approach in the adjudication and disposition of matters in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation through various institution established under this enactment. (the Long Title of the Act).
56. Section 2(k), the Juvenile Justice (Care and Protection of Children) Act,2000.
57. *Ibid*, Sections 2 (d) and 2(l).
58. *Ibid,* Section 4 (2).

3. The Act provided separate and distinct Child friendly Procedure;
4. Cases involving 'juvenile in conflict with law' are to be processed and adjudicated upon by the Juvenile Justice Board (instead of a Juvenile Court), that is comprised by one Magistrate (judicial member, who is designated as Principal Magistrate) and two non judicial members (of which at least one to be a woman member);
5. The Board is empowered to sentence the juvenile to wide range of dispositional alternatives; and
6. Custodial sentence can be awarded not beyond a period of three years.

The liberal juvenile justice system envisaged by the Juvenile Justice Act, 2000 also came under the ideological criticism. It was criticized from all the corners of the society for its perceived failure to hold the child offender accountable. This Act was unsuccess to identify 'juvenile in need of care and protection' and failed to provide procedural guarantee like- right to counsel and right to speedy trial, right to education and recreation of children who were in observation homes. There was no concept of parental responsibility under the Act.

Later on, during its implementation, several issues arose such as increasing incidents of abuse of children in institutions, inadequate facilities, poor quality of care and rehabilitation measures in Child Care Institutions, high pendency of cases, delay in adoption due to faulty and incomplete processing, lack of clarity regarding roles in performing responsibility and accountability, inadequacy of provisions to counter offense against children that compelled the Government to review the Act. Moreover, the involvement of one juvenile in the Delhi Gang Rape incident in December, 2012 gave a rallying point for opposing the liberal juvenile justice system. In July, 2013, a Public Interest Litigation was filed in the Supreme Court of India seeking permission that the juvenile be tried in an ordinary court of law as an adult.[59] The Court refused to interfere with the age of juvenility in cases where juveniles are found guilty of heinous crimes and held that the provisions of the Act comply with the Constitutional directives and international conventions. The Court, further, directed to the Juvenile Justice Board to decide on the best interest of the child as per law. However, the Government prepared a new draft, allowing children between16-18 age group to be tried as an adult if committed any heinous offence such as rape, robbery, murder, burglary, etc so that it creates a deterrent effect for the others. The Government even after facing strong opposition and condemnation from different corners, made the Juvenile Justice (Care and Protection of Children) Act, 2015 in which children in the 16-18 age groups would be tried as adults if they commit heinous crimes. It is necessary to understand rehabilitation policy, therefore, it would be necessary to examine the provisions of the Act carefully to assess its possible impact on the society at large.

(c) The Juvenile Justice (Care and Protection of Children) Act, 2015

The introduction of the new Juvenile Justice (Care and Protection of Children) Act, 2015, has introduced a number of the exceptional changes within the existing Juvenile Law. The present Act is divided into ten chapters and contains one hundred twelve sections. This Act provides provisions for both 'children in need of care and protection'[60] and 'children in

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59. *Dr. Subramanian Swamy And Ors.* v *Raju, Through Member, Juvenile Justice Board And Anr.,* (2014) 8 SCC 390.

60. Section 14, the Juvenile Justice (Care and Protection of Children) Act, 2015.

conflict with law'[61]. The Act removes negative connotation associated with word 'Juvenile' and introduces several new definitions- most importantly child[62], abandoned child[63], orphan[64], and surrendered child[65] on the one hand, and on the other, petty[66], serious[67] and heinous[68] offences. It also provides criteria for presumption and determination of the age of child[69] and various general principles to be followed in administration of the Act.[70] This legislation is, thus, intended to ensure proper care, protection, development, treatment and social re-integration of children in difficult circumstances by adopting a child-friendly approach in the best interest of the child. This Act mandates for compulsory registration of all the Child Care Institutions and also lays down stringent punishment in case of non compliance and introduces a new chapter on Adoption intending to streamline adoption procedures in respect of orphans, abandoned and surrendered children.[71] The Act includes several new offences against the children which were, so far, not adequately covered under other laws, such as:

i. Sale and procurement of children for any purpose including illegal adoption.

ii. Corporal punishment in institutions,

iii. Use of child by militant and other adult groups,

iv. Offences against disabled children,

v. Kidnapping and abduction, and

vi. Using a child for vending, peddling, carrying, supplying or smuggling intoxicating liquor, narcotic drug or psychotropic substance.

The Act also describes for mandatory reporting in respect of a child found separated from the guardian[72] and penalty in case of non reporting a child who appears or claims to be abandoned, lost, is an orphan or is without family support[73]. This Act embodies many reformative changes for Juveniles nevertheless it has many drawbacks in it. The most debatable issue under the Act is 'claim of juvenility'. This claim of Juvenility, initially, is to be decided by the Juvenile Justice Board before the starting of proceedings in the court. Nonetheless, this issue can be raised before the Court at any stage of proceedings, even after the disposal of the case by the Board.[74] The apex court has different views on the issue of age. An extraordinary power, which has been granted to the Board for conducting a preliminary enquiry in determining maturity of the juvenile to commit the offence, is a matter of speculation[75].

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61. *Ibid,* Section 13.
62. *Ibid,* Section 2(12).
63 *Ibid,* Section 2(1).
64. *Ibid,* Section 2(42).
65. *Ibid,* Section 2(60).
66. *Ibid,* Section 2(45).
67. *Ibid,* Section 2(54).
68. *Ibid,* Section 2(33).
69. *Ibid,* Section 94.
70. *Ibid,* Section 3.
71. *Ibid,* Sections 41, 42.
72. *Ibid,* Section 32.
73. *Ibid,* Sections 33, 34.
74. *Ibid,* Section 9; In *Arnit Das v. State of Bihar*, AIR 2001 SC 3575, the Supreme Court has overruled its previous decisions and held that date to decide in claim of juvenility should be the date on which the accused is brought before the competent authority.
75. *KulaiIbrahim v. State of Coimbatore,* (2014) 12 SCC 332.

Further, the Act gives no clear distinction between various categories of crimes; no intelligible criteria have been provided for transferring the case for adult trial. Children committing heinous offences, often, may be victims of circumstances, such as socio-economic conditions, neglect and exploitation, and abuse and 'Places of safety' mentioned under the Act are not the suitable places for providing positive environment. Restorative and rehabilitative ideals are mooring of the juvenile policy and this Act does not support the 'principle of fresh start'.

V. CONCLUSION

It seems that the present Act is pre-modern step in modern times, especially, when the focus of general debate is on restorative reformation and re-integration of the Criminal Justice System. The juvenile law forces child delinquents to jump off the ship of reformation and enter into a vicious cycle of revenge and life-long stigmatization. A society has to remember that the youth within juvenile justice systems are, most of the time, youths who simply haven't had the right mentors and supporters around them because of circumstances beyond their control.

Its objects and scope are straight and clear. There is need to review of the working of the existing Juvenile Law. It indicates that greater attention is required to be given to children who are found in situations of social ill-treatment, destitution or neglect. The justice system available for adults should not be considered appropriate to apply to juveniles. It is felt that a uniform juvenile justice system can make available adequate and positive atmosphere in the changing scenario of the country. Better implementation of juvenile justice legislation and augmentation of children's capacity building are the need of hour.

The Criminal Law should not be used as an instrument of wrecking private vengeance by an aggrieved party against the person who, according to that party, had caused injury to it. Barring a few exceptions, in criminal matters, the party who is treated as the aggrieved party is the State which is the custodian of the social interests of the community at large and so it is for the State to take all the steps necessary for bringing the person who has acted against the social interests of the community. Nelson Mandela has aptly said that:

> 'Our children are our greatest treasure. They are our future. Those who abuse them tear at the fabric of our society and weaken our nation[76]'.

Finally, to conclude this, it would be noteworthy to quote :

> 'For a punishment to attain its end, the evil which it inflicts has only to exceed the advantage derivable from the crime; in this excess of evil one should include the certainty of punishment and the loss of good which the crime might have produced. All beyond this is superfluous and for that reason tyrannical'[77].

As it is rightly stated that a wasp and a child have alike disposition, saints never find fault with them.[78]

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76. Address by Nelson Mandela (the President of South Africa) at National Men's March, Pretoria on 22 November 1997.

77. Cesare Beccaria, *On Crime and Punishments* (1764);

78. बररै बालकु एकु सुभाऊ। इन्हहि न संत विदूषहिं काऊ।। गोस्वामी तुलसीदास, रामचरितमानस, बालकाण्ड, 3-279, संपादक, विश्वनाथ प्रसाद मिश्र, काशिराज संस्करण, प्रथम संस्करण, भार्गव भूषण प्रेस, वाराणसी.

UNIFORM CIVIL CODE: PROBLEMS AND PROSPECTS

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RABAB KHAN**

ABSTRACT : India is a large country with a large population so diversified that it is almost impossible to stamp them with one kind of anything. The idea of Uniform Civil Code for the first time mooted seriously in the Constituent Assembly. The object of incorporating certain Articles under the Constitution is to govern all relationships of life by uniform system of law for reason that human relationships and different group of persons belonging to different religion. But, the multi cultural aspect in the human life has its own importance. Thus, in the present paper a modest attempt has been made to find out the problems of implementing a common code to all citizens irrespective of their religion and to see its prospects.

KEY WORDS : Uniform Civil Code, Fundamental Rights, Directive Principles of State Policy, Personal Laws, Constituent Assembly Debate.

I. INTRODUCTION

India is known for its secular image and its peculiarity is unity among diversity. It is like a beautiful garden where flowers of different colours blossom. For the past seven or eight hundred years, people of different religion, caste and creed are peacefully and comfortably living with love and affection. Practically speaking, these communities are so socially intermingled and dependent on each other that they cannot think to live without the other although efforts are regularly made by some vested interests to create hatred amongst them. The Constitution of India under Articles 25 and 26 have guaranteed freedom to religion to every person subject to certain restrictions mentioned therein. These individual rights are further strengthened by Articles 21, 29 and 30. However, the Supreme Court too has in few cases in its *obiter dicta* impressed upon the need to enact Uniform Civil Code (hereinafter UCC) for the people as mandated by Article 44 of the Constitution. Much has been written on both aspects of the need of enacting and implementing the Uniform Civil Code by eminent writers but till date no specific formula has been laid down to be the basis of it.

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II. CONSTITUTIONAL STATUS OF ARTICLES 44 AND 25

To understand the scope of Article 44[1] and Article 25,[2] it is indispensible to understand the importance of these Articles. The former is Directive Principles of State Policy and the latter is Fundamental Rights. Seervai in the Preface to the Vol. II of 3rd edition of his book[3] writes:

> "Two judgments of the Supreme Court[4], had made him think out afresh the nature of Fundamental Right *vis-a-vis* Directive Principle of State Policy and this fresh approach led me to a conclusion which ran counter to the accepted doctrine of Supreme Court. According to that doctrine, Fundamental Rights are largely, individual rights, whereas Directive Principles provide, largely, for the social good." This doctrine led him to ask two questions: "What would have happened if Fundamental Rights had not been enacted in our Constitution or are struck out? And what would have happened if Directive Principles had not been enacted in our Constitution or are struck out? He came to the conclusion that if Directive Principles had not been enacted or were struck out nothing would have happened. But if Fundamental Rights had not been enacted or struck out, the result would have been disaster—— and our country would have been in danger of being converted into a dictatorship and Police State."

Sir Fredrick Pollock, while discussing the nature and meaning of the Law[5] has observed that:

> "In one sense, we may well enough that there is no law without a sanction. For a rule of law must at least be a rule conceived as binding, and a rule is not binding when anyone to whom it applies is free to observe it or not as he thinks fit. To conceive of any part of human conduct as subject of law

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1. Article 44 provides, "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India".
2. Article 25 provides, "Freedom of conscience and free profession, practice and propagation of religion:

   (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

   (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law.

   (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

   (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus Explanation I The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion Explanation II In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.
3. H. M. Seervai, *Constitutional Law of India*, 3rd edn., N.M. Trepathi Bombay (1983) (1981)1 SCR 206.
4. *Minerva Mills Ltd v. Union of India,* AIR 1980 SC 1789; *Waman Rao v. Union of India,* AIR 1981 SC 71.
5. *Jurisprudence and Legal Essays* Pp. 13-15, (selected and Introduced by A.L. Pollock, Sir Frederick, Goodhart , (1963).

> is to conceive that the actor's freedom has bounds which he oversteps at his peril. "… On the whole the safest definition of law in the lawyer's sense appears to be a rule of conduct binding on members of a commonwealth as such."

Applying Sir Fredrick Pollock observations to the Part IV of the Constitution, it is clear that the Directive Principles are not binding and the State to whom they apply is free to observe them or not as the Sate thinks fit. It follows, therefore, that if Directive Principles had been struck out of the Constitution nothing would have happened. It is true that since Directive Principles are present in our Constitution, an attempt must be made to reconcile Fundamental Right and other constitutional limitations with directive principles. However, if Fundamental Rights and Directive Principles are in conflict, as they did in *In Re Kerala Education Bill*, 1957, then Fundamental Rights must prevail because any violation by law of Fundamental Rights would render the law *pro tanto* void, whereas Directive Principles can be violated with impunity by Parliament and State legislatures.[6]

Thus, the settled principle is that the principle of harmonious construction will be applied in case of conflict between Fundamental Rights and the Directive Principles so far as possible, but if it is unavoidable, the Fundamental Rights shall prevail over the Directive Principles. However, according to Basu, the Directive Principles of State Policy differs from Fundamental Rights in the following respects:[7]

i) The Fundamental Rights is the guarantees against the State whereas Directive Principles of State Policy are the directives to the governments to do certain acts and thus achieve certain objectives by their actions.

ii) The Directive Principles of State Policy is not justiciable and therefore cannot be enforced in the court of law whereas the Fundamental Rights is, being justiciable, can be enforced in the court of law.

iii) Unless there is legislation on any particular directives, it cannot be implemented. In the absence of such legislation neither the individual nor the State can violate any existing law under the colour of Directive Principles of State Policy. For the enforcement of any directives it is essential that the State must enact the legislation.

iv) The Fundamental Rights mentioned in Part III of the Constitution are narrower in scope than the Directive Principles of State Policy. Thus there is always a possibility of conflict between the provisions of the two. Since the directives are not justiciable, therefore, the courts cannot declare any law as void on the ground that it contravenes any of the directives. Whereas Fundamental Rights are justiciable and therefore can be enforced in the court of law under Articles 32 and 226 and the courts have to declare such law as void which contravenes any of the FR. Hence, in case of any conflict between Part III and Part IV of the Constitution, the former should prevail over the latter.[8]

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6. H. M. Seervai, *Constitutional Law of India Vol. 2,* Universal Book Publishing, New Delhi, 4th edn., (2014).
7. Durga Das Basu, *Introduction to the Constitution of India,* 258 (Lexis Nexis, Gurugram, 21st edn., (2014).
8. *State of Madras* v. *Champakam*, (1951) SCR 523(531).

In *Minerva Mills Case*[9], the Supreme Court has, however, foiled the attempt to confer a primacy of Directive Principles of State Policy over Fundamental Rights and held that in fact, both Fundamental Rights and Directive Principles of State Policy are supplementary and complementary to each other.

III. JUDICIARY AND UNIFORM CIVIL CODE

Under the Constitution, India has been declared a 'Secular State'. It means a State which observes an attitude of neutrality and impartiality towards all religions. In a secular State, the State is not concerned with the relation between man and God. It is a matter of individual conscience. A secular State is always concerned with the relation of man and man. A secular State does not interfere with the individual rights of the persons regarding religion, faith and worship, but treats all religions equally. Such attitude of impartiality of the State towards all religions is secured by the Constitution, particularly, Articles 25-28[10]. So far as Article 44 is concerned, the Supreme Court of India has refused in a number of cases to entertain the issue of UCC or declaring certain enactment relating to family law (alleged to be discriminatory) as unconstitutional through Public Interest Litigations (Writs).

In *Maharshi Avadhesh* v. *Union of India*[11], the apex court rejected the petition to introduce a Common Civil Code. The Court held that the legislature if so wants should enact the law. The court cannot legislate in these matters. In *Reynold Rajmani* v. *Union of India*[12], Section 10 of the Indian Divorce Act, 1869 (applicable to Christians) was challenged on the ground that it discriminates between men and women. The court rejected the prayer on the ground of court's jurisdiction. Court has held that when a legislative provision enumerates the ground of divorce, those grounds limits the court's jurisdiction and the court cannot rewrite the law. In another case, *Pannalal Bansilal* v. *State of Andhra Pradesh*[13], the Supreme Court (with reference to the Andhra Pradesh Hindu Religious and Charitable Endowment

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9. AIR 1980 SC 1789, In this case, the majority in the Supreme Court held that a law would be protected by Article 31C only if it has been made to implement the directives in Article 39(b)(c) and not any of the other Directives included in Part IV. It is further held by the Supreme Court that there is a fine balance between the Directives and the Fundamental Rights which should be adhered to by the courts, by a harmonious reading of the two categories of provisions, instead of giving any general preference to the Directive Principles.

10. See Durga Das Basu, op.cit.124. Firstly, there shall be no 'State religion' in India. The State shall neither establish a religion of its own nor confer any special patronage upon any particular religion. Secondly, every person is guaranteed the freedom of conscience and the freedom to profess, practice and propagate his own religion, subject only-

    (a) To restrictions imposed by the State in the interest of public order, morality and health (So that this freedom may not be abused to commit crimes or anti-social acts to commit the practice of infanticide),

    (b) To regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practice, but do not really appertain to the freedom of conscience),

    (c) To measures for social reform.

    Subject to the above limitations, a person in India shall have the right not only to entertain any religious belief but also to practice the observances dictated by such belief, and to preach his views to others.

11. (1994) 1 Supp SCC 713.

12. AIR 1982 SC 1261.

13. AIR 1996 SC 1023.

Act, 1987) rejected the plea that the said law should apply uniformly to persons professing all religions. It was further observed that:

> "In a pluralist society like India, in which people have faith in their respective religious beliefs — The founding father while making the Constitution, were confronted with problems to unify and integrate people of India professing different religious faith—, speaking different languages and dialects in different religions and provided a secular constitution to integrate all section of the society as a United Bharat. The directive principles themselves visualise diversity and attempt to foster uniformity among people of different faith. A Uniform law, though it is highly desirable, enactment thereof in one go perhaps may be counter-productive to unity and integrity of the nation."

The Court further observed that:

> "In a democracy governed by rule of law, gradual progressive change and order should be brought about. Making law or amendment to a law is a slow process and the legislature attempts to remedy where the need is felt most accurate. It would, therefore, be inexpedient and incorrect to think that all laws have to be made uniformly applicable to all people in one go. The mischief or defect which is most acute can be remedied by process of law at stages."

In *Mohammad Ahmad Khan* v. *Shah Bano Begum*[14], the Supreme Court of India has held that a Muslim divorced wife is entitled for maintenance from her husband for life or until she remarries. During the course of its judgment, the court observed that even after the expiry of thirty five years no attempt has been made to enact a UCC. Article 44 of the Constitution has remained a dead letter. Under Muslim Law, a divorced wife is entitled to get maintenance only for the period of *Iddat*. Hence, the decision was found to be a direct interference in Personal Law of Muslims. This judgment created a *furore* in the Muslim community which resulted in the Muslim Women (Protection of Rights on Divorce) Act, 1986 passed by the Parliament. The court, through interpretation, has made the provision of this Act in consonance with the Muslim Personal Law.

In *Sarla Mudgal (Smt.) President, Kalyani & others* v. *Union of India*[15], in order to contract second marriage, a Hindu male converted himself to Islam, while the first wife was living. The court declared such marriage void and punished the husband for bigamy under Section 494, IPC.

It is submitted that the decision in this case would have been the same even if it was decided under the provision of Muslim Law because embracing Islam in order to marry a woman would be no conversion. It must be purely to be a Muslim. In this case, the Court again reminded the Union Government to give effect to the Article 44 of the Constitution which enjoins upon it to take steps for providing a UCC. This has triggered the debate on this subject again. Further, the speeches which the judges made were misunderstood and sent wrong signals to various quarters. Such type of utterings could have strengthened the majority chauvinism on the one hand and the minority fundamentalism on the other[16].

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14. AIR 1985 SC 945.
15. AIR 1995 SC 1531.
16. See S.P. Sathe, "Uniform Civil Code-Implications of Supreme Court Intervention" *Economic and Political Weekly,* Vol. 30, Issue No. 35, Sept. 2, 1995.

In *Lily Thomas etc.* v. *Union of India*[17], the Supreme Court made a weighty observation holding that:

> the desirability of Uniform Civil Code can hardly be doubted but this goal can be achieved when social climate is properly built up in the society. Statesmen amongst leaders who instead of gaining personal mileage rise above and awaken masses to accept the change for the betterment of the society."

Here, it is submitted that the basic question which may be asked regarding the meaning of Uniform Civil Code is, whether it means that all civil codes must be uniform and applied to all people irrespective of their religion; or only the personal laws of the people of different religions must be uniform. Here in our country, almost in all fields there are civil laws uniformly applied to all people. What is the harm if people of different religious beliefs are allowed to follow their own Personal Laws? If uniform personal law is allowed to be applied to all people irrespective of their religion, then freedom guaranteed in Part III of our Constitution under Articles 25 and 26 would of no meaning. Space has already been given in Article 25 to the State to enact laws as a measure for social reform or when it is necessary to maintain public order, morality and health or to regulate any economic, financial, political or other secular activity which may be associated with religious practice.

IV. CONSTITUENT ASSEMBLY DEBATE AND UNIFORM CIVIL CODE

On perusal of the Constituent Assembly Debate on draft Article 35 (now Article 44), it is but axiomatic that this provision was vehemently opposed by some of the members of the Constituent Assembly. They were under the apprehension that this Article, in future, may be used to suppress the freedom of religion of minorities. This Article reads thus:

> "The state shall endeavour to secure for citizens a uniform civil code throughout the territory of India."

Mohamad Ismail wanted that the following proviso be added to this above Article 35 as:

> "Provided that any group, section or community of people shall not be obliged to give up its own personal law in case it has such law."

He said:

> "The right of a group or a community of people to follow and adhere to its own personal law is among the fundamental rights and should really be made amongst the statutory and justiciable fundamental rights …"

Now, the right to follow personal law is part of the way of life of those people who are following such laws; it is part of their religion and part of their culture. If anything is done affecting the personal laws, it will be tantamount to interference with the way of life of those people who have been observing these laws for generations and ages. This secular state which we are trying to create should not do anything to interfere with the way of life and religion of the people. He further submitted that for creating and augmenting harmony in the land it is not necessary to compel people to give up their personal law".[18] Naziruddin Ahmad

17. AIR 2000 SC 1650.
18. C.A.D. Vol.VII 541.

also sought an amendment to Article 35. He said that the following proviso be added, namely:

> "Provided that the personal law of any community which has been guaranteed by the statute shall not be changed except with the previous approval of the community ascertained in such manner as the Union Legislature may determine by law."[19]

He further said:

> "In fact, each community, each religious community has certain religious laws, certain civil laws inseparably connected with religious beliefs and practices. I believe that in framing a uniform draft code these religious laws or semi-religious laws should be kept out of its way … One of the reasons is that it perhaps clashes with Article 19 the Draft Constitution (presently Art. 25). In this Article it is provided that subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion. In fact this is so fundamental that Drafting Committee has very rightly introduced this in this place. Then in clause (2) of the same Article it has been further provided by way of limitation of the right that 'Nothing in this Article shall affect the operation of any existing law or preclude the State from making any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religions practice."[20]

He added that there may be many pernicious practices which may accompany religious practices and they may be controlled. But, there are certain religious practices, certain religious laws which do not come within the exception in Clause (2), having guaranteed, and very rightly guaranteed the freedom of religious practices and the freedom to propagate religion, I think the, present Article tries to undo what has been given in Article 19. I submit, Sir, that we must try to prevent this anomaly"[21].

Finally, he submitted that well, the goal should be towards a Uniform Civil Code but it should be gradual and with the consent of the people concerned.

Mahboob Ali Baig Sahib Bahadur, on the other hand moved that the following proviso be added to Article 35, "Provided that nothing in this Article shall affect the personal law of the citizens. He opined:

> "The words 'Civil Code' in Article 35 do not cover strictly the personal law of a citizen. The Civil Code covers law of this kind: laws of property, law of contract, transfer of property, law of evidence etc. The law as observed by a particular religious community is not covered by Article 35. If for any reason the framers of this Article have got in their minds that personal law is also covered by the expression 'Civil Code' I wish to submit that they are overlooking the very important fact of the personal law being so much dear and near to certain religious communities. As far as Mussalman are concerned, their laws of succession, inheritance,

19. Id at 543.
20. Id.
21. Id at 552.

marriage and divorce are completely dependent upon their religion.[22]"

Mr. B. Pocker Sahib Bahadur also concurred the view of Mahboob Ali Baig Sahib and said that "one of the reason why the Britishers were … able to carry on the administration of this country for the past 150 years and over was that he gave a guarantee of following their own personal laws to each of the various communities in the country. That was one of the secret of success and the basis of the administration of justice." He further raised the question as to, what is the real intention behind the introduction of this clause. He said:

> "If the word 'Civil Code' are intended only to apply to matters like CPC and other such laws which are uniform so far as India is concerned at present well, nobody has any objection to that but various Civil Courts Acts in the various provinces in this country have secured for each community the right to follow their personal laws as regards marriage, divorce, inheritance etc. But if it is intended to override all these provision and to have uniformity of law to be imposed upon the whole people on these matters which are dealt with by the Civil Courts Acts in the various provinces … it is a tyrannous provisions which ought not to be tolerated.[23]"

One more member, Hussain Imam was of the view:

> "the apprehension felt by the members of the minority community is very real. Secular does not mean that it is Anti-religions State. It means that it is not irreligious but non-religious … He therefore suggested that "it would be a good policy for the members of the Drafting Committee to come forward with such safeguards in this proviso as will meet the apprehensions genuinely felt … .[24]"

On the other hand, K.M. Munshi spoke in favour of Article 35 i.e. Uniform Civil Code. He said, that the ground that is now put forward against it is, firstly that it infringes the Fundamental Rights mentioned in Article 19; and secondly, it is tyrannous to the minority. As regards, Article 19, he said that the House has already accepted in principle that if a religious practice followed so far covers a secular activity or falls within the field of social reform or social welfare, it would be open to Parliament to make laws about it without infringing this Fundamental Right of a minority.

He further said that :

> "if this clause is not put in, it does not mean that the Parliament in future would have no right to enact a Civil Code. The only restriction to such a right would be Article 19 …. which already permits legislation covering secular activities. The whole object of this Article is that as and when the Parliament thinks proper or rather when the majority in Parliament thinks proper an attempt may be made to unify the personal law of the country.[25]"

Another argument which was advanced is that the enactment of a Civil Code would be

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22. Supra Note 18, at 544.
23. *Ibid*.
24. Supra Note 18 p546.
25. Supra Note 18 Pp547-548.

tyrannical to minorities. Is it tyrannical? He said that nowhere in advanced Muslim countries the personal law of each minority has been recognized as so sacrosanct as to prevent the enactment of a Civil Code.

Alladi Krishnaswami Ayyar also supported for the Code. He said that:

> "the Muslim Law covers the field of contracts, the field of criminal law, the field of divorce and marriage and every of law as contained in the Muslim Law. When the British occupied this country, they introduce one criminal law in this country which will be applicable to all citizens, be they Englishmen, Hindu or Muslims. Did the Muslim stake exception and revolt against the British for introducing a single system of Criminal Law? Similar law of contract or transfer of property and many others borrowed from English jurisprudence and applied to all in British India."

He further said that:

> "when there is impact between two civilizations or between two cultures each culture must be influenced and influence the other culture. If there is determined opposition or if there is strong opposition by any section of the community, it would be unwise on the part of the legislators of this country to attempt to ignore it. Today even without Article 35, there is nothing to prevent the future Parliament of India from passing such laws. Therefore, the idea is to have a Uniform Civil Code.[26]"

Dr. B.R. Ambedkar stated that:

> "we have in this country a uniform code of laws covering almost every aspect of human relationship. We have uniform and complete Criminal Code, CrPC, TPA, Negotiable Instrument and many other innumerable enactments which would prove that this country has practically a Civil Code, Uniform in its content and applicable to the whole of the country. The only province the Civil Law has not been able to invade so far is Marriage and Succession. It is this little corner which we have not been able to invade so far and it is the intention of those who desire to have Article 35 as part of the Constitution to bring about that change. Therefore, the argument whether we should attempt such a thing seems to me somewhat misplaced for the simple reason that we have, as a matter of fact, covered the whole lot of the field which is covered by a Uniform Civil Code in this country. It is therefore too late now to ask the question whether we could do it. As I say, we have already done it[27]."

It may be submitted that in the changing situation prevailing in democratic country like India where the voice of dissent also gets enough importance, where public opinion is respected and where all institutions are responsible for maintaining social order, the enactment of a uniform civil code will be acceptable when, Parliament may pass it with due consultation with the community affected thereby. Moreover, the Parliament or the State Legislature earlier has passed many such laws.

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26. Supra Note 18 p549.
27. Ibid Pp550-552.

V. CONFLICT IN VARIOUS PERSONAL LAWS

Personal Laws are supposed to be the essential for the communities who follow them. These laws are very personal to them since, they regulate the entire behaviour and relationship of the person. In India, barring Muslim law, almost all personal laws are codified. A modest attempt is made to enlist the points of distinction in various personal laws-

1. For Muslims, marriage is a contract (in strict sense, it is neither a contract nor a sacrament). But for Hindus, marriage is still regarded as a sacrament.
2. In Muslim Law, a wife has a right to receive 'dower' from her husband even after divorce or death whereas there is no such provisions under the other Laws.
3. A Muslim wife has a right of maintenance from her husband during subsistence of marriage and on divorce for a period of *Iddat* (now regulated by the Muslim Woman (Protection of Rights on Divorce) Act, 1986). On the other hand, the Hindu, Christian and Parsi Law allow for maintenance till death or remarriage of divorced wife.
4. A Muslim cannot bequeath more than 1/3 of his net estate by will. He can also not give any property to his heir by Will except with the consent of other heirs. Under Shia Law, a testator can give away 1/3 of his property in favour of his heir or to a stranger. There is no such restriction under any other personal laws. The provisions contained under the Indian Succession Act, 1925 apply to the immediately preceding personal laws.
5. Under the Hindu Succession Act, 1956, daughter takes equal share with son whereas under Muslim Law, daughter takes half of the share of a son in inheritance.
6. After the Hindu Succession (Amendment) Act, 2005, daughter has become a coparcener with son in the joint family property unlike other personal laws where daughter has no such status under Muslim Law.
7. Adoption of a child is not recognized under Muslim, Christian and Parsi Law while Hindu Law permits the same.
8. Muslim Law recognizes acknowledgement of paternity, while other personal laws do not recognize the same.

In this backdrop, it can be submitted that Muslim Law is poles apart from other personal laws. Almost, it may be very difficult for harmonisation.[28]

VI. CONCLUSION

The proponent of Uniform Civil Code generally argue that even after sixty nine years, no efforts have been made for unification of personal laws in India. In 1955-56 Hindu Law was codified and later amended in 1976 and 2005 replacing the traditional approach. Christian and Parsi laws have also been codified. In case of Muslim Personal Law, it is to be noted that Muslims believe that provisions regulating the personal life of Muslim are based on the principles derived from Quran and the traditions of Prophet Mohammad. The nicety of the religion and the principles underlying are difficult to understand a by the proponent. Here, it may be submitted that let the government codify the Muslim Law also but this attempt should be done in consultation with the Jurists of personal law who understand and have the command over Muslim Jurisprudence.

28. See also, D.C. Manooja, "*Uniform Civil Code: A Suggestion*" XLII *ILJ* 448-457 Constitutional Law Special Issue (2000).

It is pertinent to know what is best in all personal laws for all community in every field. We have uniform laws in all matter e.g. Contract, Transfer of Property, Civil Procedure Code, Code of Criminal Procedure, Indian Penal Code, Partnership, Sale of Goods Act, and Companies Act etc. However, subjects that are marriage, succession, adoption and maintenance still remain untouched. If one see the difference in the provisions of the personal laws of our country, it is rather impossible to make them uniform. All the Personal Laws, they are poles apart.

It is generally argued that Muslims Personal Law is discriminatory and bias towards women and thus violative of Articles 14 and 15(1) of the Constitution. This is not correct. This is the first law which has given the share to females in all movable and immovable properties of the propitious. There is utmost respect to women based on 'Justice'. There is no Place for mathematical equality. Mathematical equality may, sometime, lead to injustice.

In democracy, to sustain healthy dissent is indispensable. In a plural society, any effort to regiment various ethnic and linguistic groups into a uniform mould may be counterproductive. Identity does not mean separatism. Article 21 of the Constitution guarantees every people of India a right to life and personal liberty. Given a wider interpretation, right to life also includes right to live with a separate identity. Hence, it cannot be said that living with distinct identities may lead to national disintegration and therefore do not necessarily lead to separatism. Sathe has rightly pointed out which would noteworthy to mention here:

> "India is a country of different ethnic, religious and linguistic groups having different traditions and cultures and they are entitled to preserve them under the Constitution (Articles 29 & 30). Their personal laws are based on such variety of traditions and cultures and therefore cannot be obliterated just for the sake of Uniform Civil Code which is only a directive principle[29]."

It is wisdom of the Parliament that enacted *the Special Marriage Act, 1954*. Under this Act, two persons belonging to the same or different religion can marry. It may be treated as an optional Uniform Civil Code. It is further argued that if personal laws of different community are treated as a part of religion, equality cannot be achieved among men and women, so religion must be restricted to religion only and the secular activities attached to the religion must be regulated, unified and modified for a strong and consolidated nation[30]. It may be submitted that so far as Hindu law is concerned, it is codified and the shares of the heirs are well defined by the Hindu Succession Act, 1956. But, for Muslims, the subjects mentioned in the *Shariat Act*, 1937 are very much part of the Muslim law. Under Muslim law, to separate religion and law is difficult. Moreover, the law of inheritance has been well defined in *Quran* and it has been specifically mentioned in it that doesn't interfere in the law of inheritance as mentioned in it. Justice and equality has been maintained in it for both men and women. It should never be considered a threat to the national integrity.

We the People of India are very much used to live together with harmony although having different personal laws since long. There have been no clash in the personal laws dealing with the metter for Hindus or for Muslims. It is therefore very earnestly may be

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29. *Supra* note 16.

30. *Supra* note 19.

submitted that for India the decision laid down by the Apex Court in *Pannalal Bansilal Pitti & Ors v State of Andhra Pradesh & Anr.*[31] is more relevant. In a pluralist society like India in which people have faith in their respective religious....., the founding fathers, while making the constitution, were confronted with problem of unity ..... A uniform law, though is highly desirable, enaetment thereof in one go perhaps may be counter-productive to unity..... The mischief or defect which is most acute can be remedied by the judiciary and by process of law at the stages. The Muslim Women (Protection of Rights on Divorce) Act, 1986, and the Hindu Succession (Amendment) Act, 2005 are the few examples.

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31. 1996 SCC (2) 498.

RECONCEPTUALISING FEDERAL COMITY IN INDIA

J. P. RAI*

ABSTRACT : The government's capacity to implement policies is determined, among others, by the political system - federal or unitary - followed in a country. Federalism results in division of power but it must not result in competitive federalism. It must be a co-operative federalism where Union and States join hands to defend, develop, serve and deal the challenges being faced by the Country in modern heterogeneous era.

KEY WORDS : Form of Government, Co-operative Federalism, Centre State Relations, Division of Powers

I. INTRODUCTION

Federalism is a concept that allows for diversity within unity of a union in which the partners retain their fundamental integrity. As a concept it has aroused increasing interest throughout the world, both in nations that are formally federal and those that seek to utilize federal principles to deal with problems that have proved intractable to centralize solutions.

Federalism is the embodiment of trust and faith between the Union and the States. The trust and faith is ensured through the concept of co-operative federalism. It is indeed a modern formula between ir-reconciliation which is destructive of National Solidarity, and centralization which is destructive of local autonomy. Federal theory today has advanced a great deal and cooperative federalism has been the guiding principle for federal governments to follow and implement their policies for the mutual advantage of the Union and the component units and for the avoidance of any rupture as between States inter se or between the Union and the states as the aim of all societies is to obtain the best form of government. The success of federalism rests, to a large extent on the capacity of the different units to work together in spirit of co-operation.

The framers of the Indian Constitution were aware of this emerging trend in comparative federalism. They realized that governments in a federal structure are not arranged hierarchically or vertically but horizontally; that there is no line of command and decisions amongst them can be promoted not by dictation but by discussion, persuasion, agreement and compromise.[1] Several provisions relating co-operation between Centre and States are present in the Indian Constitution. Even then, we can experience cases of allegations of misuse of power by the Centre, violation of rights of the States or in other words, strife between Centre and States on

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different issues of their concern.

In this article, an attempt has been made to analyze different aspects of federal comity in India which is a relationship of trust and faith between Union and States. Critical analysis of the history of Co-operative federalism in pre and post independent India, Constitutional provisions, recommendations of different Commissions and judicial interpretation using doctrinal research methodology has been done to draw appropriate inferences and conclusions.

II. HISTORY OF CO-OPERATIVE FEDERALISM IN INDIA

a. Pre-Independent India

Federal system of governance, though not in the modern sense of definition, is not new to India and governance at multiple levels has been prevalent during earlier eras. It is a well recorded fact that governance during ancient India was characterized by the three-tier system of administration, namely the village panchayats/local principalities, the urban provinces and the kingdoms/empires. Political unity was premised by the economic self sufficiency of the units, maintenance of social order and observance of religious and linguistic identity coupled with traditional diversity. While the federal principles of administration had the Indus and Indo-Aryan heritage, their practice had been pervasive that enjoyed longevity over centuries. The same was manifest from the fact that the provinces and local governments in various empires, from the Mauryas to Mughals, were able to maintain considerable degree of autonomy in administration.

During the ancient period, federal principles and systems were put to test and practice. What was astoundingly clear was that the principles of democratic systems and people's participation in governance at the grass roots level were well established that stayed largely undisturbed over longer periods. Liberty, local administrative autonomy and women's participation in local elected Governments were the hallmark of self governance systems.[2]

During the Mughal period the governance reforms were largely confined to urban administration, centralization and empire building. Emphasis of the administration was mainly on revenue management, development of urban infrastructure and building of large army for expansion of the empire. In order to achieve this goal a well-knit and entrenched bureaucracy was developed which supported these endeavors.[3]

In the British period, seeds of co-operative federalism can be traced right from the Regulating Act of 1773 which set up a system whereby the British Government regulated the work of the East India Company but did not take power for itself. But Once the Britishers became rulers of India after 1820s, their main aim was establishing orderly government in India.[4] However, in the subsequent phases, the establishment of centralized British Rule in India witnessed near total disintegration in the independence of the village economy and the village community greatly lost both its economic and administrative functions. The Indian

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1. M.P. Jain, *Constitutional Developments since Independence*, ILI, New Delhi, 1975, pp. 248-49
2. A.S. Altker, *State and Government in Ancient India*, Motilal Banarasidas, Delhi, 1962, pp. 286-287.
3. Beni Prasad, *The States in Ancient India*, Central Press, Allahabad, 1928, p. 162.
4. K.R. Bombwall, *The Foundation of Indian Federation*, Asian Publications, Bombay, 1967, pp. 34-36.

Councils Act, 1909 failed to establish representative institutions in India, so increasing association of Indians in every branch of administration and the gradual development of the self-governing institutions was made the prime moto of the British empire.[5] The Montague-Chelmsford reported that the complete fulfillment of the above pledge could not take any form other than that of the self-governing systems.

The Government of India Act, 1919, based on Montague-Chelmsford Report, provided for a considerable measure of devolution of authority to the provinces.[6] The reforms of 1919, however, failed to meet the aspirations of the people for full responsible government. The administrative structure remained unitary with the Governor-General-in-Council in effective ultimate control. During the period from 1924 to 1931, the growth of nationalist demand for independence acquired unprecedented strength. The Government of India Act, 1935 envisaged an all-India federation[7]with provincial autonomy. The British Cabinet Mission Plan envisaged a government at the Centre with very limited powers and relatively strong provinces having considerable degree of autonomy with all the residuary powers.

Was the Constitution of India to establish a federal or unitary system? In this regard, the members of the Constituent Assembly had two schools of thought. The first school of thought favored that the proposed Indian federation is a federal system.[8] It included T T

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5. H.H. Dodwell, *"The Cambridge History of India"*, S. Chand and Company, New Delhi, 1979, Vol. 2, p. 529

6. For the first time there was division in the field of administration into two spheres, the central and the provincial. The matters which were of all India concern requiring uniform treatment like for instance, defence, communication, foreign relations, customs, income tax, criminal law, etc., were put on the central list; and those which were predominantly of provincial interest such as education, medicine, public health, public works, land tenures, etc., were listed as provincial subjects. The residuary matters belonged to the Centre. The Governor- General-in-Council could declare a subject in the Central list to be included in the Provincial list - available at ://www.constitution of India.net/ historical_constitution/government_of_india_act_1919_1st%20 January%201919.

7. See, Lawrence, *"Federalism without Centre"*, Sage Publications, New Delhi, 2002, pp. 23-25 It consisted of eleven Governor's provinces, six Chief Commissioner's provinces, and such Indian States as would agree to join the federation. The governmental subjects were divided into three Lists i.e. Federal, Provincial and Concurrent. The provincial legislatures were given exclusive power to legislate with respect to matters in the Provincial list. The federal legislature had the exclusive power to make law on matters in the Federal List. The federal and the provincial legislatures had concurrent jurisdiction with respect to matters in the Concurrent List. In case of conflict between a provincial law and a federal law on a matter enumerated in the Concurrent List, the latter was to prevail, and the former would, to the extent of the repugnancy be void. Residuary powers were vested in the Governor-General, who could, in his discretion, assign any such power by a public notification to the federal legislature or the provincial legislature. Section 102(1) of the Act authorized the federal legislature to legislate on provincial matters when a Proclamation of Emergency was declared under that Section. Section 103 empowered the federal legislature to make laws on matters contained in the Provincial List in pursuance of a resolution to the effect passed by two or more provincial legislatures. Any such legislation might, in respect of any province to which it applied, be amended or repealed by an Act of the legislature of that province. Besides, Section 108(2) stated that a bill, which was repugnant to any provisions of any Act of Parliament extending to British India, or which affected matters in respects which the Governor-General was required to act in his discretion, or which affected the procedure for criminal proceedings in which European British subjects were concerned, could not be introduced in the provincial legislature without the previous sanction of the Governor-General.

8. T.T. Krishanamchari, *Constituent Assembly Debates*, vol. VII, No. 29, 30, December, 1948, p.1132 observed, "The concept of this Constitution is undoubtedly Federal. But, how far Federalism is going to prove to be of benefit to this country in practice will only be determined by the passage of time and it would depend on how far the various forces inter-act conceding thereby to the provinces

Krishnmachari and K Santhanam. The second school of thought pointed out that the proposed federation of India was a unitary system. The second school of thought included P.T. Chacko[9], P.S. Deshmukh[10], B. M Gupte.[11] At the end B.R. Ambedkar declared that the Constitution of India is basically a federal Constitution as it fulfills all the requirements of a federal system.[12]

b. Post-Independent India

Under the provisions of Indian Constitution, relations between the Union and States can be studied under the Legislative Relations[13], Administrative Relations[14], Financial Relations[15] heads. The Constitution of India provides various provisions dealing with the co-operative aspect of federal structure. The constitution makers deliberately provided for such features in the Constitution in order to ensure the smooth working of the government. Parliament and Central executive has also added to this agenda through various actions. Full Faith and Credit Clause[16], Inter State Council[17],

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greater or lesser autonomy than what we now envisage."*K. Santhanam* , (1949) *Constituent Assembly Debates*, vol. XI, p. 718, 19 November 1949. (Madras: General) observed, "We have got a Constitution which is federal in character and the federalism of it is so well protected by the Judiciary that it cannot be broken except by a change of the Constitution. Therefore, I dot not think that Provincial Autonomy as such has suffered materially."

9. P.T. Chacko, (1949), *Constituent Assembly Debates*, vol. XI, 21 November 1949, p.745, observed, "I am of opinion that in substance it is unitary Constitution. Take for example the legislative powers of the Centre. Specified powers are given to the States and the residuary powers are given to the Centre unlike the Constitution of the USA or the Commonwealth of Australia.

10. P.S. Deshmukh, (1949), *Constituent Assembly Debates,* vol. XI, 22 November, 1949, p.778, observed, "We should have a unitary form of government, but I have the satisfaction that although we have not incorporated a full-fledged and full- blooded unitary form of government, our Constitution is more unitary than federal and from that point of view I think it is a much greater improvement from the time we set about this task"

11. B.M. Gupte, (1949), *Constituent Assembly Debates* vol. XI, 23 November, 1949, p.844, observed "Our State was not a Federal State but a decentralised Unitary State. Subsequent provisions, namely article 365 and article 371 have vindicated my description... The units are kept completely dependent in financial matters on the good graces of the Centre and it is this kind of semblance of independence with complete dependence upon the Centre for finances that is in my opinion the most objectionable feature".

12. B.R. Ambedkar, (1949), *Ibid*, Vol. XI, 25 November, 1949, pp.976-977.He observed, "The chief mark of federalism as I said lies in the partition of the legislative and executive authority between the Centre and the Units by the Constitution. This is the principle embodied in our Constitution. There can be no mistake about it. It is, therefore, wrong to say that the States have been placed under the Centre. Centre cannot by its own will alter the boundary of that partition. Nor can the Judiciary, these overriding powers do not form the normal feature of the Constitution. Their use and operation are expressly confined to emergencies onIy."He also clarified that the Draft Constitution can be unitary as well as federal according to the requirements of time and circumstances. In normal times, it is framed to work as a federal system. But in times of war it is so designed as to make it work as though it was a unitary system. (1948), *Ibid*, Vol. VII, No.1, 4 November, 1948, pp.34-35.

13. Constitution of India, 1950, Articles 245-255.

14. Constitution of India, 1950, Articles 256-263.

15. Constitution of India, 1950, Articles 263-293.

16. Article 261 of the Constitution of India dealing with the full faith and credit clause promotes uniformity and unity throughout the territory of India. It develops a sense of harmony and unity in the country. It promotes cooperation between the states and the center and gives due credit to all the public acts.

17. Constitution of India, 1950, Article 263 provides that the President may by order appoint an Inter State Council if it appears to him that public interest would be served by its establishment. The President may define the organization, procedure and duties of the Council.

Zonal Councils[18], River Water Disputes Councils[19], Planning Commission[20] replaced by Niti Ayog, National Development Council[21] are some of the examples. Other Statutory Bodies like the University Grants Commission[22], Indian Medical Council,[23]Damodar Valley Corporation[24], Drugs Consultative Committee[25] are some other arrangements furthering the cause of co-operative federalism in India.

The first fifteen years after independence were marked by a democratically elected regime with a comfortable majority coupled with idealism and freshness of hope having just

18. Zonal Councils, introduced by the States Reorganisation Act, 1956, were created in order to bring the states of a particular region in close conformity with each other, as an instrument of intergovernmental consultation and cooperation mainly in socio economic fields and also to arrest the growth of controversies and particularistic tendencies among the various States. There exists five Zonal Councils. Each State included in a zonal council enjoys a complete equality of status as each state has an equality of representation in the council; each Chief Minister is to act as the Vice chairperson of the council in rotation for a year; meetings of the council are to be held in each member state by rotation; the Chief Secretary of a member state is to act as the Secretary of the council in rotation for one year. A zonal council is an advisory body and has no executive or legislative function to perform.
19. Article 262 of the Indian Constitution empowers the Parliament to provide by law for adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of any interstate river or river valley.
20. In 1950, the Government of India set up the Planning Commission with the Prime Minister as its chairman. It had a vice president and a few central ministers and a few non official experts as its members. It was assigned the following functions: 1. to make an assessment of material, capital and human resources of the country and investigate the possibilities of augmenting such of these resources as are found to be deficient in relation to the nation's requirements; 2. to formulate a plan for the most effective and balanced utilization of the country's resources; 3. on a determination of priorities, to define the stages in which the plan should be carried out and propose the allocation of resources for the due completion of each stage; 4. to indicate the factors which are tending to retard economic development and determine the conditions which in view of the current social and political situation, should be established for the successful execution of the plan; 5. to determine the nature of the machinery which will be necessary for securing the successful implementation of each stage of the plan in all its aspects; 6. to appraise from time to time the progress achieved in execution of each stage of the plan and recommend the adjustments of policy and measures that such appraisal might show to be necessary.
21. The National Development Council was established in 1952 in order to provide a mechanism to give sense of participation to the states in the planning processes. It consists of the Prime Minister, the State Chief Ministers, representatives of the Union Territories. In 1967, its membership was enlarged by the addition of all members of the Union cabinet and Chief Ministers of the Union Territories. The functions of the council were to strengthen and mobilize the efforts and resources of the nation in support of the plans; to promote common economic policies in all vital spheres and to ensure the balanced and rapid development of all parts of the country.
22. UGC was was created under the University Grants Commission Act, 1956. It gets its funds from the center only. It grants fund both for maintenance and development to central universities while only for maintenance to state universities.
23. Indian Medical Council was created under the Indian Medical Council Act, 1956, the All India Council for Technical Education, formed under the All India Council for Technical Education Act, 1987 are some of the bodies regulating and coordinating higher education in India.
24. Damodar Valley Corporation is the joint enterprise of center and the states of Bihar and West Bengal and has been established under the provisions of Article 262 to develop the interstate valley of the Damodar River for irrigation, power and flood control.
25. Section 7 of the Drugs Act, 1940, empowers the Central Government to constitute the Drugs Consultative Committee to advise the central and state governments on any matter tending to secure uniformity throughout India in the administration of the Act. The committee consists of two representatives of the central government and one representative of each of the state governments.

gained independence. The States Reorganization Act, 1956, creating linguistic states, fulfilled a demand that was being made vociferously and was a victory of popular will. Five Zonal Councils were set up vide Part-III of the States Re-organization Act, 1956 with the object to "develop the habit of co-operative working.[26] The Planning Commission was set up by a Resolution of the Government of India in March 1950 to promote a rapid rise in the standard of living of the people by efficient exploitation of the resources of the country. The National Development Council (NDC) was created in 1952 with the aim to impart national character to the entire process of planning.

From 1960 to 1980, the very policies of centralization, politicization and dictatorship damaged the federal and democratic structure of the country.[27] Federalism came heavily under pressure with the misused declaration of emergency on 26th June 1975 under ominous conditions. Post emergency witnessed break up from single party rule across the country and the rise of regional parties happened simultaneously. It was because of the federal structure that people could aspire for share in power. Because of highhandedness of then Central government, movements for autonomy within the existing states and movements for separation from the Union as in Andhra, Assam and Punjab aggravated.[28]

Tensions were most acute over financial matters. The control of the centre, over plan funds to be spent in the States was in effect, by bringing majority of the programs under centrally sponsored schemes to include everything like drinking water and supply of oil seeds. The State governments were slowly sidelined from all areas of development generating resentment among the latter. Such a tendency is found even today (Rural Health Mission, *Sarva Shiksha Abhiyan* etc.) and it shows lack of confidence in the states and discourages initiative from the states making them dependent on the Centre for basics. It does not augur well for progressive federalism. It is also an instance of the misuse of the grants under Article 275.

1989 marked the beginning of multi-party system in India. "True federalism"[29] was established when Planning Commission was asked to make a presentation to the assembled CMs explaining the rationale for the allocations that had been made to each sector of the economy, and how the principal goals of the plan would be met. In addition to revival of the NDC, the Inter State Council was set up as an apostle of federal comity on a permanent basis.[30] With the economic liberalization of the 1990s, State leaders came to demand partnership in the federal policy making processes that concern multilateral agreements with international organizations. This brought out into the open the economic and regional disparities making

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26. Available at https://lexforti.com/legal-news/wp-content/uploads/2020/08 Cooperative-Federalism-Pawanpreet-singh.pdf

27. Amal Ray, *Central Reserve Police and Union-State Relation*, National Publishing House, Delhi, pp. 368-369.

28. Available at https ://www.jstor.org/stable/43953637?seq=1. In its election manifesto, the National Front argued for a serious commitment to, what it termed, "true federalism" by reversing the over centralization brought about by the ruling party.

29. Available at http://www.legal.serviceindia.com/article/1441-cooperative-Federalism-In-India.html.

30. It was created under Article 263, a general Article under which any number of such bodies can be appointed to deal with various matters. Basically advisory and recommendatory, its main function is to inquire and advice upon inter–state disputes of non-legal nature. Hence it complements the Supreme Court's jurisdiction under Article 131. The Council is fully dominated by the executives of the two levels of government. There is no representation from, or role for, the legislature in deciding the agenda and issues to be discussed. Furthermore, the meetings of the Council are held in camera and while the questions discussed by the Council are decided by consensus, the decision of the PM is final. *The Indian Journal of Political Science*, Vol. IXVIII, Oct.– Dec. 2007, pp. 699-700

the same a matter of significant concern all the more for the federal government. At another level, inter-state competition of sorts came to mark the behavior of state governments to attract FDI. Hence, economic liberalization prompted a change in federal relations from inter governmental cooperation to inter jurisdictional competition among the states.

In 1992, the 73rd and 74th Amendment Acts were passed making the core of the federalist, decentralized form of democracy. Three new states were created in 2000 to recognize the demands around tribal identities. It is important to note that these new states have emerged very much within the fabric of India which is a "Union of States", reinforcing that our federalism is alive and kicking. In 2003, Bodo, Dogri, Maithili and Santhali were included in the Eighth Schedule of the Constitution to strengthen cooperative federalism

III. COMPARATIVE STUDY OF CO-OPERATIVE FEDERALISM

The study of co-operative federalism in Australia, Canada and the United States recognizes as fundamental the complex relationships which inevitably exist within multilevel systems of government, none of which is more important than the fiscal relationship.

a. Australia

Australian population is generally homogeneous in nature. The federal and state governments operate under the parliamentary-cabinet system. The Australian Constitution, like that of the United States, enumerates the powers of the federal government, leaving the residual powers with the states. A good many powers are left concurrent with both the federal and state governments. Again, like the U.S., the High Court of Australia, through its power of judicial review, has more often permitted the expansion of federal powers than those of the states, and the federal government's superior revenue position has further cut into areas formally belonging to the states.[31]

b. Canada

The Canadian Constitution, the British North America Act of 1867, as amended details a good many exclusive powers for both the national government and the provinces and leaves most of the residual power (power to "make laws for the peace, order, and good government of Canada") with the national government. While federal residual power relates to matters of national importance, the provinces have residual powers with respect to matters of a "merely local or private nature.[32]

c. United States

The U.S. Constitution delegates most of the expected powers of a national government to the Congress (Article I, Section 8); and through the presence of an "implied powers" clause, legislative, executive, and judicial actions have considerably expanded the range of the national government's powers. The states have "reserved" powers, which ensure that

31. Available at https://library.unt.edu/gpo/acir/Reports/information/M-130.pdf. The federal government has constitutional power in such areas as defense, overseas trade and trade between the states, foreign affairs, the government of territories, and migration into, and out of the country, as well as sharing with the states power in such areas as banking and insurance, industrial disputes, and transport. The states have retained responsibility for the preservation of law and order, have engaged in a wide variety of regulatory and service functions, and exercise primary responsibility for education, the provision of health, cultural and recreational services, and developmental activities in connection with land and resources.

32. Available at https://library.unt.edu/gpo/acir/Reports/information/M-130.pdf.

they can organize their own governments without national interference, legislate for the health, welfare, safety, and morals of their residents (through the exercise of the so-called "police power"), assume responsibility for, and control of local governments, and play an important role in the electoral processes of the national government. Many governmental programs in the U.S. involve the joint or cooperative action of the national, state, and local governments in the system, so that competition for power in fact has become less central in intergovernmental relations than has the search for improved ways of cooperative action.[33]

IV. NATURE OF INDIAN FEDERAL SYSTEM

The Constitution of India provides for a federal system with certain non-federal features to maintain the unity of the country and to ensure the economic development of whole of the country. The Constitution of India describes India as a Union of States, because the formation of the federation is not a result of an agreement between - Union and States, and the States have no right of separation from the Union. As Article I provides, "India that is Bharat shall be a Union of States".[34] The Indian federal system is a unique system in its origin, structure and functioning. We can describe the unique features of Indian federal system as: *first*, the Constituent Assembly framed the Constitution of India representing the people of India and also adopted it on the behalf of the 'people of India'. Thus, the Union of India cannot be said to be the result of any compact or agreement between autonomous States. *Second*, the Constitution of India lays down the Constitution for the States as well, and, no State has a right to determine its own Constitution. *Third*, the States have no sovereign entities and they have no right to separation from the Union of India. However, the Union's Parliament is competent to form new States, in changing, their names or boundaries. Thus, the Union of India is not destructible but the States are destructible.[35]*Fourth*, the residuary powers are assigned to the Union's Parliament, [Article 248]. *Fifth*, the Union's Parliament is given power to legislate the subjects of the State List under certain circumstances: concerning national interests, on the demand of two or more state assemblies, on implementing the international treaty or agreement, and when emergency is imposed under Articles 352 and 356. *Sixth*, there is provision in the Constitution for the exercise of control by the Union both over the administration and legislation of the States. Legislation by a State shall be subject to disallowance by the President, when reserved by the Governor for his consideration [Article 201]. The Governor of a State is appointed by the President of the Union and holds office 'during the pleasure' of the President (Articles 155-156). *Seventh*, in the matter of amendment of the Constitution, the part assigned to the State is minor, as compared with that of the Union. Except in a few specified matters affecting the federal structure, the States need not even be consulted in the matter of amendment of the bulk of the Constitution, which may be effected by a Bill in the Union's Parliament, passed by a special majority. *Eighth*, there is no theory of 'equality of State rights' underlying the federal scheme in the Constitution, since it is not the result of any agreement between the States. Under the Constitution, there

33. *Ibid.*

34. Government of India (1991), Article 1, The Constitution of India, Legislative Department: New Delhi, P.1.

35. Article 4 (2) of the Constitution of India does not require that consent of the Legislature of the State concerned is necessary for enabling Parliament to make such laws; only the President has to 'ascertain' the views of the Legislature of the affected States to recommend a Bill for this purpose to Parliament. Even this obligation is not mandatory insofar as the Legislature expresses its views if at all.

is no equality of representation of the States in the Council of States. *Ninth*, the Indian Constitution does not introduce any double citizenship, but only one citizenship, viz., - the citizenship of India, and birth or residence in particular State does not confer any separate status as a citizen of that State. *Tenth*, the Constitution provides for the creation of All-India Services, and they are common to the Union and the States [Article 312]. A member of an All-India Service can be dismissed or removed only by the Union Government even while serving under a State. *Eleventh*, the Supreme Court stands at the apex of integrated system of judiciary. It will administer both the Union and State laws as they are applicable to the cases coming up for adjudication. There is also a fundamental law, civil and criminal, throughout the country. *Twelfth*, the Chief Election Commissioner and other Election Commissioners are appointed by the President (Article 324). The Commission conducts supervision and control of the elections not only to Parliament, but also the State Legislatures. *Thirteenth*, The machinery for Accounts and Audit (Article 148) is also integrated. The Indian Audit and Accounts Service is a Central Service; they audit and control the accounts of the Union Government and the State Governments. *Fourteenth*, the Constitution of India empowers the Union to entrust its executive functions to a State, by its consent, and a State to entrust its executive functions to the Union, similarly. *Fifteenth*, when a Proclamation of Emergency under Articles 352, 356 and 360 is made, the Union gets power to give directions to the States on all matters, and the Union's Parliament is empowered to legislate on State List. *Sixteenth*, the Union Government is competent to issue directions to the State Governments to ensure due compliance with the legislative and administrative action of the Union Government [Article 256-257], and to supersede a State Government which refuses to comply with such directions [Article 3651.[36] *Seventeenth*, the provision for giving grants-in-aid and loans from the Union Government to the State Governments provides the opportunity to Union to influence the States. *Eighteenth*, the Constitution vests powers in the Union Government and its agencies to resolve conflicts that arise between the Union and the States, e.g., the Finance Commission [Article 280], the Inter-State Council [Article 263] etc.[37]

V. COMMISSIONS AND COMMITTEES

a. First Administrative Reforms Commission, 1966

The first Administrative Reforms Commission was constituted by the GOI for reviewing the public administration system of India and recommending measures for making administration fit for carrying out the social and economic policies of the government and being responsive to the people. Out of 20 parts containing 537 major recommendations, the 13th report covered the issues of Centre-State relations.[38]

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36. Durga Das, Basu, (2001), *Introduction to the Constitution of India*, Wadhwa: Nagpur, pp.53-60, Reprinted 2005.

37. M.V, Pylee, (1960), *Constitutional Government in India*, S. Chand: New Delhi, Fourth Ed., 1984,pp. 466-67.

38. Reports of First Administrative Reforms Commission, 1966. With regard to Inter-State Council the Commission made the following recommendations: 1.Establishment of an Inter-State Council under Article 263 (b) and (c) of the Constitution which would discuss all issues of national importance in which the States are interested. 2. Saddling the Council with functions under article 263 (a) to inquire into and advise upon disputes between the States would prevent it from giving full attention to the various problems of national concern which it ought to consider. 3. This body should replace the National Development Council, the Chief Minister' Conference, the Finance Minister' Conference,

b. Rajamannar Committee, 1969

Committee recommended[39] that the Inter-State Council be constituted immediately. Every bill of national importance or which is likely to affect the interests of one or more states, before its introduction in parliament, be referred to the Inter-State Council and its views thereon should be submitted to parliament at the time of introduction of the bill. No decision of national importance or which may affect one or more States should be taken by the Union Government except after consultation with the Inter-State Council. Exceptions may be made in regard to subjects like Defence and Foreign Relations.

The Planning Commission should be placed on an independent footing without being subject to political influences. To secure this objective, it should be placed on a statutory basis by parliament enacting a law providing for the establishment of Planning Commission.[39]

c. Sarkaria Commission, 1983

This Commission was constituted to examine and review the working of the existing arrangements between the Union and States in regards to powers, functions and responsibilities in all spheres keeping in view the social and economic developments that have taken place over the years and have due regard to the scheme and framework of the Constitution which the founding fathers have designed to protect the independence and ensure the unity and integrity of the Country which is of paramount importance for promoting the welfare of the people.

The Commission observed that the new areas of national concern are emerging with economic growth, technological development and socio-political changes. The rapidly expanding governmental functions and routine problems which arise in the day to day working are sorted out through discussions and inter-action at various levels of bureaucracy. Federalism is more a functional arrangement for cooperative action, than a static institutional concept. Article 258 (power of the Union to confer powers etc on states in certain cases) provides a tool by the liberal use of which cooperative federalism can be substantially realised in the working of the system. A more generous use of this tool should be made than has hitherto been done, for progressive decentralisation of powers to the governments of the states. The commission made several key recommendations relating centre state

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the Food Ministers' Conference and the National integration Council. 4. The Council will be wide-embracing and will provide standing machinery for effecting consultations between the centre and the states. Only issues of real and national importance need be taken up there. Others should be settled by conferences convened by the ministries concerned, at a lower preferably official level. 5. The Council should have an appropriate secretariat. The Secretary of the Council should be an officer having the knowledge, experience and status that will enable him to work effectively. Report available at https://darpg.gov.in/panel/first-administrative-reforms-commission-reports.

39. Report of Central-State Relations Committee, (Rajamannar Committee), 1971, available at https://en.wikipedia.org/wiki/P._V._Rajamannar.

40. The Commission recommended that the Planning Commission to be established by law should consist of only experts in economic scientific, technical and agricultural matters and specialists in other categories of national activity. No member of the Government of India should be on it. The law to be made in this behalf should deal with the tenure, term of office and conditions of service of the members of the Planning Commission which should have a Secretariat of its own. The existing Planning Commission should be abolished. The duty of the Planning Commission should be to tender on schemes formulated by the States. It will also have the responsibility of making recommendation for consideration by the Finance Commission regarding grant of foreign exchange to state for industrial undertaking started by or in the States.

relationship.[41]

d. National Commission to Review the Working of the Constitution (NCRWC), 2000[42]

The National Commission to Review the Working of the Constitution was set up with the objective to examine in the light of experience of the part fifty years, as to how best the Constitution can respond to the changing needs of efficient, smooth and effective system of governance and socio-economic development of modern India within the frame work of Parliamentary democracy and to recommend changes if any, that are required in the provisions of the Constitution without interfering with its basic structure or features.[43]

On co-ordination between States, Centre-State Relations, the Commission was of the view that federalism is a living faith to manage diversities and it needs to be supported by institutional mechanisms to facilitate co-operation and co-ordination among the Units and between the Units and the Union. Co-operative federalism is easily endorsed but difficult to practice without adequate means of consultation at all levels of the government. The Constitution has provided only limited institutional arrangements for the purpose and regrettably they are not adequately utilized. In this context, the Commission strongly recommends the strengthening and mainstreaming of the Inter-State Council to make it a vibrant forum for all the tasks contemplated in Clauses (a) to (c) of Article 263.[44]

e. Second Administrative Reforms Commission, 2005

This Commission of Inquiry called the Second Administrative Reforms Commission (ARC) constituted to prepare a detailed blueprint for revamping the public administration system reported that the last decade has witnessed significant maturing of our federalism.

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41. Reports of R.S. Sarkaria Commission, available at http://interstatecouncil.nic.in/report-of-the-sarkaria-commission/.

42. *Justice M.N. Venkatachaliah* retired Chief Justice of the Supreme Court of India and a former Chairman of the National Human Rights Commission was the Chairman of the Commission (NCRWC).

43. Reports of National Commission to Review the Working of the Constitution, available at https://legalaffairs.gov.in/ncrwc-report.

44. Though the Article does not provide a dispute settlement function to the Council, it envisages the Council to inquire into and advise on disputes between States towards settlement of contested claims. The Commission is of the view that the Council should be vested with the powers and functions contemplated in Article 263(a) also as it would further enhance the capacity of the Council to discharge its functions in Clauses (b) and (c) more effectively and meaningfully. The Council can further have expert advisory bodies or administrative tribunals with quasi-judicial authority to give recommendations to the Council if and when needed. In short, it is imperative to put the Inter-State Council as a specialized forum to deal with intergovernmental relations according to federal principles and Constitutional good practices. The Commission was of the view that the Council is an extremely useful mechanism for consensus building and voluntary settlement of disputes if the body is staffed by technical and management experts and given the autonomy required for functioning as a Constitutional body independent of the Union and the States. It should have sufficient resources and authority to carry out its functions effectively and to engage civil society besides governments and other public bodies. It needs to meet regularly with adequate preparation of agenda and negotiating points and position papers from parties involved. The Secretariat of the Council may have joint staff of the Union and States to inspire confidence and enhance co-ordination. Negotiation, mediation and conciliation to find common points or agreement and narrowing of differences employed in international intercourse and in judicial proceedings can usefully be cultivated in the Council Secretariat for advancing the cause of harmonious intergovernmental relations. Towards this end, the Commission would recommend suitable amendments to Article 263 with a view to make the Inter-State Council a credible, powerful and fair mechanism for management of inter-state and Centre-State differences.

States are increasingly empowered to determine their own policies and the programmes and the Union is even more sensitive to local needs. The role of the Union is expanding in a substantial measure in new ways. Education, health care, rural and urban development and social security are either State subjects or largely under State jurisdiction.[45]

f. Punchhi Commission, 2010

The basic question that the Commission identified to be addressed was; are the existing arrangements governing Centre-State relations-legislative, executive and financial– envisaged in the Constitution, as they have evolved over the years, working in a manner that can meet the aspirations of the Indian society as also the requirements of an increasingly globalizing world? If not, what are the impediments and how can they be remedied without violating the basic structure of the Constitution?[46]

The Commission recommended that the sanctity of this constitutional post should be preserved. In democracy, nobody can have absolute power in the name of smooth administration and good governance. The administrative apparatus has to be in the line of the Constitution, which was prepared by the people of the country and amended by the elected representative of the people of India.

VI. CO-OPERATIVE FEDERALISM AND INDIAN JUDICIARY

Federalism and cultural and ethnic pluralism have given the country's political system great flexibility, and therefore the capacity to withstand stress through accommodation. However, continuation of the same requires not simply federalism, but cooperative and constructive federalism. The Judiciary has used numerous phrases to describe this concept of cooperative federalism, though all of them, in essence, have the same meaning.

In *West Bengal* v. *Union of India*[47], the Court held that "Indian- Constitution did not propound a principle of Absolute-Federalism"[48]. In *Keshvanand Bharti* v. *State of*

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45. Available at https://darpg.gov.in/sites/default/files/human_capital2.pdf.

46. Commission of Centre-State Relations, 2010, Vol. 1, (Justice M.N. Punchi Commission) Report, available on http://interstatecouncil.nic.in/report-of-the-commission-on-centre-state-relations/.

47. AIR 1963 SC 1241.

48. The reason being First being that there is no provision of separate Constitutions for each State as required in a federal state. The Constitution of India is the supreme document, which governs all the states. Secondly, the Constitution can be altered only by the Union Parliament; whereas the States have no power to alter it. Thirdly, in contradiction to a federal Constitution, the Indian Constitution renders supreme power upon the Courts to invalidate any action which violates the Constitution. Fourthly, the distribution of powers facililitates local governance by the states and national policies by the Centre.The Supreme Court further held that both the legislative and executive power of the States is subject to the respective supreme powers of the Union meaning that Centre is the ultimate authority for any issue. The political sovereignty is unevenly distributed between the Union and the States with greater weightage in favor of the Union. Another reason which militates against the theory of the supremacy of States is that there is no concept of dual citizenship in India. The learned judges finally concluded that the structure of the India as provided by the Constitution is centralized, with the States occupying a secondary position *vis-à-vis* the Centre. Conversely, *Justice Subba Rao* was of the view that under the scheme of the Indian Constitution sovereign powers are distributed between the Union and the States according to their respective spheres. The legislative field of the union legislature is much Wide ranging than that of the State legislative assemblies; the laws passed by the Parliament should therefore have an upper hand over the State laws in case of any conflict. In a few cases of legislation where inter-State disputes are involved, sanction of the President is made

Kerala[49] case, some of the Judges in full Constitutional Bench expressed federalism as one of the basic-Features of the Indian –Constitution. In *State of Rajasthan* v. *Union of India*[50], the Court declared that the Constitution of India was the first to embrace "cooperative federalism" from the start and the Constitution was declared 'amphibian'. The Court held that the extent of federalism of the Indian-union is largely watered-down by the needs of progress development & making the ratio integrated, politically & economically co-ordinate & socially & spiritually uplifted. In the case of *State of Karnataka* v. *Union of India*[51], the Supreme Court held that, "our constitution has, despite whatever federalism may be found in its structure, so strongly unitary-features also in it." In *S.R.Bommai* v. *Union of India*[52] the phrase *"pragmatic federalism"* was used.

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mandatory for the validity of those laws. Further, every State has its judiciary with the State High Court at the apex. This particular thing in his opinion of the learned judge does not affect the federal principle. He while arguing this gave the parallel of Australia. In Australia, appeals against certain decisions of the High Courts of the Commonwealth of Australia lie with the Privy Council. Thus the Indian federation cannot be negated on this account. In financial matters, the Union has more resources at its disposal as compared to the states. Thus, the Union being in charge of the purse strings can always persuade the States to abide by its advice. The powers vested in the union in case of national emergencies, internal disturbance or external aggression, financial crisis, and failure of the Constitutional machinery of the State are all extraordinary powers in the nature of safety valves to protect the country's future. The power granted to the Union to alter the boundaries of the States is also an extraordinary power to meet future contingencies. In their respective spheres, both executive and legislative, the States are supreme. In a nutshell, Justice Subba Rao argued that the Union has a bigger role to play when compared to states and therefore, the Union powers have to supersede the State's. This minority view provided by *Justice Subba Rao* in this case had consistency with the federal scheme under the Indian Constitution. The Indian Constitution undoubtedly accepts the federal concept and distributes the sovereign powers between the coordinate Constitutional entities, namely, the Union and the States.

49. AIR 1973 SC 1461

50. AIR 1977 SC 1361

51. AIR 1978 SC 68

52. AIR 1994 SC 1918. In this case four opinions were given by honorable judges expressing varying views: *Justice Ahmadi* was of the view that in order to understand the true-nature of the Indian-constitution, it is essential to comprehend the concept of federation. The essence of the federation is the existence of the union & the states & the distribution of power between them. The significant absence of expressions like 'federal' or 'federation' in the constitution, the powers of the parliament under Articles 2&3 in the constitution powers conferred to meet emergency-situations, residuary powers, powers to issue directions to the state, concept of single-citizenship & the system of integrated judiciary all these provisions create doubts about the federal-nature of Indian constitution. Thus, it would be more appropriate to describe the constitution as Quasi-Federable or Unitary rather than federal-constitution in the true nature of the term. *Justice Sawant & Kuldip Singh* was of the opposite view. They two regarded "Democracy & Federalism as essential features of the Indian constitution. The overriding powers of the centre in the event of emergency do not destroy the federal-character of the Indian-constitution. They aid, every state is constituent political unit & have an exclusive Executive & Legislative elected & Constituted by the same process as the Union Government. The judges justified the use of power of president (Art 35)."*Justice Ramaswamy* held that the units of the federation had no roots in the past & hence the constitution does not provide mechanisms to uphold the territorial integrity of the state above the powers of the parliament. He declared the Indian constitution as "Organic-federalism", designed to suit the parliamentary from of government the diverse conditions prevailing in India. *Justice Jeevan Reddy & Agarwal* said that the expression Federal or Federal-Form of government has no fixed meaning the constitution is also 'distinct' in character, a federation with a bias in favour of the centre. But his Factor does not reduce the states to within the sphere allotted to them the states are supreme.

VII. CONTESTS AND CONTRADICTIONS

We are discussing 'Cooperative Federalism' in a country where there was never an agreement between the Centre and the states regarding the creation of the Union. The states are not a part of the pact but rather a creation of the Constitution which was designed by an assembly favouring centralized polity. No equality has been designed as far as states' rights *vis-a-vis* the Centre are concerned and even the representation of the states in the upper house, Rajya Sabha, is unequal; the 'federal' parts of this Union are not even entitled to decide about their name, territory, boundary, or area; in matters enumerated in Concurrent list Union law prevails when it is in conflict with the state law; the Union Government can trench upon the state list in national interest (Article 249); and the residuary powers of legislation are vested in the Union Government (Article 248). Similar other centralizing provisions weigh heavy on the spirit of cooperative federalism in India.

The present government has replaced the Planning Commission with *National Institution for Transforming India (NITI) Aayog*. The governing council of *NITI Aayog* is composed of all the Chief Ministers and Lt. Governors of the Union Territories. Given the continuance of regional inequality; possibilities of opposing parties coming to power in few states; pressures of globalization professing more fiscal decentralization; and the seemingly visualized policy making role of *NITI Aayog,* will it be possible for the Union Government to allow a considerable degree of desired financial autonomy not only to the states but also to the third tier of government? Will the new *NITI Aayog* be provided with the required and long desired effective decentralized inter-governmental mechanisms, instead of the pre-existing centralized planning structures, with enough powers to act on the long disputed verbal rhetoric of cooperative federalism?

Temporary and special provisions like Article 370 for State of J&K and Arts. 371A and 371G for Nagaland and Mizoram continue till today resulting asymmetrical federalism. Yet in most of these areas there is a feeling of injustice and betrayal. Their dissatisfaction at the unilateral decision to take away the option of withdrawal from the union is reflective of their sense of alienation. The centralized and unresponsive bureaucratic apparatus is often alleged for 'step-motherly' treatment towards the north-eastern states.[53]

The sixth schedule, which covers the states of Assam, Meghalaya, Tripura and Mizoram, knits another strand of asymmetrical federalism by providing for councils for self-governments in autonomous districts. The tribes located in these states and the states themselves are caught in a triangular[54] strife. Such special provisions for these states are unquestionably positive steps in the course of building a more responsive federal democracy but the challenges here are; to bring the north eastern community into mainstream politics by increasing the participation of their elected representatives and opening up the face of north east to planned development initiatives; to change the unitary mould in which the state-district relations have been casted.

Other than the asymmetrical texture of the Indian federalism, we are also witnessing strands of multi-level federalism in India. Other than the Centre and the states, the third tier comprising of *Panchayat* and municipalities is also functional. The third tier has got

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53. D. Munshi and P.R. Dash, *"NE States Upset Over Move to Cut Financial Privileges",* Times of India,September9, 1993

54. Limited powers to administer the tribes, inadequate finances, and governor's omnipresent intervention; Centralizing political interventions largely under the garb of security; and; The strategically sensitive location of these states on the Indian borders with China, Bangladesh, Bhutan and Myanmar.

constitutional recognition but the debate on distribution of responsibility and resources is still on. Their position in the federal structure is still ambiguous. They still are treated as merely an implementing agency of the Union or the State; getting funds and functionaries is still a herculean task i.e. fiscal ambiguities overshadow any rational move towards practicing decentralization; politico-electoral meddling is rampant; the elite bureaucracy still displays the age old condescending attitude towards any form of interaction with the functionaries of this 'third tier'; and the locally dominant social elite bias proves to be a major bottleneck.

With the increase in the number of states in the Indian Union, the third tier will also widen its presence. The challenges here are of: recognizing and acknowledging the 'third tier' as a next level of government with autonomous status in the federal structure rather than as a unit for discharging the devolved responsibilities from the state government; and deciding whether the third tier was envisioned just as a contrivance of governance or also for empowering people at the local level thus decentralizing democracy. If the *Panchayats* and the local governing agencies are to be allowed to function as real units of local self-governance, then they should be apportioned separate competence areas, functions and corresponding accessibility to resources.

The new challenges facing 21st Century federalism have further necessitated the pre-existing need for cooperative federalism, thereby making its practice as a form of governance all the more indispensable. Technological advances have led to tremendous improvement in connectivity and accessibility, both, physical as well as electronic.

VIII. CONCLUSION

The past Indian experience has shown that the centralizing predispositions by the Union government had always enfeebled the federal structure. The challenge of balancing the ongoing forces of globalization, which act variedly on Central and state governments looms large. Hence, reforms have to be carried at the central as well as the state levels so that the multi-tier interaction with the global economy is made possible. The pre-reform vertical competition between the Centre and the States has changed into horizontal competition among the states to attract investment and resources from varied sources, national as well as international, which are bound to further accentuate regional disparities. Since none of the twin processes of globalization and decentralization can be reversed or even disturbed, the government has to strike a balance in a way that allows state-level actors also to shape foreign economic relations.

The principle of practicing federalism might be about distribution of powers between the Centre and the states but the spirit and essence of federalism is about the decentralizing tendencies of the operating political system. The notional transfer of powers to the state governments and the continuance of a disciplinary hierarchical political party at the Centre and the states will be an obstacle to the very principle of federalism. The structural acceptance of federalism has been somewhat achieved but the progression towards reconciling internal diversities–regional, fiscal and administrative – within the federal framework has been obscure. What is required is the resilience to adapt and to accommodate, structurally and politically, the countless pressures of regional forces and centralizing endeavors of national political parties. In order to adopt the cooperative model of Indian federalism, we have to reorient our operational discernments of federalism so that the present 'predominantly centralized federal polity' becomes malleable.

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REMEDIES AVAILABLE AGAINST INFRINGEMENT OF COPYRIGHT UNDER INDIAN COPYRIGHT ACT 1957

ADESH KUMAR*

ABSTRACT : Copyright is the oldest form of intellectual property which protects creation of authors in form of artistic, dramatic, literary, musical, cinematographic and sound recordings. These creations are valuable assets for authors and the author is the only person who is entitled to reap the benefits of it. In order to protect the copyright several international documents are adopted by the international community to protect this intellectual property country at par. Berne Convention and TRIPs Agreement are major documents to protect copyright at international level. India is signatory of TRIPs Agreement hence comply with the provisions of it and provides the appropriate remedies in the domestic law relating to copyright i.e. Copyright Act 1957. This Act provides a wide range of remedies which are Civil, Criminal and Administrative for the copyright work which is registered. This research paper examines procedure and remedies available against infringement of copyright under Copyright Act 1957 available. For the owner of the copyright, infringement is actionable claim and civil remedies available are injunctions, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right. Along with the civil remedies, criminal and administrative remedies are also available in case of infringement of copyright under the Copyright Act 1957.

KEY WORDS : Infringement, Passing Off, Penalties, Injunction, Author and Owner.

I. INTRODUCTION

Copyright is one of the branches or aspects of Intellectual Property Rights (IPR). IPR has been defined by World Intellectual Property Organization (WIPO), as "Intellectual Property, very broadly, means the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields. Countries have laws to protect intellectual property for two main reasons. One is to give statutory expression to the moral and economic rights of creators for their creations and the rights of the public in access to those creations. The second is to promote, as a deliberate act of government policy, creativity and the dissemination and application of its results and to encourage fair trading which would contribute to economic and social development".[1] The objective of copyright is to promote

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1. Anjaneya Reddy N M and Lalitha Aswath, *"Understanding Copyright Laws: Infringement, Protection and Exceptions*", Vol. 2, Issue 1 (January-June) 2016,48-53, *International Journal of Research in Library Science*.

the public good by encouraging and fostering cultural and scientific activity. Copyright protects cultural works, the creative expression of thoughts and feelings.

As per the Copyright Act 1957 the word "copyright" means the exclusive right over the subject matter which is protected under this Act. These exclusive rights comprised in the copyright in the different classes of protected works which are provided under section 14 of the Indian Copyright Act 1957. The copyright in the case of a literary, dramatic or musical work means to reproduce the work in any material form, to publish the work, to perform the work in public, to produce, reproduce, perform or publish any translation of the work, to communicate the work by radio-diffusion or to communicate to the public by a loud-speaker or any other similar instrument the radio-diffusion of the work, to make any adaptation of the work or to do in relation to a translation or an adaptation of the work any of the acts specified earlier.[2] The copyright in the case of an artistic work, to reproduce the work in any material form, to publish the work, to include the work in any cinematograph film, to make any adaptation of the work or to do in relation to an adaptation of the work any of the acts specified earlier.[3] The copyright in the case of a cinematograph film, to make a copy of the film, to cause the film, in so far as it consists of visual images, to be seen in public and, in so far as it consists of sounds, to be heard in public, to make any record embodying the recording in any part of the sound track associated with the film by utilising such sound track and to communicate the film by radio-diffusion.[4] The copyright in the case of a record, to make any other record embodying the same recording, to cause the recording embodied in the record to be heard in public and to communicate the recording embodied in the record by radio-diffusion.[5]

These exclusive rights subsisting in a work is infringed by any person who does or authorises any other person to do any of these acts restricted by copyright without the consent of the copyright owner.[6]

II. STATUTORY REMIDIES

In all member state of Berne Convention[7] and TRIPS Agreement[8], remedies are granted against infringement of copyright. These available remedies are civil and criminal both in nature. Though no provisions are made in international conventions in relation to remedies against infringement of copyright yet the nations included remedies in their domestic laws which are civil and criminal too because to inflict penalties is a national issue. It is the power of national legislature to provide remedies against infringement of copyright.

Under the Copyright Act 1957 the civil remedies and criminal penalties and administrative remedies are given and are available to prevent infringement of copyright. In Chapter XII the civil remedies are provided for the author of copyright owner[9] and in chapter

2. Copyright Act, 1957 Sec 14(1)(a).
3. Copyright Act, 1957 Sec 14(1)(b).
4. Copyright Act, 1957 Sec 14(1)(c).
5. Copyright Act, 1957 Sec 14(1)(d).
6. Copyright Act, 1957 Sec 51.
7. 1886.
8. 1995.
9. Sections 54 to 62.

XIII criminal penalties are given for infringement of copyright[10]. Civil remedies include an injunction, an account of profit or damages while criminal remedies call for imprisonment and fine to the infringer. In order to sustain a criminal proceeding under the Copyright Act, the knowledge of the infringing party to infringe the rights shall be proved beyond doubt. In Copyright Act, civil remedies compensate the owner of the copyright, the criminal remedies act as a deterrent against infringing activities.

(1). CIVIL REMEDIES

The civil remedies are provided in chapter XII of the Act. Before the enactment of this Act, the Act of 1911 also provides civil remedies in section 6 for infringement of copyright as:

Where copyright of any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction or interdict, damages, accounts by law for the infringement of a right.

The Act of 1911 was repealed by the Act of 1957 under which civil remedies are provided under section 55. It describes a wide range of civil remedies for infringement of copyright. It provides that where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right.[11]

It provides that the infringement of copyright is actionable by the copyright owner. For the owner of the copyright, the civil remedies available for infringement of copyright are injunctions, damages, accounts or otherwise by way of law. In any given case the question of jurisdiction will have to be decided with reference to the plaint allegations[12]. But if the civil court comes to the conclusion that the plaintiff is entitled to have the right to exhibit the film, then the plaintiff can only be said to be entitled to a copyright in respect of the film and the civil remedies for the infringement of such copyright as provided under section 55 of the Act where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided in the Act, be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by Copyright Act 1957. The defendant has one exception that if he proves that at the date of infringement he was completely not aware and also had no reasonable ground to believe that the work in which copyright subsists, the plaintiff shall not be entitled to any remedy other than an injunction in respect of infringement and a decree for the whole or a part of the profits made by the defendant by sale of the infringing copies as the court may in the circumstances deem reasonable.[13] The Act provides that every suit or proceeding arising in respect of infringement of copyright shall be instituted in the district court having jurisdiction.[14]

The most important remedy for infringement of copyright, passing off and breach of confidence is an injunction. An injunction may be either interlocutory that is one granted prior to trial or only until after the trial or further order or it may be final and permanent. The

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10. Section 62 to 70.
11. Section 55(1)
12. In Everest Pictures Circuit, *Salem v. Karuppannan* AIR 1982 Mad. 244 at Pp. 246 & 247
13. Section 55(1)
14. Section 62

general principles upon which injunctions are granted for the protection of copyright do not differ from those upon which they are granted for the protection of other property. The nature of copyright property, however, makes an injunction a peculiarly suitable and indeed the normal remedy.

In order to get remedy, the plaintiff must first prove a strong prima facie case for the existence of the right in his favour on which he sues. He must at least show to the court that he is likely to succeed. If he does that, however or if his right is not in question, then although he must continue to show a prima facie case of its infringement of copyright yet for that purpose he necessarily not to show that he is likely to be successful in the case or move likely to be so than the defendant, but only that he has a case reasonably capable of succeeding. Even than the remedy is still discretionary and in exercising its discretion the court will have regard to balance of convenience but the governing principle is the preservation of the status quo. Accordingly, unless there be grounds based on the balance of convenience or the circumstances generally while the court in the exercise of its discretion should withhold relief, the plaintiff are entitled on proper terms to such an injunction as will protect their property pending the trial of the action when the difficult question whether the defendants' script is legitimate can be properly decided. In *Gramophone Co. of India Ltd. v. Mars Recording Pvt. Ltd*[15] the plaintiff/respondent was willing of sound recording into audio cassettes of three titles named 'kallusakkare kolliro', 'maduve maduve maduve' and 'chinnada hadugalu'. The copyright in these sound recordings was owned by the appellant/ defendant. The plaintiff issued a notice as per sub-clause (ii) of clause (j) of sub-section (1) of Section 52 of *the Copyright Act* expressing their intention to record audio cassettes of the above three titles along with three demands of royalty payable in favour of the copyright owner i.e., the defendant. The plaintiff has also informed the Registrar of Copyright Board, New Delhi on the same day notifying the same. The plaintiff waited for 15 days for the reply of the defendant and later on recorded three titled sound recording in the form of audio cassettes and released the same in the market. The defendant later on sent a letter to the plaintiff expressing their regret and inability to permit the plaintiff to make version recordings of songs of above three titles and accordingly returned the demand drafts. Plaintiff/ respondent immediately sought for permanent injunction restraining the appellant from seizing the respondents the aforesaid three titled audio cassettes which was granted by the Trial Court to the same effect. The appellant filed an appeal but the High Court accepted the arguments of respondent that in the event of licence or consent is not given even after compliance of Section 52(1)(j) of the Act within 15 days, the licence is deemed to have been granted and the person producing the cassette after the expiry of 15 days is not said to have infringed copyright. Against the order of the High Court an appeal was filed in the Supreme Court. The Supreme Court set aside the order of the High Court due to absence of specific pleading and held that :

> "[T]o attract the provisions of Section 52(1)(j) of the Act or to fall outside the scope of Section 2(m) of the Act it is necessary to plead and establish these aspects of the case as contended for respondent No.1. Before we examine the tenability of the contentions raised, we think it necessary that the parties shall lay factual foundation in the pleadings. If, as contended for respondent No.1, these aspects bring out the true

15. 2001 PTC 681(SC).

> controversy between the parties and there are no pleadings to that effect in either form or content, to proceed to grant any temporary injunction or to decide the matter will be hazardous. Therefore, we set aside the order made by the High Court affirming the order of the Trial Court granting temporary injunction. It is open to the parties to raise appropriate pleadings by amendments or otherwise. We also make it clear that it is open to the parties to seek appropriate interim orders after amendment of pleadings."

In *P.N. Krishna Murthy v. Cooperative for American Relief Everywhere*[16] there are two cross appeals filed by plaintiff and defendant against judgment and decree passed by learned Additional District Judge. By the impugned judgment and decree the two suits of the plaintiff were decreed. The plaintiff/appellant in this case is a writer of children's story books under his pseudonym Raj Krishan Murthy and is the author of story titled "Lakshman Kills A Tiger" with ownership of copyright. He is carrying on business under the name and style of M/s. Children Are Precious (called here CAP) which firm undertakes the printing and production of the books of the plaintiff. "Cooperative for American Relief Everywhere Inc." (called here CARE) is an organisation incorporated in United States of America. CARE wanted to distribute the story "Lakshman Kills A Tiger" written by the plaintiff among children of various villages in the States in India, in their 'Mid Day Meal Project. CARE, under license from the plaintiff, entered into a contract with M/s. Children Are Precious for printing and publication of the said story in the form of cartoon booklet. As per this contract, CAP were to print and publish the said comic book in Hindi, Halbi, Kannada, English, Gujrati, Marathi and Punjabi under the name of the appellant and under his copyright. In 1970 CARE entered into a contract with CAP for printing of 15 lakh copies of booklet in Malayalam language in the State of Kerala under license from the plaintiff. Later on CARE terminated the contract, however, thereafter, placed order for printing and publication of the aforesaid comic book with another publisher in Malayalam language. The plaintiff, therefore, filed a suit for injunction against all defendants for a permanent injunction restraining the defendants, its servants, agents or other authorised representatives from printing, publishing the book "Lakshman Kills A Tiger" in any language and/or in any way distributing the same in Kerala or any part of the Union of India or abroad and to produce and deliver up to the Court all infringing copies in the power and possession of the defendants. The plaintiff filed second suit for recovery of damages for infringement after defendants submitted accounts with regard to infringing copies. Both the suits were tried together thereafter. Thereafter, the suit went on for trial which was lengthy and time consuming. Some witnesses of the defendants were not available at times. Therefore, although the plaintiff's evidence had concluded way back in the year 1973, it took many years to complete defendants' evidence. Ultimately the learned Additional District Judge rendered impugned judgment and decree dated and both the suits filed by the plaintiff stand decreed in the terms already reproduced above. However, both the parties are dissatisfied and have preferred the appeals to Delhi High Court. The High Court held that there is a clear infringement of plaintiff's copyright in the said book and in view thereof plaintiff is entitled to the injunction as well as rendition of accounts and damages on this account. Because the book was not priced and when the defendant were directed to maintain the record and sumit the same, they never submitted the statements of accounts hence in the given situation, we feel that :

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16. AIR 2001 Delhi 258.

> "the formula adopted by the Trial Court in awarding damages could be the only proper course. The Trial Court has taken the cost of publication of the book at Re.1.00 and has awarded 17.50% of the same to the plaintiff. However, the Trial Court has taken infringing copies as 15 lakhs only whereas, as per our findings recorded above, it is 9.874 million copies (i.e. 98 lakhs and 74 thousand). We are conscious of the argument of the plaintiff that 17.50% of this cost which is taken as the basis by the Trial Court was the amount which the plaintiff would have received had there been printing and publication of the book in question by the plaintiff as per contract dated 15th September, 1970 and the plaintiff is not claiming the said cost but is claiming the damages on account of infringement. However, in the absence of any other yardstick, even for the purpose of damages we consider 17.50% of the cost as reasonable particularly when the book is not a priced one and royalty in the normal course, would be attracted on the basis of the price of the book. Therefore, we feel that if the plaintiff is given 17.50% of the cost and if the cost of printing and publication of the book is taken as Re.1.00 that would be an adequate compensation to the plaintiff. Calculating in this manner, plaintiff would be entitled to Rs.17,27,950/- for 9.874 million copies. Adjusting the amount of Rs.35,000/- already received, the balance would come to Rs. 16,92,950/- (Rupees Sixteen Lakhs Ninety Two Thousand and Nine Hundred and Fifty only)."

In *Harman Pictures Ltd. N.V. v. Osborne*[17] the plaintiff brought an action for infringement of copyright, in which they claimed injunction restraining the defendants from infringement and seeking each of them by themselves, their servants or agents from infringing or authorizing the infringement of the plaintiff company's copyright and from making or producing any film based on the screenplay. The plaintiff also sought that defendant should be restrained from assigning or purporting to assign the copyright of screenplay in question or purporting to grant any licence to any person in respect of the screenplay in question or any similar screenplay or from dealing with or disposing or purporting to dispose of any interest in the screenplay in question or any similar screenplay.

In the present case the court ought to grant relief in the limited form in which it is now asked which will preserve the status quo by enabling the defendants to proceed with the making of their film so that if they prove right, they will not have suffered any or any appreciable loss before the time comes when they are ready to exhibit or distribute. In *Chappel v. Davidson*[18], a case of alleged fraudulent imitation of a musical publication independently of copyright, the court did not consider the fraud clearly made out. It was held by the court that an injunction ought only to be continued on the terms of plaintiff undertaking to bring an action and to be answerable in damages. In *Performing Right Society v. London Theatre of varieties*[19], where in 1916 a firm of music publishers assigned by deed to plaintiffs, the performing right of all songs of which they then possessed or should thereafter acquire such rights. Subsequently a certain song was written and the copyright in it together with

17. 1967 2 All E.R. 324 at PP 327, 336.
18. (1856) 8 De.G.M. And G.I: 44 E.R. 289 L.L.J.
19. (1922) 2 K.B. 433: 91 L.R.K.B. 908.

the right of performance was assigned by the author of the film. Defendant's music hall proprietors permitted the said song to be publicly sung in their music hall without the consent of the plaintiff. Plaintiff sued the defendants under Copyright Act 1911 for infringement of their performing right. The court held it as plaintiffs' interest in the song was purely equitable and as defendants were mere infringers claiming no interest in it.

It is not necessary to give proof of actual damage at all in an action for infringement of copyright. If in a case where the only infringement claimed by the palintiff, he is entitled to nominal damages and costs. If passing off is established, some damages must at any rate be given where there has been an unwitting invasions of the plaintiff's right, though innocence, the plaintiff's claim would be limited to nominal damages. There can be no question that it is the duty of the court in suit for damages for personal injuries to determine the amount of the defendant's liability once and for all at the time of the trial. The court no doubt before it reaches to its decision upon the liability, may desiderate further evidence. But once the evidence has been closed, it is the duty of the court there and then to assess the amount of the damages to plaintiff and in so doing take into consideration any possible future incapacity to the plaintiff resulting from the injuries sustained.

If the court is satisfied that effective remedy would not be available to the plaintiff in lieu of flagrancy of the infringement and any benefit shown to have accrued to the defendant by reason of the infringement, such additional damages may be awarded by the court as it may consider appropriate. In *Fenning Film Service Ltd. v. Welverhampton etc. Ltd*[20] the court held that the fact that the pirated work may have injured the reputation of the author and vulgarized, the original is also a fact that may be taken into consideration in assessing the amount of damages and generally the damages may be said to be at large. The award of exemplary damages in cases where the defendant has acted contumeliously is sanctioned not only by English Law Court but also by Indian Courts. In *Venkatappayya v. Ramakrishnanma*[21] the court gave exemplary damages in a case of malicious prosecution and raised the amount Rs.500 fixed by the lower court to Rs.1500 fixed by themselves as adequate in the circumstances of the case.

A successful plaintiff in an action for infringement of copyright is entitled to an account of profits made by the infringer and payment of the amount, as an alternative to damages. Any person entitled to royalties is entitled to an account and may obtain an order for such an account by a relative legal proceeding. The account is of net profits. But a plaintiff cannot obtain both an account of profits and damages either for infringement or conversion since a claim for an account condones the infringement. The remedies of damages and accounts are remedies in the alternative for it was held the two reliefs are incompatible. This preposition is well settled in the case of *Caston Publishing Co. v. Sutherland Publishing Co.*[22]

The Copyright Act 1957 provides that the author or any other owner of copyright or any person deriving any right, title or interest in the copyright by assignment or otherwise may individually for himself and in his own name bring an action for protecting or enforcing his right.[23] Under this section the part owner of any right comprising the copyright in any

20. (1914) 3 K.B. 1171.
21. (1913) 62 M.J.J. 107.
22. (1939) A.C. 178.
23. Section 56.

work has been given a right to seek remedy under this Act. He may individually enforce said right by means of any suit, action or other proceedings without making the other owners of any other right a party to such suits action or proceedings.

The Copyright Act also grants the special rights[24] to the authors and protects these special rights[25]. This section confers additional rights to the author of the work, independently of the author's copyright and even after whole or partial assignment of the said copyright is done. The author of a work shall have two rights and first is to claim authorship of the work and second is to restrain the third party or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation. The author shall not have any right to prevent or restrain or claim damages in respect of any adaptation of a computer programme.

This section provides a special right to the author of the work even after the assignment of copyright therein to some other person that the author of a work shall have a right to claim authorship to the work as well as right to restrain or claim damages in respect of any distortion, mutilation or other modifications in the said work or any other action, in relation to the copyrighted work which would be prejudicial to his honour or reputation. This right shall also be available to the legal representatives of the author. But the assignee of the copyright may bring out editions with additions, omissions, corrections and alterations which may not injure the reputation of the author. The right under section 57 is a statutory recognition of intellectual property of the author and special care with which the intellectual property is protected. The special protection of the intellectual property is emphasized by the fact that the remedies of a restraint order or damages can be claimed even after the assignment either wholly or partially of the said copyright.

In *Mannu Bhandari v. Kala Vikas Pictures Pvt. Ltd.*[26] the respondent "Kala Vikas" has produced one motion picture named "Samay Ki Dhara" under assignment of filming rights taken from the appellant of her novel "Aap Ka Bunty". The appellant filed suit against the mutilation and distortion of the novel written by her and she pleaded for permanent injunction against its screening and exhibition. The trial court has refused an ad interim restraint order and the Additional District Judge has observed that:

> In my view prima facie the film is not at all going to harm the reputation of the plaintiff in any manner. The plaintiff's reputation can be harmed in' the eyes of those only who have read her novel and seen the film also. Those who have read her novel and seen the film may change their views about the producer, director of the film but not about the Plaintiff.

The appellant filed an appeal in the High Court of Delhi against the order of the trial court. The high court have gone through the script of the film and also seen the visual effect of these characters in the film and directed that the entire scene in the morgue was too crude, brash and nauseating. The irony of the situation is that the child has both the parents but the body was required to be kept in the morgue as an unclaimed body which creates very pathetic situation and is quite enough to make the viewer of the film disturbed. Even for the

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24. Section 57.
25. Substituted by section 20 of the Copyright (Amendment).
26. AIR 1987 Delhi 13.

less educated or illiterate people who saw Hindi films, the message will go home even if the film stopped at a point where both the families saw the dead body of 'Bunty' in the morgue and collect it. It was therefore directed that part of the end of the film which shows a large number of dead bodies spread on the table and the desperation of the families to identify Bunty's body should be deleted from the film. The court was about to pronounce the judgement meanwhile a joint application for settlement has been moved by the parties. The story of the filming of the novel "Aap ka Bunty" was settled down outside the court by the parties and the respondent would be free to exhibit the movie in accordance with the settlement between the parties. In *Garapati Prasad v. Paranandi Saroja*[27] the Andhra Pradesh High Court held that it is not established that reputation of the plaintiff will be affected if the extended episodes are telecast without referring the name of the plaintiff as writer. In such a case there cannot be mental agony or anguish. If ultimately the plaintiff succeeds in establishing that she got a copyright and due to the act of defendants there was infringement of her copyright, she can be compensated. It is not unusual for the writers to sell their stories for production of a picture or a T.V. serial. So she can be sufficiently compensated by way of damages if she succeeds in the suit.

The Act provides that it is the right of owner against persons possessing or dealing with infringing copies in which copyright subsists. The Act provides that all the goods which are infringing copies in which copyright subsists which includes all plates which are used or intended to be used for the production of the infringing copies of any work in which copyright subsists, shall be deemed to be the property of the owner of the copyright who created it. That person may initiate proceedings in the court for the recovery of possession of those infringing copies.[28] The defendant has remedy where he has done in good faith without reasonable ground. The Act provides that the owner of the copyright in any work shall not be entitled to seek remedy in court of law in respect of the conversion of any infringing copies of copyright work, if the defendant proves that at the time of use he was not aware and had no reasonable ground to believe that there exists copyright in the work of which such copies are alleged to be infringing copies or that he had reasonable grounds to believe that such copies or plates do not involve infringement of the copyright in any work.[29]

The Act provides that any person can file declaratory suit against owner of copyright if he threatens for legal proceedings or liability for alleged infringement of copyright. The Act says that where owner of copyright by circulars, advertisements or otherwise, threatens any other person regarding any legal proceedings, any person aggrieved institute a declaratory suit in court that the alleged infringement to which the threats related was not in fact an infringement of any legal rights of the person making such threats and may in any such suit obtain an injunction against the continuance of such threats and recover such damages, if any, as he has sustained by reason of such threats.[30]

(2). CRIMINAL REMEDIES

Besides of civil remedies, the provisions are also made for criminal offences in the Copyright Act 1957. It provides criminal penalties for the intentional infringement of copyright.

27. 1990 (1) Andh. L.J. 624.
28. Section 58.
29. Ibid.
30. Section 60.

These provisions are given in chapter XIII of the Act[31]. The Act provides that any person who knowingly infringes or abets the infringement of the copyright in a work, or any other right conferred by this Act except the right conferred by section 53A shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees.[32] The Act also provides that where the infringement has not been made deliberately for gain in the course of trade or business, the court may, mentioning the adequate and special reasons, impose a sentence of imprisonment for a term of less than six months or a fine of less than fifty thousand rupees. The Act makes it clear that construction of a building which infringes or which, if completed, would infringe the copyright in some other work shall not be an offence under this section. Before the Copyright (Amendment) Act 1984, the Copyright Act 1957 provides one-year punishment or fine or both to the infringers of the copyright. But in 1984 the Copyright Amendment Act was passed to amend the criminal punishment of the Act. This Amendment Act enhanced the punishment for the infringement of the copyright upto imprisonment of three years, with a minimum punishment of imprisonment of six months, and a fine up to 2 lakh, with a minimum of Rs. fifty thousand.

The Act also inflicts enhanced penalty on second and subsequent convictions for infringement of copyright. It says that whoever having already been convicted by competent court of an offence under section 63 is again convicted of any such offence committed earlier shall be punishable for the second and for every subsequent offence, with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one lakh rupees but which may extend to two lakh rupees.[33] But where the infringement has not been made for gain in the course of trade or business the court may, for adequate and special reasons, impose a sentence of imprisonment for a term of less than one year or a fine less than one lakh rupees.

In *N.C. Sippy v. Prem Kumar*[34] it was held that there can be no room for doubt that even if the infringing copies, viz the video tapes of the film "Gorakhdhanda" has been prepared by the petitioners and their co-accused prior to 1984 when the Act was amended by introducing the piracy of cinematograph film as an offence by Amendment Act of 1984, the accused in this case would be still liable, if it is proved that at the relevant time, the infringing copies of the infringed work were being sold or distributed for display etc. by the accused or their agents or servants etc. In this sense of the work, an offence under section 63 of the Act can be legitimately looked upon as a continuing offence. In *Garapati Prasada Rao v. Parnandi Saroja*[35] the question to be considered was whether the viewers of the extended 13 episodes of the serial have got the impression that the subsequent episodes are continuation of the original 13 episodes written by the complainant. It was held that it was a matter to be decided on evidence to be adduced before the trial court and therefore unless there is evidence on that aspect it is not possible to decide whether there is infringement of the copyright of the complainant and so it is not possible to quash the proceeding under section 482 Cr. P.C. on that allegation.

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31. Section 63 to 70.
32. Section 63.
33. Section 63 A.
34. 1988(1) Comp. L.J. 91.
35. 1992 Cr. L. J. 2561 p. 2564; AIR 1992 A.P. 230.

It is provided under the Act of 1957 that if the convicted person again infringes the copyright, he shall be punishable for the second and for every subsequent offence, with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not less than one lakh rupees but which may extend to two lakhs rupees[36]. The police have been given power in relation to infringement of copyright to seize the infringing copies or articles[37].

In *Gheru Lal v. State*[38] Gyanendra Kumar J. observed that section 64 of the Act provides that where a magistrate has taken cognizance of any offence under section 63 in respect of the infringement of copyright in any work, it shall be lawful for a sub inspector to seize all copies of the work wherever found, which appear to be infringing copies. The infringing copies so seized shall as soon as practicable be produced before the magistrate. In the present case under section 63 of the Act is being tried at Bareilly. In this view of the matter as well the production of copies seized by the sub inspector of Hathras also becomes necessary before the trying magistrate at Bareilly.

Any person who publishes a record or a video film in contravention of the provision of section 52 (A) shall be punishable with imprisonment which may extend to three years and shall also be liable to fine[39]. The companies are also made liable for the infringement of copyright[40]. Under section 69 the punishment are given for the offences which are committed by companies. In *N.C. Sippy v. Prem Kumar*[41] it was held that when any offence described under this Act has been committed by a company, every person who was in-charge of the company and was responsible to the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of such offence and shall be liable to be proceeded against and punished accordingly.

In *J.N. Bagga v. All India Reporter Ltd*[42] it was held that according to the explanation added to section 69 the word 'company' is used in this section in a special sense, and includes a partnership firm or other association of persons. So like a company, a firm is criminally liable in it own name apart from the partners thereof. The offence committed by shall be under trail not below the Metropolitan Magistrate or a Judicial Magistrate of the first class under this Act[43]. Any police officer, not below the rank of a sub inspector may seize without warrant, all copies of the work, and all plates used for the purposes of making infringing copies of the work if he is satisfied that an offence of the infringement of copyright in any work has been, is being, or is likely to be committed and all copies and plates so seized shall as soon as practicable be produced before a Magistrate.[44] The possession of plates for purpose of making infringing copies is also an offence under this Act. Any person who knowingly makes, or has in his possession, any plate for the purpose of making infringing

36. Section 63 A.
37. Section 64.
38. AIR 1965 All 206.
39. Section 68 A.
40. Section 69.
41. 1987 (1) Comp. L. J.
42. AIR 1969 Bom. 302.
43. Section 70.
44. Section 64(1).

copies of any work in which copyright subsists shall be punishable with imprisonment which may extend to two years and shall also be liable to fine.[45] The Act also provides protection to technological measures and infringement is a criminal offence. Any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by this Act, with the intention of infringing such rights, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine.[46] The Act also protects the rights management information and removal and alteration is criminal offence.

(i) COMPARISON OF CRIMINAL PENALTIES FOR COPYRIGHT INFRINGEMENT IN OTHER COUNTRIES

In United States of America, if an individual commits first offence of infringement which is done wilfully and for purposes of commercial advantage or private financial gain is punishable with a imprisonment of a term upto five years and fine upto $ 250,000. The second offence by an individual is punishable with a imprisonment of a term upto ten years and fine upto $ 250,000. In France unauthorised dissemination for purposes of economic gain is punishable with a imprisonment form three month to two tears and with 6,000 to 120,000 Francs. In case of second offence the penalty and fine becomes double. In Poland an imprisonment Up to 2 years in jail and unspecified fines for unauthorised dissemination for purposes of economic gain shall be imposed. In Hungary an imprisonment up to three years and unspecified fine for infringements causing considerable damage may be imposed which may be up to five years in subsequent act.

(3). ADMINISTRATIVE REMEDIES

Under the Copyright Act 1957 an administrative remedy is also available pursuant to which the Registrar may issue an order prohibiting the importation of offending copies in India and the handing over of the confiscated goods to the copyright owner[47]. It provides that if a person is owner of copyright in any work or any performance originated form that work, he may give notice in writing to the commissioner of customs or any other officer authorised in this behalf by the Central Board of Excise and Customs explaining with proof that he is the owner of the said right and the owner of the copyright will request that the infringing copies of his protected work are expected to import in India at a particular time and place which is to be mentioned in the notice requesting to treat infringing copies of copyright as prohibited goods. The owner has to mention the period also in which the infringing goods are to be imported in India but this period should not exceed than one year.[48]

The Commissioner will examine the notice along with the evidences adduced by the owner of copyright and if he is satisfied with it, will treat the infringing goods as prohibited goods which are imported in India including goods in transit. The commissioner will take these initiatives only if owner of the work deposits such amount as required by him for expenses on demurrage, cost of storage and compensation to the importer if it is found true that the prohibited goods are not infringing copies.[49]When any goods treated as prohibited

45. Section 65(1).
46. Section 65A.
47. Section 53.
48. Section 53(1).
49. Section 53(2).

goods under this Act and have been detained by the custom office, he shall inform, the importer along with the person who gave notice, about the detention of such goods with in the period of 48 hours of its detention.[50] The Customs Officer shall release the said goods, and they shall no longer be treated as prohibited goods, if the owner of the copyright or the person who gave notice does not produce any restraint order from a court having jurisdiction as to the temporary or permanent disposal of such goods within fourteen days from the date of their detention.[51]

The administrative remedy available to copyright owner against infringement of copyright under Copyright Act is altogether different form the civil remedy and criminal available under the Act. It is quasi-judicial in nature and aggrieved party can file an appeal to the Copyright Board against the order of Registrar.

In addition to the above statutory remedies, the Government of India has taken a number of other administrative measures to strengthen the enforcement of copyright and neighboring rights in India. A summary of these measures is given below:

1. The Government of India continued to stress the need for strict enforcement of the Copyright Act 1957 and Rules notified. The concerned authorities are regularly requesting to the state Governments and other ministries to lay special attention and to ensure protection of copyright of the author and owners in their functioning.
2. In order to create awareness about protection of copyright in India, the Government of India also prepared A Handbook of Copyright Law and disseminated it through its portal amongst the stakeholders, enforcement agencies, and professional users. Printed Copies of the Handbook of Copyright Law were also circulated the state and Central Government officials and police personnel free of cost and also provided to participants in various seminars and workshops on IPR matters.
3. Training of officials or authorities dealing with copyright issues is one of the most essential part of protection of copyright in India hence National Police Academy, Hyderabad and National Academy of Customers, Excise and Narcotics are conducting several training programs on issues related to copyright and its protection for the police and customs officers. Several modules on copyright, copyright law, its protection and enforcement of copyright laws have been included in their regular training programs.
4. To review the progress of enforcement of copyright laws in India periodically, the Department of Education, Ministry of Human Resource Development, Government of India, constituted of a Copyright Enforcement Advisory Council (i.e. CEAC) on 6th November, 1991. The responsibility of Copyright Enforcement Advisory Council is to advise the government regarding the measures of improvement of enforcement of copyright laws in India. The Department of Education also initiated the creation of separate cells in state police headquarters, encouraging setting up of collective administration societies and organization of seminars and workshops to create greater awareness about copyright law among the enforcement personnel and the general public.
5. The Secretary, Department of Higher Education, Ministry of Human Resource Development, Government of India and Joint Secretary in charge of Book Promotion

50. Section 53(3).
51. Section 53(4).

and Copyright Division is the Ex-Officio Chairman and Vice Chairman of the CEAC respectively. The CEAC members include Director Generals of state police forces, representatives of the Federation of Publishers and Booksellers Associations in India, representatives of Film Federation of India, representatives of National Association of Software Service Companies, representatives of Phonographic Performance Limited, representatives of Indian Performing Right Society Limited and representatives of Cine Artistes Association and representatives of copyright industry organizations. The CEAC meets at least twice every year in month of June and December.

6. For copyright enforcement and better coordination between authorities, special cells have been set-up in various States and Union Territories. States are also under obligation to appoint a nodal officer for copyright enforcement to facilitate easy interaction by copyright industry organizations and copyright owners.

7. For administration of copyright issues in particular field, various copyright societies have been set-up for different classes of works. There are three registered copyright societies namely Society of Copyright Regulations of Indian Producers of Films & Television (SCRIPT) for cinematography films, Indian Performing Rights Society Ltd. (IPRS) for musical works and Phonographic Performance Ltd. (PPL) for sound recordings.

8. The Government also funding for organization of national and international Conferences/seminars/workshops/training sessions etc on issues related to copyright law and its enforcement. The participants in these seminars include academic, professional and enforcement personnel.

III. CONCLUSION

The object of the copyright law is to protect the creative work of the author and to motivate the creation of intellectual works for the public welfare. Another important object of copyright law is to secure economic interest of those persons who creates the literacy, artistic, dramatic, cinematographic, musical work or sound recording. The ideal system of copyright protection should ensure the protection of rights of all stakeholders. On one hand it should protect the rights of author or owner of copyright as well as it should also protect the interest of public at large.

In order to ensure the above said protection to the author or owner of copyright and public at large the copyright law in India provides wide range of remedies including civil, criminal and administrative remedies alongwith the exceptions to infringement of copyright. One of the most sought remedy in any copyright infringement suit is injunction which is available under Copyright Act 1957. Apart from that Indian judiciary has also recognize other remedies i.e. Anton pillar orders and Mareva injunctions. The Indian judiciary has given remedy to plaintiff applying Anton Pillar orders and Mareva injunctions. Apart from injunction, damages and account of profit are also available to plaintiff. The copyright Act also provides the criminal remedies to the author of copyright in case of willful infringement of copyright. The Copyright Act also provides administrative remedies for infringement of copyright which is an important quasi judicial remedy. In order to protect the rights of public at large, the copyright law also provides the acts which do not constitute infringement of copyright in which fair use of copyright work is major defence.

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INTERRELATION BETWEEN DOMAIN NAME AND TRADEMARK

MAYANK PRATAP*

ABSTRACT : The essential function of a trade mark is to guarantee the identity of origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others. A domain name is the unique address or URL of a website on the World Wide Web. In the modern era of electronic commerce and other online business ventures, every business enterprise is concerned about establishing its identity over the Internet. This function of identifying the business enterprise over the Internet is performed by domain names. A number of factors need to be taken into consideration in doing so. One of the major factors is to include the trademark within the domain name because the inclusion of trademark, which is well established to identify the enterprise in the real world, would foster the establishment of identity of the said enterprise over the Internet. The consumers, who are generally unaware of specific domain name of an enterprise, can easily locate the enterprise by typing its well known trademark. The interrelation between trademarks and domain names can also be seen in the domain name disputes. In the cases where the domain name is related to a trademark, the trademark right is a formal and substantial prerequisite for the successful domain name dispute. Today, the disputes relating to domain names that infringe the trademarks stand as the most common form of domain name disputes. In this article an attempt has been taken to discuss the role and function of trademark as well as domain name and the interrelation between them regarding similarities, differences and disputes between them.

KEY WORDS : Trademark, Domain Name, Relationship, Registration, Disputes.

I. INTRODUCTION

The internet is a big network of linked computers. Internet has brought a massive revolution in the 19th century which can be equated with the industrial revolution. The internet was launched for the purpose of communication between the masses but within the few years only, it became one of the most important tools for the communication for every type of business transactions, social interaction and governmental policies, it is a high speed electronic postal system. The early days of 1990s saw the use of Internet mainly for e-mails and gathering information. But now with the emergence of electronic commerce (e-commerce) there is a rapid growth in the commercial activities taking place via Internet[1]. The merits of

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Internet usage are undisputable, but on other hand it is not free from the demerits. Cyberspace has been prone to a number of misuses because of its inherent nature of being without any boundary. It has paved way for various types of crimes and complex conflicting situations in the virtual world cyber squatting is one of them.

Since the commercial activities on the Internet are increasing every day but Domain names are integral parts of businesses the usefulness and purpose of domain names cannot be ignored. These days, domain names are not just names of websites of different entities, but serve as business identifiers and promoters. Some may refer to domain names as the online equivalents of trademarks. However, views differ on if domain names should be given the same treatment under law as trademarks. Computer linked to the internet have unique numerical address so that electronic information is delivered to right place. For the purpose to make these identification number more user friendly they can be associated with identifies consisting of alphanumeric characters. These identifiers are internet domain names. It is possible for the sequence of characters to spell out words and hence trademarks or other signs used by businesses.

The conflict between trademarks and domain names is a topic of intensive discussion throughout the world. The paper analyses the conflicts and the contribution of the law to resolve those conflicts.

II. TRADEMARKS

A trademark is a form of intellectual property, which appears in the form of some recognizable design, phrase, or expression that serves to identify products or services produced by one source, over those produced by another. A trademark includes any words, symbol, configurations, device, shape of goods, packaging, combination of colours or any combination thereof which one adopts and use to identity and distinguish his goods from those of others. The distinctiveness of this mark is important as the main purpose of a trademark is to help the consumers in identifying the unique source of the product or services. In other words, a trademark portrays the authenticity of a business.

*"*A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging[2]." A trademark is "a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours.[3] "

A mark includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any such combinations[4]. Trademark could be any kind of unique representation as long as it is capable of being distinctive. It may be a letter or combination of letters, a logo, a picture or a slogan, a sound or a shape.

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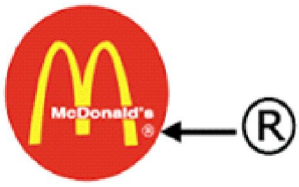
1. Catherine Colston and Kirsty Middleton, *Modern Intellectual Property Law*, Second edition, (London: Cavendish Publishing Ltd, 2005) p. 615.
2. Section 1(1) of the Trade Marks Act 1994
3. Section 2(zb) of the Trademarks Act, 1999.

i. Symbol of Trademark

Trademarks are registered, and only the person or entity who owns the registration is allowed to use the trademark, most companies identify the graphic, phrase, or other mark with what is known as a "trademark symbol." Trademark symbols appear in two forms:

(a). Trademark symbol appears as the letters "TM" [™]in superscript, placed immediately after the mark.

(b). Registered trademark symbol appears as the letter "R" enclosed in a circle [®], also in superscript placed immediately after the mark.



While the ™ symbol may be used by anyone engaging in common law usage of the mark, only the person or entity that owns the trademark, having properly registered it, may use the ® registered trademark symbol.

Trademark symbols may be added to documents, emails, and web pages using keyboard code. To do this on a Windows computer, hold down the "Alt" key, and use the number pad to press the numeric code. When the last number is entered, release the Alt key, and the symbol will appear. ™ = Alt+ 0153 & ® = Alt+ 0174

ii. Function of Trademark

The function of trademarks is to serve as an indicator of the origin of goods and service. This is considered to be the primary and most important function of trademarks it as a badge of origin. The European Court of Justice Observed[5] "the essential function of a trade mark is to guarantee the identity of origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin". For a trademark to fulfill its essential guarantee of origin function, it is important that the trademark must be distinctive. This function has also been recognised by the court as an essential function of trademarks in conjunction with the guarantee of origin function. This can be seen in the case of *Hoffman La Roche & Co,* where the Court stated:

"the Essential function of the Trademark, which is to guarantee the identity of the origin of the Trademarked Product to the Consumer or ultimate user, by enabling him without any possibility of confusion to distinguish that product from products which have another origin[6]."

In concluding way a trademark normally performs following functions:

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4. Section 2(m) of the Trademarks Act, 1999.
5. *Arsenal Football Club* v *Matthew Reed* [2003] RPC 39.
6. *Hoffmann La Roche & Co. AG* v *Centrafarm* 493 U.S. 165 (1989)

a. To identify goods or services of one trader and separate them from goods or services sold by others.

b. To signify that all goods or services bearing the trademark come from a single source, albeit anonymous source.

c. To signify that all goods tack the *trademark* are of an equal level of quality

as a prime instrument in selling and advertising the goods or services.

d. Renting by way of licensing of franchising. Trademarks serve two or more functions which are referred to as double function of the trademarks adding up to seven functions.

e. Protecting the public against confusion and deception by identifying. The source of origin of particular products as distinguished from other similar products.

f. Protecting the trademark owner's trade and business as well as the goodwill which is attached to his trademark.

III. DOMAIN NAME

The Internet is a linked network of computers. Every device connected to this network is given a unique electronic address, which is called Internet Protocol (IP) address. Each identifiable location in cyberspace has its own distinctive IP address. The IP addresses are numerical in nature as they are expressed by a lengthy sequence of digits. For ex: 0110.11.01.00. Since IP addresses are numerical in nature, they are not catchy and hence not easy to remember ultimately resulting in mistakes being made in typing an intended IP address. As the popularity of the Internet increased so too the difficulty to remember these numerical addresses became obvious. Thus, for the purpose of convenience, a word / alphabet based system called as Domain Name System (DNS) was introduced[7]. In general, a domain name is the word / alphabet based substitute to the numeric IP addresses. These alternates to the string of numbers are human comprehensible and easy to remember. Originally, domain name provided an address for computers on the internet but now, as the internet has developed from a mere means of communication to a mode of carrying on commercial activity, the domain name, therefore not only serves as an address for internet communication but also identifies the specific internet site as a domain name owner provides information/ services which are associated with such domain name, a domain name may pertain to provisions of services within the meaning of section 2(1) (z) of the Trade Marks Act 1999[8].

Domain name is a combination of typographic characters used to describe the location of a specific location online. It is known as the Uniform Resource Locator or URL. It is considered the identity of a Web site. Technically speaking, because the Internet is based on IP addresses, every web server requires a Domain Name System (DNS) server to translate domain names into IP addresses. Each website has a domain name that serves as an address, which is used to access the website. The Bombay High Court in *People Interactive (India) Pvt. Ltd. vs. Vivek Pahwa & Ors*[9] held, "it [domain name] is the Internet equivalent of a

7. Michael Froomkin, ICANN s "Uniform Dispute Resolution Policy" – Causes and (Partial) Cures , *Brooklyn Law Review*, Vol. 67, No. 3, 2002, pp. 605 - 718 at p. 615.

8. V K Ahuja, *Law relating to Intellectual Property Rights*, Lexis Nexis Publication edition first reprint fifth 2012. P. 229

9. 2016 (68) PTC 225, 509 [Bom]

physical or terrestrial address. It directs a user to a particular part of the Web where a domain name registrant stores and displays his information, and offers his services."

i. Anatomy of A Domain Name

Domain name is distinct from website and Universal Resource Locator (URL). Domain name, being the substitute to IP address, forms only part of the other two. For example - <http://www.mayank.com, mayank. Com> is the domain name, www.mayank.com is the website, and http://www.un.org is the URL. The domain name system consists of two sets of domains. The first level set of domains is called as top level domains (TLDs). They can be seen in the right most part of the domain names. The TLDs can be further divided into generic top level domains (gTLDs), and country code top level domains (ccTLDs). While the gTLDs are intended to provide information about the type or nature of the organizations address like the sequence **.ac** (short for ***ac****ademia*) is in use in many countries as a second-level domain for academic institutions such as universities, colleges, and research institutes. www.bhu.ac.in is a perfect example of this sequence. Traditionally, there were seven gTLDs, namely .com, .org, .net, .edu, .int, .gov and .mil[10] . ccTLDs generally give information about the location of organizations. For example, www.argos.co.uk implies that the company is based in the UK. Similarly, <www.bsnl.co.in> implies that the company is based in India. This is called country code Top Level Domain(ccTLD).In mayank.com , suffix dot com is top level domain name (TLDs) and Mayank is second level domain name (SLDs). This is a sequence of characters which is unique within the set of .com domain nams and therefore operates as a unique identifier. Sometimes more than one second level domain name can be used to identify particular

ii. Domain Name Registration

The domain name system is currently managed and administered by Internet Corporation for Assigned Names and Numbers (ICANN). Generally there is one organization which oversees registration in each country but there may be several organization acting as registrar particularly in those countries where internet use is well established. In India, National Centre for Software Technology (NCST) is the body that regulates country level domain name registration. Upon the conclusion of the registration agreement, the domain name, is allocated to the registrant, whereby it becomes the legal owner of it

iii. Disputes Over Domain Name Registration

Disputes over domain name registration fall into one of two categories:

(a) There are some domain names which so obviously refer to and identify a particular business or entity, that there registration by a third party amounts to illegitimate hijacking of the name.

(b) There are far more domain names which could be legitimately registered and used by more than one person or business. A particular domain name is secured by the first to register and in the vast majority of cases all the others who might like that particular domain name cannot challenge the registration. An example of this type of case is

10. '.com' refers to commercial organizations, .'org' refers to non-profit organization, .'net' refers to network service providers, „.edu refers to educational institutions, „.int refers to international organizations, „.gov refers to government entities, and „.mil refers to military and defence entities. Paul Sugden, „Trademarks and Domain Names in Jay Forder and Patrick Quirk (eds.), *Electronic Commerce and the Law*, (Australia: John Wiley & Sons, 2001) p 2

Pitman Training Ltd v *Nominet UK*[11] where there were two independent business entitled to trade under the name Pitman. The registration of pitman.co.uk by one could not be disturbed by other.

Both situations arise because, hitherto, the internet is governed by convention. It has taken some time to find ways to deal with the illegitimate hijacking of domain names, but in general terms there are three ways by which dispute may resolved:

a. A claimant may bring proceedings for passing off and or infringement of registered trademark.

b. Under dispute resolution policy of ICANN[12]

c. By dispute resolution service operates by most of domain name registrar.

iv. Nature of Domain Name

According to Julius Stone, the right to property exists due to the recognition given in the civilized society for men who have discovered or created by their own labour, physical or mental, something that is beneficial to them under the existing social and economic order. The need to control such things forms the basis of recognition of such rights. Since the registration of a domain name gives registrant certain rights over it, so an obvious question arises that, whether the domain names qualify to be virtual property of the holders? Can domain name be subject to challenge before national courts or UDRP panels for different reasons, necessarily we need to consider whether such rights are akin to rights that one enjoy over one's property? The legal scholars are divided in their opinion regarding the status of domain names as virtual property.

(a). Domain Names As Contractual Rights

Since a domain name is the subject of a registration agreement, some authors and courts have concluded that the right to a domain name is a contractual one[13]. For example, the Virginia Supreme Court in *Network Solutions, Inc.* v *Umbro International*[14] held that a domain name could not be subject of garnishment to the benefit of a judgment creditor. In fact, the court described the right to use a domain name as "the product of a contract for services" scholars who are of the view that the domain names are not virtual property, consider it as just a licensed right to use the name for a particular purpose, that is, to establish the presence of the domain name holder over the Internet. The holder of a domain name gets a kind of license to use it as long as the license fee is paid and in case the registration is not renewed, the holder loses the right to the domain name[15]. These authors believe that domain names derive from the contract with the registrar and cannot exist separately from that contract.

(b) Domain Names as Property

The supporters of virtual property status of domain names might tend to derive support

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11. F.S.R. (1997) 797
12. The Uniform Domain Name Dispute Resolution Policy adopted by ICANN, August 26, 1999.
13. WIPO, the National Intellectual Property Association of Bulgaria, Legal Protection of Domain Names, 2001, 4.
14. 529 S.E.2d 80 (Va. 2000), 81.
15. Walden I & Hörnle J, *E-commerce Law and Practice in Europe*, 2001, Woodhead Publishing Limited, https://books. google.com/books?isbn=1845699009

from Roscoe Pound's statement that the Porcelains had the practice of awarding the new thing to its maker because prior to his labor that thing had not existed[16]. While applying this logic to domain names, the scholars advocate that the registrant applies his intelligence and skill to select such name which helps for his identification and fulfillment of other purposes over the Internet. So he has to be given some sort of property rights over his creation. Hence, domain names, URL, e-mail accounts etc. are classified as virtual property[17] According to these scholars, domain names are property because they possess all three requisite rights: first, the owner has the right to exert control over domain name, i.e. its domain name is unique; second, it has the exclusive right to use the domain name; and third, it has the right to alienate or otherwise dispose of the domain name.

Finally, coming to the answer of main question regarding the nature of domain name, In a case where the domain name is registered by borrowing from an intellectual property right, the conflict arises between the rights conferred by domain name and the intellectual property right in question. If the domain names are accepted as a kind of property, the unavoidable dilemma would be regarding the priority of conflicting property rights[18]. In simple words, whether the domain name as a property should give way to intellectual property right in question or intellectual property right should give way to domain name? Therefore, it is advisable to consider the nature of domain name is as contractual right to avoid practically unavoidable situation.

IV. LINK BETWEEN TRADEMARK AND DOMAIN NAME

Domain names are a result of the registration contract and their existence depends on it. There are rights and obligation for both parties which derive from that contract. But intellectual property rights are not a creation of contract. A trademark, no doubt, is principally, valid if it is but their use is not regulated by a contract. Intellectual property rights are territorial rights, protected within the boundaries of a country, while domain names are universal rights and immediately after a domain name is registered, no one, except the owner, can obtain any rights to it.

However, there are important intellectual property implications arising out of the use of a verbal expression (which a domain name ostensible is) in the course of trade. The top and second level domain elements for national registration in most of the countries and do not generate any form of allied intellectual property rights but the rest of domain name is user defined and may well spell out a trade mark or other sign used in trade leading to trademark infringement issues and possible passing off. Taking example of a Dutch case law- Where a company got a trademark registered as *thuisbezorgd.nl* in the year 2000. Another company engaged in the same business activity under the domain name *thuisbezorgen.nl*. The Trademark owner filed a suit against the domain name owner contending that it deceived the customers to think that the site was theirs and that the goodwill of the company was being

16. Roscoe Pound, *An Introduction to the Philosophy of Law*, Second Indian Reprint, (Delhi: Universal Law Publishing Co. Pvt. Ltd, 1998) p. 110.

17. Joshua A. T. Fairfield, „Virtual Property , *Boston University Law Review*, Vol. 85, 2005, pp. 1047 - 1102 at p. 1055.

18. David Nelmark, *Virtual Property: The Challenges of Regulating Intangible, Exclusionary Property Interests Such as Domain Names*, *Northwestern Journal of Technology and Intellectual Property*, Vol. 3, No. 1, Fall 2004, pp. 1 - 23 at p. 5

used by the domain name owners to earn profit. On the contrary, the domain name owner contended that the trademark lacked distinctiveness. However, the Court ruled that since the trademark was registered before the domain name, the defendants were at fault. Thus, most of the times, the company grows such a reputation that the courts grant recognition of trademark as domain name.[19]

Another *Amazon.com Inc v. Royal responder Inc Civil Action CV'03 1634PHXDKD*[20] wherein defendants were charged for sending e-mails using Amazon's domain name *Amazon.com* and making the customers believe that the goods/services were of Amazon. The defendants were neither affiliates of Amazon nor were doing so with the prior permission of the company. Amazon has wide range of customers all over the world and is also famous for its services both online and offline. It became a fortune 500 company after commencing operations in 1995 on the World Wide Web. Hence, it can be concluded that the domain name of the company became valuable corporate asset. Court held the defendants liable.

Thus, through the above case studies, it can be concluded that whatever domain name and trademark both are different in nature and jurisdiction but still domain names and trademarks are interrelated in so many aspects and posses so many challenges in legal domain.

V. TYPES OF DISPUTES BETWEEN TRADEMARK AND DOMAIN NAME

(a) Cyber Squatting

This is the act by which one party earns profit and attracts customer by misusing the trademark of other party. It is a common practice for companies to use their trademarks as their domain names. Cyber squatters beat a company to the punch by registering a domain name which they think the company wants own for the purpose of online advertising and will be prepared to spend a huge amount for acquiring the same. Cyber squatting (also called domain squatting) is a situation where a person acquires a domain name in which he has no legal interest, with a mala-fide intention to gain profit for selling or licensing it to the company to whom the domain name rightfully belongs. In *Panavision v Toeppen*[21] the plaintiff Panavision International held the ownership of marks 'Panavision' and 'Panaflex'. The defendant Dennis Toeppan had registered the domain names 'panavision.com' and 'panaflex.com' and demanded $13,000 when Panavision asked him to relinquish the domain name. He had no interest in the domain name was proven by the fact that he did not use the websites. The website 'panavision.com' simply contained images of Pana, Illinois and the website 'panaflex.com' just contained one word 'HELLO'. The District Court and the Appellate Court held that Toeppen's act was clearly done with an intention of arbitraging and was not benign as he blocked hundreds of domain names with the mala-fide intent to profit from the goodwill of the trademark owners and act[s] as a 'spoiler,' preventing Panavision and others

19. Stefan Kuipers, Faculty of Law: Lund University, The Relationship between Domain Names and Trademarks/ TradeNames *availabl*http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=5470120&fileOId=547015

20. Eric Misterovich, Domain Names as Registered Trademarks, *available a*t https://revisionlegal.com/trademark-attorney/domain-names-as-registered-trademarks/

21. 141 F. 3d 1316 (9th Cir. 1998)

from doing business on the Internet under their trademarked names unless they pay his fee.

(b) Reverse Domain Name Hijacking

It is defined in Rule 1 of the UDRP Rules as "using the Policy in bad faith to attempt to deprive a registered domain-name holder of a domain name."Also the burden of proof lies on the respondent to prove the presence of the element of 'bad faith' and mala-fide intention of acquiring the domain name. Here the person attempting to take control of the domain name would be having full knowledge of the fact that the owner of domain name has legitimate interest in it. Still he resorts to legal action in bad faith with a primary intent to harass the domain name holder having full knowledge of the fact that the owner of domain name has legitimate interest in it. Still he resorts to legal action in bad faith with a primary intent to harass the domain name holder. Unfortunately, this kind of conflict is not properly addressed in law[22]. Only remedy available in such circumstances is a written reprimand against the complainant[23]. For instance, *Data Concepts Inc v Digital Consulting Inc*[24]. Digital Consulting Inc. registered the trademark 'DCI' (in 1987) whereas Data Concepts Inc had registered the domain name 'dci.com' in 1993. Digital Consulting Inc initiated a claim for the possession of the domain name and won in the NSI and Federal District Court. However, in an appeal to the Sixth Circuit Court of Appeals, the earlier decisions were reversed saying that the petitioner was unaware of the trademark of the defendant during the time of registration of its domain name and held that not all the domain names function as trademarks.

(c) Typo squatting

The misuse of domain name registration can also be done by registering a domain name almost similar to a well-known trademark or domain name. A domain name similar to a well-known trademark or domain name generates a misrepresentation that both endorse same goods or services, thereby deceives the customers. This type of mischief may be by misspelling the domain name or trademark, or adding some letter or word to the domain name or trademark.118 These slightly variant domain names would be visited by the net users when they make mistakes in typing the well-known trademark or domain name. Thus, there is every chance of such users being deceived by the miscreants[25]. This kind of mischief is also referred as cyber piracy.

VI. TRADEMARK INFRINGEMENT IN CYBERSPACE

Apart from the issues discussed above there are various other issues concerning trademark infringement in cyberspace came before the court such as infringement by way of linking or framing, Meta tagging etc.

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22. The UDRP gives less significance to the problem of reverse domain name hijacking. See Mikki Barry, „Comments on UDRP , available at <http://www.icann.org/en/comments-mail/comment-udrp/current/maillist.html>

23. Anne Gilson LaLonde, *Litigation Alternatives: UDRP and Trademark Office Proceedings*, *Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series*, June-July, 2007. <www.westlaw.com>

24 150 F3d 620, 47 USPQ2d 1672 (6th Cir. 1998)

25 Robert A. Badgley, *Internet Domain Names and ICANN Arbitration: The Emerging "Law" of Domain Name Custody Disputes*, *Texas Review of Law and Politics*, Vol. 5, 2000 - 2001, pp. 343 - 392 at p. 346.

(a) Meta Tagging

Meta tagging is a technique to manipulate the keyword field of a search engine. The manipulators insert a word in the keyword field of a site which manipulates the search engine so that the user returns to the same site although the site may have nothing to do with the search engine. Meta- tags also known as hidden texts because they are hidden tags includes in software which makes up a web page generally not visible to readers screen. However, every case of Meta tagging are not regarded as trademark infringement. Only those cases wherein the plaintiff has proved that the use of their trademark in defendant's website is in bad faith will be regarded as infringement. In *Playboy Enter Inc v. Welles SD Cal 1998*, The Court did not regard use of metatags as trademark infringement since it qualified the test of "fair use". The Court said that "legitimate editorial use" of Meta tags must be allowed.

(b) Linking And Framing

Linking and framing is another way to deceit the consumers into believing that the website belongs to the original trademark owners. When a user accidently or knowingly clicks on a link highlighted on a webpage known as "hypertext reference link", a totally different webpage appears which transports the user to a new location. This whole process is termed as "linking". Fake companies copy the trademark of well-known brands and put them in the hyperlinks highlighted on various websites.

VII. DISPUTE RESOLUTION UNDER THE UNIFORM DOMAIN NAME DISPUTES RESOLUTION POLICY

A person may complain before administration-dispute-resolution service providers listed by ICANN under Rule 4(a) that:

(a) A domain name is "identical or confusingly similar to a trademark or service mark" in which the complainant has rights; and

(b) The domain name owner/registrant has no right or legitimate interest in respect of the domain name; and

(c) A domain name has been registered and is being used in bad faith.

Rule 4(b) has listed by way of illustration the following four circumstances as evidence of registration and use of a domain name in bad faith:

(a) Circumstances indicating that the domain name owner/registrant has registered or the domain name owner/registrant has acquired the domain name primarily for the purpose of selling, renting or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of its documented out-of-pocket costs directly related to the domain name; or

(b) The domain name owner/registrant has registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that it has engaged in a pattern of such conduct; or

(c) The domain name owner/registrant has registered the domain name primarily for the purpose of disrupting the business of a competitor; or

(d) By using the domain name, the domain name owner/ registrant has intentionally

attempted to attract, for commercial gain internet users, to its web site or other on-line location, by creating a likelihood of confusion with the complainants mark as to the source, sponsorship, affiliation, or endorsement of the domain name owner/registrant web site or location or of a product or service on its web site or location.

These rules indicate that the disputes may be broadly categorised as:

a. disputes between trademark owners and domain name owners and

b. disputes between domain name owners inter se.

A prior registrant can protect its domain name against subsequent registrants. Confusing similarity in domain names may be a ground for complaint and similarity is to be decided on the possibility of deception amongst potential customers. The defences[26] available to a complaint are also substantially similar to those available to an action for passing off under trademark law. As far as India is concerned, there is no legislation, which explicitly refers to dispute resolution in connection with domain names. But although the operation of the Trade Marks Act, 1999 itself is not extra territorial and may not allow for adequate protection of domain names

VIII. APPLICABILITY OF THE TRADEMARKS ACT, 1999

In India, the Trademarks Act, 1999 (Act) provide protection to trademarks and service marks respectively. In *satyam Infoway Ltd.* v *Sifynet* Solution[27] the Supreme Court, on the question of whether the principles of trademark law and in particular those relating to passing off apply to domain name, the court observed:

As far as India is concerned, there is no legislation which explicitly refers to disputes resolution in connection with domain names. But although the operation of the Trademark Act, 1999 itself is not extraterritorial and may not allow for adequate protection of domain names, its does not mean that domain names are not to be legally protected to the extent possible under the laws relating to passing off.

A closer perusal of the provisions of the Act and the judgments given by the Courts in India reveals that the protection available under the Act is stronger than internationally required and provided Rule 2 of the UDNDR Policy requires the applicant to determine that the domain name for which registration is sought, does not infringes or violates someone else's rights. Thus, if the domain name, proposed to be registered, is in violation of another person's "trademark rights", it will violate Rule 2 of the Policy. In such an eventuality, the Registrar is within his right to refuse to register the domain name. This shows that a domain name, though properly registered as per the requirements of ICANN, still it is subject to the Trademarks Act, 1999 if a person successfully proves that he has "rights' flowing out of the Act. This point is further strengthened if we read Rule 2 along with Rule 4(k), which provides the parties have a right to agitate before a court of competent jurisdiction, irrespective of the declaration or decision to the contrary by the ICANN. Thus, a contrary decision of an Indian Court of competent jurisdiction will prevail over the decision of ICANN.

26. Rule 4(c) of UDNDR
27. (2004)6SCC 145

The Act covers the remedies peculiar to Indian legal system as well as the well-known common law principles of passing off. At the same time it is in conformity with the recognised international principles and norms. Thus, the protection provided under the Act is more reliable and secure.

IX. CONCLUSION

The functional similarities between the domain names and the trademarks have brought them together in the cyber world. But this interrelation between the domain names and trademarks has also resulted in conflicts between them, especially with the growth of e-commerce. Resolution of such conflicts, to be certain, is a major challenge to law in the years to come, particularly in order to deal with a cross border conflict. The paper discussed the conflicts between trademarks and domain names, their causes, kinds and the attempts made to resolve the conflicts. In Indian context, the protection of domain name under the Indian legal system is standing on a higher footing as compared to a simple recognition of right under the UDNDR Policy. The ramification of the Trademarks Act, 1999 are much wider and capable of conferring the strongest protection to the domain names in the world. The need of the time is to harmoniously apply the principles of the trademark law and the provisions concerning the domain names.

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IMPLICATIONS OF CROP INSURANCE ON AGRICULTURAL SUBSIDIES IN INDIA WITH SPECIAL REFERENCE TO PMFBY, 2016

ANOOP KUMAR*

ABSTRACT : Governments intervene in the agricultural sector for a number of reasons, including the desire to provide adequate food for the population, to achieve self-sufficiency and to promote rural welfare. India's vulnerabilities to the unpredictability of nature are Well-known. In an attempt to counter or minimize the effect of unpredictable nature, crop insurance is seemed as a tool. In order to provide insurance coverage and financial support to the farmers in the event of natural calamities and diseases, the *Pradhan Mantri Fasal BimaYojana* (PMFBY), 2016 reduces the premium to be paid by farmers to 1.5% on Rabi crops, 2% on *Kharif* crops and 5% on commercial or horticultural crops. It is relevant to note that the scheme does not prescribe any provision of capping the premium rate. Thus, it ensures that farmers can get a higher claim against the full sum insured. In this context the issue of subsidies and support to agriculture always deserves a detailed discussion involving all the stakeholders. Crop insurance helps in stabilization of farm production and income of the farming community. It helps in optimal allocation of resources in the production process. Crop insurance is considered domestic support to agriculture in the terms of Agreement on Agriculture of WTO. For exemption from the reduction commitments, crop insurance scheme must be conforming to Annexure 2 clause 7 and 8 (a-e) of Agreement on Agriculture (AoA). The task of the present paper is to assess the implications of crop insurance on agricultural subsidies in India. It is believed that in the initial phase till the *Pradhan Mantri Fasal BimaYojana* (PMFBY) penetrates deep in the rural sector the government spending shall be on the higher side. It is thus important for us to present justification for establishing as to how Indian scheme is excluded from the reduction commitments.

KEY WORDS : WTO, Green Box, *Pradhan Mantri Fasal BimaYojana* (PMFBY), Crop Insurance, Agriculture.

I. INTRODUCTION

In India agriculture has been a way of life and continues to be the single most important

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livelihood of the masses. India's culure and civilization is based on agriculture. It grows with the growth of agriculture and strengthens with the strength of agriculture which at present is facing challenges. Indian agriculture has an extensive background which goes back to 10 thousand years.[1] Agriculture plays a vital role in India's economy. 54.6% of the population is engaged in agriculture and allied activities (census 2011)[2] and it contributes 17.4% to the country's Gross Value Added (current price 2014-15, 2011-12 series. Agriculture Gross Value Added (GVA) was earlier referred as Gross Domestic Product.[3] It is still the main source of livelihood for the majority of the rural population. As such rapid, growth of agriculture is critical for inclusiveness. As per the land use statistics 2012-13, the total geographical area of the country is 328.7 million hectares, of which 139.9 million hectares is the reported net seeded area and 194.4 million hectares is the gross cropped area with a cropping intensity of 138.9%. The net irrigated area is 66.1 million hectares.[4]

The focus of agricultural policy in India across decades has been on self-sufficiency and self-reliance in foodgrains production. Considerable progress has been made on this front. Foodgrains production rose from 52 million tonnes in 1951-52 to 251 million tonnes in during 2014-15. The total food-grain production during 2014-15 crop year (July-June period) was 251.12 million tones.[5]The above indicates that growth of agriculture sector is a pre-requisite to the economic and social development of the Indian economy.

All over the world, agriculture is synonymous of uncertainty and risks. In order to handle the agricultural problems crop insurance may play a significant role. Indian farmers have to suffer huge losses during natural calamities such as flood and drought and the growing number of farmer deaths makes it more essential to have a financial assistance at the time of crop failure. The government and the policy makers have always faced challenges *vis-a-vis* the task of ensuring food security, higher agricultural growth and adequate jobs in agricultural sector. There has been a long felt need to bring together at one place all conceptual issues, detailed institutional framework and operational details related to farmers' welfare, risk management of farming community and the crops during drought and floods and other localized risk factors. Therefore, the present government pronounced *Pradhan MantriFasalBimaYojana* (PMFBY), on 13th January, 2016.[6]

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1. Salunkhe, Harshal A. & Deshmush, B.B, The overview of Government subsidies to agriculture sector in India *IOSR Journal of Agriculture and Veterinary Science* (Nov. - Dec. 2012) (1)5, at.43.
2. Department of Agriculture Cooperation & Farmers Welfare available at:*http://agricoop.nic.in/department-glance* [Accessed on 30Dec. 2016].
3. Central Statistics Office (CSO), Ministry of Statistics &Programme Implementation has released the New Series of National Accounts on 30.01.2015, revising the base year from 2004-05 to 2011-12. As per the first revised estimates released by CSO on 29.01.2016, the Agriculture and Allied Sector contributed approximately 17.0% of India's Gross Value Added(GVA) at current prices during 2014-15.
4. Annual Report, 2015-16, Department of Agriculture, Cooperation & Farmers' Welfare Ministry Of Agriculture& Farmers' Welfare Government of India KrishiBhawan, New Delhi-110 001 available at:*http://agricoop.nic.in/sites/default/files/Final%20Annual%20Report%20English.pdf pdf* at.[Accessed on 20 July, 2016].
5. Food grain production during 2014-15 crop year declines by 13.92 MT, available at: *http://timesofindia.indiatimes.com/business/india-business/Foodgrain-production-during-2014-15-crop-year-declines-by-13-92-MT/articleshow/47268453.cms* [Accessed on 5 January, 2015].
6. *See generally,* Operational Guidelines, *Pradhan Mantri Fasal BimaYojana*, Department of Agriculture, Cooperation and Farmers Welfare Ministry of Agriculture & Farmers Welfare Krishi Bhawan, New Delhi- available at: *110001http://agricoop.nic.in/Admin_Agricoop/Uploaded_File/OprationalGuidelines1822016.pdf* [Accessed on 20 July, 2016].

It is in this context that the present paper examines how agricultural insurance programs are treated under the World Trade Organization (WTO) and further examines the new crop insurance scheme (PMFBY) in the context of domestic support disciplines under the WTO and tried to find out the answers, it is possible for India to meet its food security, rural livelihood and development concerns within the WTO framework.

II. THE EVOLUTION AND GROWTH OF AGRICULTUREAL INSURANCE IN INDIA: A BACKGROUND

Natural disasters such as drought, floods, cyclone, storm, landslide, earthquake etc. affect farmers through loss in production and farm income, and are beyond the control of farmers. Agricultural insurance is considered an important mechanism to effectively address the risks to output and income resulting from various natural and manmade events. Crop insurance is an insurance that provides financial compensation for production or revenue losses resulting from specified or multiple perils, such as hail, windstorm, fire, or flood. Most crop insurance pays for the loss of physical production or yield. Coverage is also often available for loss of the productive asset. Crop insurance scheme is a process of appraising and reducing risk of farmers. With the help of insurance some of the production risks can simply be avoided, many a time some risks could be prevented by taking advance action. For instance, risk of loss in crop yield due to pest attack could be prevented by following preventive pest control. Risk may be spread over a number of enterprises with varying degree of risk and of course with varying level of net income. Risk may be transferred from one entity to another and sharing risk this is quite common in India.

Crop and livestock insurance has a long history in Western Europe. Crop-hail insurance was offered in Germany as early as the late-1700s and, by the late-19thcentury, in many European countries, as well as the United States. Livestock insurance was offered in Germany in the 1830s and in Sweden and Switzerland by 1900. Early insurance schemes were largely provided by small mutual companies offering coverage on single or named perils. Limited attempts to sell multiple peril crop insurance largely ended in failure. Government involvement in multiple peril crop insurance began in the late-1930s in the United States.

The quest of introduction of crop insurance in India was taken up for examination soon after independence. A special study to work out modalities of crop insurance was commissioned in 1947-48 following an assurance given by the Ministry of Food and Agriculture to introduce crop and cattle insurance in the country. The study favoured homogenous area approach.[7] The ministry circulated the scheme for adoption by the state governments but the states did not accept. In 1965, the Central Government introduced a Crop Insurance Bill and circulated a model scheme of crop insurance on compulsory basis to state governments for their views. The bill provided for the Central Government framing a reinsurance scheme to cover indemnity obligations of the states. However because of very high financial obligations none of the states accepted the scheme. An Expert Committee headed by the then Chairman, Agricultural Price Commission set up in July 1970 for

7. The homogenous area approach envisages that in the absence of reliable data of individual farmers and in view of the moral hazards involved in the individual approach, a homogenous area would form the basic unit, instead of an individual farmer. The homogeneous area would comprise of villages that are homogenous from the point of view of crop production and whose annual variability of crop productivity would be similar.

examining the economic, administrative, financial and actuarial implications of the subject. Different experiments on crop insurance on a limited, *ad hoc* and scattered scale started in 1972-73.[8]

i. First Individual Approach Scheme 1972-1978

Different forms of experiments on agricultural insurance on a limited, ad-hoc and scattered scale were started from 1972-73 when the General Insurance Corporation (GIC) of India introduced a Crop Insurance Scheme on H-4[9] cotton and later included groundnut, wheat and potato. The Scheme was based on "Individual Approach". Subsequently the scheme included groundnut, wheat, potato and gram and was implemented in the states of Gujarat, Maharashtra, Tamilnadu, Andhra Pradesh, Karnataka and West Bengal. The scheme continued till 1978-79. However, it covered only 3110 farmers for a premium of Rs.4.54 lakhs against claims of Rs.37.88 lakhs indicating its non-viability and non-popularity.[10]

ii. Pilot Crop Insurance Scheme (PCIS) 1979-1984

The Pilot Crop Insurance Scheme was launched by the GIC in 1979, which was based on the 'Area Approach' for providing insurance cover against a deficit in crop yield below the threshold level. The Scheme covered cereals, millets, oilseeds, cotton, potato and chickpea and it was confined to loanee farmers of institutional sources on a voluntary basis. The PCIS launched in 1979 continued till 1984-85 and was implemented in 13 states. During this period it covered 6.27 lakh farmers for total premium of Rs.196.95 lakhs against claims of Rs.157.05 lakhs.

iii. Comprehensive Crop Insurance Scheme (CCIS) 1985-99

On the basis of experience gained from implementation of PCIS a Comprehensive Crop Insurance Scheme (CCIS) was introduced with effect from 1st April 1985 by the Government of India with the active participation of State Governments. This is the first nation-wide Scheme and implemented on homogeneous area basis, scheme was available to all states but it was not mandatory. Both, PCIS and CCIS were confined only to farmers who had borrowed seasonal agricultural loans from financial institutions. The main difference between PCIS and CCIS was that PCIS was on voluntary basis while CCIS was compulsory for loanee farmers. The burden of premium and claims was shared by the central and state governments in a 2:1 ratio. CCIS covered 763 lakh farmers for a premium of Rs 404 crore against claims of Rs 2303 crore.[11]

iv. National Agricultural Insurance Scheme (NAIS)

National Agricultural Insurance Scheme (NAIS) was notified/ implemented with effect from Rabi 1999-2000 with the aim to increase coverage of farmers, crops and risk commitment.

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8. Raju, S S& Chand, Ramesh, Problems and Progress in Agricultural Insurance in India, Policy Brief, 31 National Centre for Agricultural Economics and Policy Research, available at: *http:// www.ncap.res.in/upload_files/policy_brief/pb31.pdf,*at. 1. [Accessed on 20 August, 2016].

9. In 1972-73, the General Insurance Department of Life Insurance Corporation of India introduced a Crop Insurance Scheme on H-4 cotton. Later in 1972, general insurance business was nationalized by an Act of Parliament, and the General Insurance Corporation of India (GIC) was set up. The new corporation took over the experimental scheme in respect of H-4 cotton in Gujarat.

10. *Supra* note 8 at 1.

11. Raju, S S& Chand, Ramesh, Problems and Progress in Agricultural Insurance in India, Policy Brief, 31 National Centre for Agricultural Economics and Policy Research, available at: *http:// www.ncap.res.in/upload_files/policy_brief/pb31.pdf,*at. 2. [Accessed on 20 August, 2016].

The main objective of the Scheme was to protect the farmers against the crop losses suffered on account of natural calamities, such as, drought, flood, hailstorm, cyclone, pests and diseases. The Scheme was implemented by the Agriculture Insurance Company of India Ltd. (AIC). The Scheme was available to all the farmers both loanee and non-loanee irrespective of their size of holding. The scheme was available to all states and union territories on optional basis.

Subsidy of 50 per cent in premium is allowed in respect of small and marginal farmers, to be shared equally by the Centre and State/Union Territory. The premium subsidy will be phased out on a sunset basis in a period of three to five years, subject to review of the financial results and the response of the farmers at the end of the first year of the implementation of the scheme. The definition of small and marginal farmer would be as defined in the land ceiling legislation of the concerned state. Normally a cultivator with a land holding of up to 1 hectare (2.5 acres) is marginal farmer and 1-2 hectares (5 acres) is small farmer. (Singh, Gurudev, 2010)During the last thirty crop seasons (i.e. from Rabi 1999-2000 to Kharif 2014), 3074 lakh farmers were covered over an area of 4413 lakh hectares insuring a sum amounting to Rs. 494373 crore. Total premium of Rs. 23933 crore were collected against the claims of Rs. 41990 crore benefiting 969 lakh farmers.[12]

v. National Crop Insurance Programme (NCIP)

To make the crop insurance schemes more farmers friendly, a re-structured Central Sector crop insurance scheme namely, "National Crop Insurance Programme (NCIP)" was approved by merging Modified National Agricultural Insurance Scheme (MNAIS), Weather Based Crop Insurance Scheme (WBCIS) and Coconut Palm Insurance Scheme (CPIS) (as its components) with some improvements for full-fledged implementation from Rabi 2013- 14 season throughout the country. National Agricultural Insurance Scheme (NAIS) was to be discontinued after implementation of NCIP from Rabi 2013-14 season. However, on the representations and at the option of States, NAIS has been allowed in few States for the year 2015-16.

The coverage of farmers under NCIP by terminal year of 12th Plan (*i.e.* 2016-17) has been projected to be at 50% with help of the improvements / changes made in NCIP component schemes of MNAIS, WBCIS and CPIS. Implementation is made compulsory for loanee farmers. And two indemnity levels of 80% and 90% would be available instead of three *i.e.* 70%, 80% and 90% under MNAIS. For successful implementation of WBCIS, 5000 AWS will be set-up in the country through the model of Private Public Participation (PPP).

After the examining the relevant crop insurance program it is impartment to examine the *Pradhan Mantri Fasal Bima Yojana* (PMFBY), 2016 in order to understand its effectiveness and implication.

III. PRADHAN MANTRI FASAL BIMA YOJANA (PMFBY), 2016: AN OVERVIEW

The existing crop insurance schemes have recently been reviewed in consultation with various stakeholders including States/ UTs. As a result of the review, a new scheme *"Pradhan*

12. Annual Report, 2014-15, Department of Agriculture, Cooperation & Farmers' Welfare Ministry Of Agriculture& Farmers' Welfare Government of India Krishi Bhawan, New Delhi-110 001 available at:*https://nsai.co.in/editor/fmanage/userfiles/impnotification/Annual%20Report%20of%20Agriculture-Govt%20of%20India.pdf*at. 81[Accessed on 20 July, 2016].

*Mantri Fasal BimaYojana (*PMFBY) has been approved for implementation from *Kharif* 2016[13] along with pilot Unified Package Insurance Scheme (UPIS) and restructured Weather Based Crop Insurance Scheme (WBCIS).[14] The Scheme shall be implemented on an 'Area Approach Basis'. The unit of insurance shall be Village/Village Panchayat level for major crops and for other crops it may be a unit of size above the level of Village/Village Panchayat. The scheme will be implemented by AIC and other empanelled private general insurance companies. The claim amount will be credited electronically to the individual Insured Bank Account. Improved Technology like Remote sensing. Drone etc. will be utilised for estimation of yield losses.

a) 3.1 Objective of the Scheme

With the objective of supporting sustainable production in agriculture sector *Pradhan Mantri Fasal Bimam Yojana* (PMFBY) proposes to achieve fallowing objective[15]:

* providing financial support to farmers suffering crop loss/damage arising out of unforeseen events.
* stabilizing the income of farmers to ensure their continuance in farming.
* encouraging farmers to adopt innovative and modern agricultural practices.
* ensuring flow of credit to the agriculture sector; which will contribute to food security , crop diversification and enhancing growth and competitiveness of agriculture sector besides protecting farmers from production risks.

b) Coverage of Farmers

Pradhan Mantri Fasal Bima Yojana (PMFBY) covered all farmers including sharecroppers and tenant farmers growing the notified crops in the notified areas. However, farmers should have insurable interest for the notified/ insured crops. The new crop insurance scheme compulsorily covered all farmers availing Seasonal Agricultural Operations (SAO) loans from Financial Institutions (*i.e.* loanee farmers) and the scheme is optional for the non-loanee farmers.[16] PMFBY promised Special efforts to ensure maximum coverage of SC/ ST/ Women farmers. Budget allocation and utilization under these sections will be in proportion of land holding of SC/ ST/ General along with Women in the respective state/ cluster.

c). Coverage of Crops, Risks and Exclusions

Three categories of crops are covered under the scheme *i.e*. (a) Food crops (Cereals, Millets and Pulses), (b) Oilseeds (c) Annual Commercial / Annual Horticultural crops. The scheme includes different stages of the crop and risks leading to crop loss for the purpose of crop insurance. *First,* Prevented Sowing/ Planting Risk: Insured area is prevented from sowing/

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13. *See Generally,*Operational Guidelines, *Pradhan Mantri FasalBimaYojana,* Department of Agriculture, Cooperation and Farmers Welfare Ministry of Agriculture & Farmers Welfare Krishi Bhawan, New Delhi- available at: *110001http://agricoop.nic.in/Admin_Agricoop/Uploaded_File/Oprational Guidelines1822016.pdf* [Accessed on 20 July, 2016].
14. *See Generally*, *Supra* note 4 at 98.
15. *Supra* note 13 at. 1.
16. The non-loanee farmers are required to submit necessary documentary evidence of land records prevailing in the State (Records of Right (RoR), Land possession Certificate (LPC) etc.) and/ or applicable contract/agreement details/ other documents notified/ permitted by concerned State Government (in case of sharecroppers/ tenant farmers).

planting due to deficit rainfall or adverse seasonal conditions. In case of majority of insured crops of a notified area are prevented from sowing/planting the insured crops due to adverse weather conditions that will be eligible for indemnity claims up to maximum of 25% of the sum-insured. *Second,* Standing Crop (Sowing to Harvesting): Comprehensive risk insurance is provided to cover yield losses due to non- preventable risks, *viz.* Drought, Dry spells, Flood, Inundation, Pests and Diseases, Landslides, Natural Fire and Lightening, Storm, Hailstorm, Cyclone, Typhoon, Tempest, Hurricane and Tornado. *Three,* Post-Harvest Losses: coverage is available only up to a maximum period of two weeks from harvesting for those crops which are allowed to dry in cut and spread condition in the field after harvesting against specific perils of cyclone and cyclonic rains and unseasonal rains. *Fourth,* Localized Calamities: Loss/ damage resulting from occurrence of identified localized risks of hailstorm, landslide, and Inundation affecting isolated farms in the notified area. Losses arising out of war and nuclear risks, malicious damage and other preventable risks are excluded from PMFBY.[17]

d). Preconditions for implementation of the Scheme

Notification by State Government/Union Territory (UT) is mandatory for the purpose of implementation of the PMFBY. The main conditions relating to PMFBY which are binding on States/UTs, are: (a) State has to conduct requisite number of Crop Cutting Experiments (CCEs) at the level of notified insurance unit area; (b) CCE based yield data will be submitted to insurance company within the prescribed time limit; (c) State/ UT will make necessary budgetary provision in State/ UT budget, to release premium subsidy based on fair estimates, at the beginning of the crop season; (d) State/ UT should be willing to facilitate strengthening of weather station network. (e) Adoption of innovative technology especially Smart phones/ hand held devices for capturing conduct of CCEs.

Department of State Government already looking after implementation of National Agriculture Insurance Scheme (NAIS)/ National Crop Insurance Programme (NCIP) may be designated as Nodal Department for implementation of PMFBY. The State Level Coordination Committee on Crop Insurance (SLCCCI) presently overseeing implementation of NAIS and NCIP may be authorized to oversee implementation of PMFBY. The States/UTs which have not implemented the NAIS / NCIP shall constitute SLCCCI for implementation of PMFBY on the lines similar to that of NAIS/NCIP. The present composition of SLCCCI may be strengthened by including representatives from State Horticulture Dept., State Remote Sensing Application Centre, India Meteorological Department (IMD), Farmers' Representatives and Empanelled Insurance Companies for implementing PMFBY. Chairman of SLCCCI shall co-opt representatives from other departments / agencies, if considered necessary.

e). Sum Insured/Coverage Limit

Sum insured per hectare for both loanee and non-loanee farmers is same and equal to the Scale of Finance as decided by the District Level Technical Committee, and would be pre-declared by SLCCCI and notified (e.g. in Uttar Pradesh Sum Insured per hectare amount are Varanasi- 44,639, Sonbhrada- 35308, Lucknow-42,902). No other calculation of Scale of Finance will be applicable. Sum Insured for individual farmer is equal to the Scale of Finance per hectare multiplied by area[18] of the notified crop proposed by the farmer for insurance. Sum

17. *Supra* note 13 at 2.

18. 'Area under cultivation' shall always be expressed in 'hectare'. Sum insured for irrigated and un-irrigated areas may be separate.

insured for irrigated and un-irrigated areas may be separate.

f). Premium Rates

The *Pradhan Mantri Fasal Bima Yojana* (PMFBY), 2016 reduces the premium to be paid by farmers to 1.5% of Sum Insured or Actuarial rate, whichever is less on Rabi crops (All food grain and Oilseeds crops, Cereals, Millets, Pulses and Oilseeds crops), 2% of Sum Insured or Actuarial rate, whichever is less on Kharif crops (All food grain and Oilseeds crops, Cereals, Millets, Pulses and Oilseeds crops) and 5% of Sum Insured or Actuarial rate, whichever is less on commercial or horticultural crops.[19]

g). Government Subsidy

The difference between the premium paid by the farmers and the premium fixed by the insurance companies will be subsidised and there will be no cap on the maximum subsidy paid by the Government. The subsidy will be borne equally by central and the respective state Government**.** However, the State/UT Governments are free to extend additional subsidy over and above the stipulated subsidy from its budget. In other words, additional subsidy, if any shall be entirely born by the state/UT Government. Subsidy in premium is allowed only to the extent of Sum Insured. Government premium subsidy to the private empanelled insurance companies may be routed through Agricultural Insurance Company (AIC) of India Limited**.** Government may release 50% of the total estimated premium subsidy to empanelled insurance companies at the beginning of crop season on the basis of business projection to be submitted by each insurance company subject to fulfillment of General Financial Rule/ guidelines in the matter.

h). Claim Liabilities

Insurance company shall take all necessary steps to take appropriate reinsurance cover for their portfolio in order to safeguard insured's interest. In case premium to claims ratio exceeds 1:3.5 or percentage of claims to Sum Insured exceeds 35%, whichever is higher, at the National Level in a crop season, then Government will provide protection to Implementing Agency. The losses exceeding the above mentioned level in the crop season would be met by equal contribution of the Central Government and the concerned State/ UT Governments. The liability of payment of all claims shall however be of the concerned IAs only. In case of unfulfilment of above mentioned condition, States/ UTs where the losses exceed the above ceiling level insurers shall be responsible to settle the admissible claims.[20]

IV. SOME REFLEXION OF AGRICULTURE WITHIN WTO REGIME

In the post-world war II and post-colonial-era of the mid twentieth century, the locus of economic decision making has been transferred from national governments to transnational organization. The international economic order has been radically restricted by the new treaty which encompasses virtually the entire economic spectrum- the final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations issued by the secretariat of the General Agreement on Tariffs and Trade on December 15, 1993.[21]The international

19. See generally, *Supra* note 13 at 7.

20. *Supra* note 13 at 8.

21. Peoples' Commission on GATT, on the constitutional implications of the Final Act embodying the results of the Uruguay round of multilateral trade negotiations, *Center for Study of Global Trade System and Development*, 1996 at 1.

trading system came of age on 1 January 1995, with the establishment of the WTO. The vast majority of international trade is now subject to this rule-based trading system...Almost all of the major trading nations can be counted among its 162 Members,[22,23] these members account for 98 per cent of global trade.[24]

Apart from many other issues subsidy is one of the most important issues within the WTO because subsidies present more complex issues for policy makers than many other instruments subject to GATT/WTO rules. Policy maker in developing countries often consider subsidies a useful tool to develop certain industries like agriculture, manufacturing and service sectors.[25]

The issue of subsidies and support to agriculture first came under international spotlight with the Uruguay Round of multilateral trade negations in the late 1980s. It was a time when protectionism and high support of agriculture were widespread leading to severe distortion in international trade in agriculture. The Agreement on Agriculture (AoA) was considered to be a starting point for liberalizing trade in agriculture. The Agreement on Agriculture consists of three main pillars. The first pillar, on market access, requires members to convert non-tariff barriers into ordinary customs duties and subsequently to bind and reduce the latter. The second pillar consists of commitments and general disciplines on domestic support and the third pillar covers the export subsidies.[26]

The Agreement on Agriculture is a step towards serious reform of international rules governing trade in agricultural product. In *Canada- Dairy*,[27] the Panel referred to the Preamble and identified the "main purpose" of the Agreement on Agriculture: "As enunciated in the preamble to the Agreement on Agriculture, the main purpose of the Agreement is to 'establish a basis for initiating a process of reform of trade in agriculture' in line with, *inter alia*, the long-term objective of establishing 'a fair and market-oriented agricultural trading system'. This objective is pursued in order 'to provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets'."

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22. Ministers formally approved Afghanistan's WTO membership terms at a special ceremony held at the WTO's Tenth Ministerial Conference (MC10) in Nairobi on 17 December, 2015. Afghanistan's First Deputy Chief Executive Mohammad Khan Rahmani said the ceremony marks a historic day for Afghanistan and a significant step in the country's journey of economic and political reform. Available at: *https://www.wto.org/english/news_e/news15_e/acc_afg_17dec15_e.htm* [Accessed on 5 January, 2016].
23. World Trade Organization, Annual report, 2016, at 24, Available at: *https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep16_e.pdf* [Accessed on 10 October, 2016]. 23 Observers Country including Algeria, Andorra, Azerbaijan, Bahamas, Belarus, Bhutan, Bosnia and Herzegovina, Comoros, Equatorial Guinea, Ethiopia, Holy See (Vatican), Iran, Iraq, Kazakhstan, Lebanese Republic, Liberia, Republic of Libya, Sao Tomé and Principe, Serbia, Seychelles, Sudan, Syrian Arab Republic, Uzbekistan. Available at: *http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm* [Accessed on 1 January, 2016].
24. World Trade Organization, Annual Report, 2015 at 23, available at: *www.wto.org*[Accessed on 17 January, 2016].
25. World Trade Report on '*Exploring the Links between Subsidies, Trade and the WTO*'. World Trade Organization, 2006 at 45.
26. Joseph A. McMahon, "The Agreement on Agriculture", in Patrick F. Macro, *et. al.* (eds.) *The World Trade Organization: Legal, Economic and Political Analysis* (New York: Springer, Vol. II, 2007) at 189.
27. *Canada- Measures Affecting the Implementation of Milk and Exhortation of Dairy Products,* WT/DS103, 113/R, adopted on 27 October, 1999, para.7.25.

The Agreement on Agriculture establishes a framework to reduce domestic support for agricultural products. Domestic support measures are basically categorized in three different general boxes, depending on their trade distortive potential. First, some types of support are deemed not to be, or only minimally, trade-distorting and are therefore allowed without limits (*i.e*. green box support). Second, some support linked to production could also be offered if it is made in the framework of a production-limiting programme (*i.e*. blue box support). Third, all other types of domestic support are in principle subject to reduction commitments because of their trade-distorting effect (*i.e.* amber box).

In addition to these three general boxes, two other boxes should be distinguished. First of all, all countries are allowed to offer a certain *de minimis* level of amber box support (*i.e*. *de minimis* box). Next, Special and differential (S&D) treatment is given to developing countries regarding some types of domestic support (the so-called S&D box). Both boxes are equally exempted from reduction commitments.[28]

Crop insurance is considered domestic support to agriculture in the terms of Agreement on Agriculture of WTO. Since the crop insurance has been an integral part of many domestic support programs, the often stated impetus for the growth in insurance program is the potential treatment of such programs as exempt from WTO reduction commitments. For exemption from the reduction commitments, crop insurance scheme must be according to Annexure 2 clause 7 and 8 (a-e) of AOA. In these context analyses of 'Green Box' is required.

1. Green Box Subsidies under Agreement on Agriculture

The idea of exempting production and trade-neutral subsidies from WTO commitments was first proposed by US in 1987 and subsequently endorsed by EU. The rationale for supporting green box was to compensate farmers in the developed countries for any potential losses following agriculture reforms and allow the governments to deliver on public goods and fulfill their policy objectives without disrupting international trading pattern. The underlying reason was also to make progress in WTO negotiations in the face of stiff resistance from the farmers in the developed countries.[29]

"Green Box" support is allowed without any limit (which also means there are no "reduction commitments"). It covers two broad categories: government service programmes and direct payments. Domestic support measures in the green box shall meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production.[30] To meet this requirement, the Agreement on Agriculture stipulates general and policy-specific criteria in Annex 2.

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28. Coppens, Dominic (2014) *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints* (United Kingdom: Cambridge University Press, First Edition) at.254.

29. Banga, Rashmi, Impact of Green Box Subsidies on Agricultural Productivity, Production and International Trade, Working Paper, May 2014, Centre for WTO Studies (CWS) Indian Institute of Foreign Trade New Delhi, available at: *http://wtocentre.iift.ac.in/workingpaper/Green%20Box%20Subsidies%20%20WP.pdf*[Accessed on 20 July, 2016].

30. *See* Annexure 2, para. 1 of the Agreement on Agriculture: 1. Domestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production. Accordingly, all measures for which exemption is claimed shall conform to the following basic criteria: (a) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers; and, (b) the support in question shall not have the effect of providing price support to producers.

Two general obligations are established, *First,* support must be provided through a publicly funded government programme (including government revenue forgone) not involving transfers from consumers, and *Second,* it must not have the effect of providing price support to producers. The support programme must fit into the list of programmes given in the Agreement on Agriculture and meet the policy-specific criteria in question. In broad terms, the list covers general services programmes, food-security related expenditures, and decoupled direct payments to producers.

If the general as well as the policy specific criteria are fulfilled domestic support measures qualify under the green box, implying that they are not subject to reduction commitments and may even is increased. Support measures that are not formally linked to production decisions could still affect such decisions and thus boost production. For instance such support could reduce fixed costs, implying more production in a market characterized by uncertainty.[31] The green box should be maintained for expenditures that provide public goods or prevent negative externalities.[32]

2. Crop Insurance under the Green Box

Article 6 of AoA provides the exception of domestic measures which are not subject to reduction in terms of the criteria set out in this Article and in Annex 2 to this Agreement. Under Annex 2, domestic support measures that claim green box status must meet the general criteria of paragraph 1, as well as the policy-specific criteria articulated in 11 separate paragraphs. Although the AoA includes special and differential treatment for reduction commitments for developing countries, Annex 2 criteria are the same for both developed and developing countries.

Paragraph 1 states that to be exempt from reduction commitments, domestic support measures "shall meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production". Paragraph 7[33] of Annex 2 includes criteria

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31. In the current negotiations, some countries argue that some of the subsidies listed in Annex 2 might not meet the criteria of the annex's first paragraph — because of the large amounts paid, or because of the nature of these subsidies, the trade distortion they cause might be more than minimal. Among the subsidies under discussion here are: direct payments to producers (paragraph 5), including decoupled income support (paragraph 6), and government financial support for income insurance and income safety-net programmes (paragraph 7), and other paragraphs. Some other countries take the opposite view — that the current criteria are adequate, and might even need to be made more flexible to take better account of non-trade concerns such as environmental protection and animal welfare.

32. Harry De Gorter, "The Distributional Structure of US Green Box Subsidies", in Ricardo Meledi-Ortiz, *et.al.,* (eds.) *Agricultural Subsidies in the WTO Green Box, Ensuring Coherence With Sustainable Development Goals* (Cambridge: Cambridge University Press, 2009) at 324.

33. 7. Government financial participation in income insurance and income safety net programmes

(a) Eligibility for such payments shall be determined by an income loss, taking into account only income derived from agriculture, which exceeds 30 per cent of average gross income or the equivalent in net income terms (excluding any payments from the same or similar schemes) in the preceding three-year period or a three-year average based on the preceding five-year period, excluding the highest and the owest entry. Any producer meeting this condition shall be eligible to receive the payments.

(b) The amount of such payments shall compensate for less than 70 per cent of the producer's income loss in the year the producer becomes eligible to receive this assistance.

(c) The amount of any such payments shall relate solely to income; it shall not relate to the type or volume of production (including livestock units) undertaken by the producer; or to the prices, domestic or international, applying to such production; or to the factors of production employed.

that identify qualifying income insurance and income safety net programs, while paragraph 8[34] includes criteria that identify qualifying natural disaster assistance programs, including crop insurance. Thus, to claim green box status, agricultural insurance programs must meet all criteria in a specific paragraph, as well as the more general criteria in paragraph 1.

To meet criteria under Paragraph 7, the eligibility to claim government financial participation in income insurance is determined taking into account loss of income derived from agriculture. The loss must exceed the average gross income in the preceding three year or a five-year average(where the high and low years are discarded) period by 30%. The paragraph also provides that such payments shall compensate for less than 70% of the producer's income loss in the year the producer become eligible. Criteria in Paragraph 7(c) state that payments "shall not relate to the type or volume of production," which would seemingly preclude product-specific revenue schemes and programs that pay on production losses even if those losses are offset by a rise in prices. The total payment under paragraph 7 and paragraph 8 shall be less than 100% of the producction lass.

Paragraph 8 makes no distinction between disaster assistance programs and crop insurance. For example, Paragraph 8(a) requires that eligible payments must be preceded by a formal recognition by government authorities that a natural or like disaster (including disease outbreaks, pest infestations, nuclear accidents, and war on the territory of the member concerned) has occurred. Payments are restricted to losses exceeding 30 percent of the average production calculated as in Paragraph 7 based on a three-year average or five-year average. Payments cannot exceed 70 percent of average production. It also provides that Payments made following a disaster shall be applied only in respect of losses of income, livestock (including payments in connection with the veterinary treatment of animals), land or other production factors due to the natural disaster in question and Payments shall compensate for not more than the total cost of replacing such losses and shall not require or specify the type or quantity of future production.

(d) Where a producer receives in the same year payments under this paragraph and under paragraph 8 (relief from natural disasters), the total of such payments shall be less than 100 per cent of the producer's total loss.

34 Payments (made either directly or by way of government financial participation in crop insurance schemes) for relief from natural disasters

(a) Eligibility for such payments shall arise only following a formal recognition by government authorities that a natural or like disaster (including disease outbreaks, pest infestations, nuclear accidents, and war on the territory of the Member concerned) has occurred or is occurring; and shall be determined by a production loss which exceeds 30 per cent of the average of production in the preceding three-year period or a three-year average based on the preceding five-year period, excluding the highest and the lowest entry.

(b) Payments made following a disaster shall be applied only in respect of losses of income, livestock (including payments in connection with the veterinary treatment of animals), land or other production factors due to the natural disaster in question.

(c) Payments shall compensate for not more than the total cost of replacing such losses and shall not require or specify the type or quantity of future production.

(d) Payments made during a disaster shall not exceed the level required to prevent or alleviate further loss as defined in criterion (b) above.

(e) Where a producer receives in the same year payments under this paragraph and under paragraph 7 (income insurance and income safety-net programmes), the total of such payments shall be less than 100 per cent of the producer's total loss.

The prescriptive criteria of Paragraphs 7 and 8 is obstacle in the path of good crop insurance schemes. It allowing some kind of support to deal with production and income losses beyond a producer's control but not allowing unlimited support that would presumably result in market distortions because both paragraphs use a three-year or five-year average as the base period for determining losses in a current year. From an actuarial perspective, longer time series produced a more accurate yield estimate that was thought to minimize adverse selection problems caused by producers who might buy insurance when a three-year average was high relative to their expected yield and not buy when it was lower than their expected yield.

Likewise, criteria in Paragraph 8 would seem to prejudice reporting toward disaster assistance programs rather than insurance programs. Paragraph 8(a) states that eligibility "shall arise only following a formal recognition by government authorities that a natural or like disaster […] has occurred or is occurring;" however, such language is less appropriate for insurance programs. Indemnity-based insurance losses are, by their nature, idiosyncratic; indeed, even in years with bumper crops, individual farms may suffer losses. Thus, requirements for a public declaration of disaster would seem to preclude insurance programs from qualifying under Paragraph 8.[35]

Because of these criteria of Paragraphs 7 and 8 many develop countries *i.e.* USA, Canada, European Union have notified crop insurance scheme in amber box. The exception is Japan, which notifies subsidies for those insurance policies at coverage levels of 70 percent or less under paragraph 8. For policies with coverage levels in excess of 70 percent, Japan notifies the subsidies as amber. That variance has prompted questions as to whether those criteria should be modified to more closely match the structure of current insurance programs or to meet the needs of developing countries. In this light, the Doha Development Agenda negotiations put forth various proposals to amend Paragraphs 7 and 8 in Annex 2. Unfortunately, it is unclear as to whether the post-Nairobi agenda will include further discussions on green box reforms.

It is relevant to note that the past several years have seen significant growth in agricultural insurance markets in developing countries. Based on recent WTO notifications, Brazil, India, and the Philippines have notified agricultural insurance programs under paragraph 8.Chile notifies its insurance program under paragraph 6 (decoupled support payments), and Mexico has notified its subsidies under paragraph 6.2 (developmental measures that are exempt from reduction). The Republic of Korea has notified its subsidies as amber box outlays. China, which paid premium subsidies totaling almost $3 billion in 2012/2013, has yet to include agricultural subsidies as part of its domestic support notifications.[36]

The WTO criteria have become even more out of step in light of changes in agricultural insurance programs, especially those in the United States. In addition to revenue products, the United States has developed area-based products based on average county yields and livestock and dairy margin products based on the difference between input and output prices. Index insurance products are also available, based on weather or vegetative growth

35. Joseph W. Glauber, Agricultural Insurance and the World Trade Organization, *IFPRI Discussion Paper 01473 October 2015*,available at: *file:///C:/Users/Anoop/Downloads/GlauberAgInsuranceandtheWTOIFPRIDiscussionPaperOct2015.pdf At.17* [Accessed on 20 July, 2016].

36. *Id*. at 10.

indexes. These new products are even further removed from the WTO criteria developed more than 20 years ago.

In light of the incompatibility of WTO green box criteria and the actual operation of crop insurance programs, two conclusions can be drawn. One is that the criteria have adequately prevented abuse of crop insurance programs, as revealed by practically all developed country programs notifying as part of the amber box.[37]However, the second conclusion is that the criteria are overly restrictive and ill-structured to allow for the establishment of even a modest and actuarially sound crop insurance program designed to protect producers from catastrophic losses. The latter conclusion would seem to demand the development of new WTO green box criteria that would allow for minimally trade-distorting crop insurance programs, while still reigning in production-distorting elements.

Given the evolution and growth of agricultural insurance programs, questions have arisen as to whether such programs are compatible with current green box criteria and whether those criteria should be modified to more closely match the structure of current insurance programs or to meet the needs of developing countries. In this light, the Doha Development Agenda negotiations have put forth various proposals to amend paragraphs 7 and 8 in Annex 2.

Many questions were raised in WTO forum by EU and Canada on the issue of new crop insurance of India. The countries have sought details from India at the multi-lateral trade forum to examine if it should be classified as a trade distorting amber- box subsidy subject to cap and question by the European Union (AG-IMS ID 79024) the Indian government has recently announced that it will introduce a new harvest insurance tool, which should cover 50% of the Indian farmers within 2 years. EU asked two questions, First, Can India explain more in detail how this insurance scheme works, the eligibility criteria for farmers and what risks are covered by this scheme? Second, Does India intend to notify this scheme to WTO? Canada also asked two questions, First, Could India indicate what crops will be covered under this new crop insurance scheme? Second, Could India indicate if producers under this new crop insurance scheme will be able to choose the level of coverage?[38]

V. MEASUREMENT OF AGRICULTURAL INSURANCE SUBSIDIES UNDER WTO REGIME WITH SPECIAL FOCUS ON INDIAN AGRICULTURE

The concept of Aggregate Measurement of Support (AMS) refers to annual support in monetary terms in the form of non-exempted product-specific and non-product-specific support. The concept of the AMS is defined in Article 1(a) as "the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product-specific support provided in favour of

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37. Joseph W. Glauber, Agricultural Insurance and the World Trade Organization, *IFPRI Discussion Paper 01473 October 2015*,available at:*file:///C:/Users/Anoop/Downloads/GlauberAgInsuranceandtheWTOIFPRIDiscussionPaperOct2015.pdf At.17* [Accessed on 20 July, 2016].

38. G/AG/W/148 29 February 2016 (16-1205) Page: 1/31 Committee on Agriculture points raised by members under the review process compilation of questions for the meeting on 9-10 march 2016 The present document compiles questions receivedby the Secretariat by the deadline specified in WTO/AIR/AG/8.

agricultural producers in general ...."[39] Annex 3 to the Agreement gives detailed guidance on the calculation of the AMS. According to the provisions of this Annex, the AMS is to be calculated on a product-specific basis for each product receiving any type of non-exempt support. The purpose is to calculate the value of all of the financial factors that influence the decision of a farmer to produce a particular product. Annex 3 identifies three kinds of support that are to be included in the calculation of the AMS: *Market price support*[40]*,Non-Exempt Direct Payments*[41]*,Other Non-Exempt Measures*[42]*,*

The total funds released by Government of India under various schemes for crop insurance are as under:

39. The AMS is defined in article 1(a) of Agreement on Agriculture in the following terms: "Aggregate Measurement of Support" and "AMS" mean the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product specific support provided in favour of agricultural producers in general, other than support provided under programmes that qualify as exempt from reduction under Annex 2 to this Agreement, which is: (i) with respect to support provided during the base period, specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule; and (ii) with respect to support provided during any year of the implementation period and thereafter, calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule.

40. which is based on the difference between a fixed external reference price and the applied administrative price; this is then multiplied by the quantity of production that is eligible to receive the applied administrative price. The applied administrative price is the price that the government determines producers should receive. The external reference price is based on the period from 1986 to 1988, and is country-specific. For a net exporting country, it is generally the average Free on Board (*f.o.b.)* value for the product and for a net importing country it is generally the average Cost, Insurance and Freight (*c.i.f.*) value for the product, adjusted if necessary for quality differences.

41. Which consist of payments that are dependent on a "price gap" calculated on the difference between a fixed external reference price and the applied administrative price multiplied by the quantity of production that is eligible to receive the applied administrative price. If the direct payments are not dependent on a price gap, the AMS calculation will be based on budgetary outlays.

42. Such as input subsidies and marketing-cost reduction measures, which are to be valued based on budgetary outlays.

Table 1: Total economic costs of Indian Crop insurance program, 1997-March, 2016
((Rs. crore),)

Plan/ Year	NAIS (since Rabi 1999-2000)	WBCIS (since Kharif 2007)	MNAIS (since Rabi 2010-11)	CPIS (since 2009-10	Total
IX Plan (1997-2002)	811.49	-	-	-	811.49
X Plan (2002-07)	2626.84	-	-	-	2626.84
XIPlan (2007-12	5851.88	1370.37	87.15	1.95	7311.35
XII Plan (2012-17)					
2012-13	700.00	655.00	194.18	0.50	1559.68
2013-14	1600.00	700.00	251.02	0.50	2551.52
2014-15	1543.56	470.00	584.79	NIL	2598.35
2015-16*	1935.71	630.79	431.88		2980.39

* As on 31.03.2016, Source:Annual Report 2015-16, Department of Agriculture, Cooperation & Farmers' Gov. of India, at. 94.

If agricultural insurance were delivered by the private sector in the absence of any government subsidies, delivery costs would be fully loaded into premium costs. As such, delivery cost subsidies constitute a subsidy to producers. Under present scheme (MFMY) the difference between the premium paid by the farmers and the premium fixed by the insurance companies is subsidy. Other WTO member argued that the difference between amount paid by insurance company to farmers and the premium paid by the farmers is subsidy. The second approach is not appropriate because it is against basic principles of insurance.

TABLE 2: **DOMESTIC SUPPORT: INDIA REPORTING PERIOD: MARKETING YEARS 2004-2005 TO 2010-2011**

Measures exempt from the reduction commitment –'Green Box'[43]

Measure Type	Name and description of measure with reference to criteria in Annex 2	Monetary value of measure in year in question (US$ million)				Data Sources
		2004-05	**2008-09**	**2009-10**	**2010-11**	
(a) General services	Research	236.97	444.99	420.74	567.75	MOA
	Pest and disease control	31.49	40.29	38.40	75.11	,,
	Training services	10.06	8.75	6.78	8.09	,,
	Extension and advisory services	19.39	70.90	67.32	115.47	,,
	Infrastructural services	30.19	273.84	213.21	324.75	,,
(b) Public stockholding for food security purposes	Buffer stock operations (food grain)	5,730.35	9,495.13	1,2282.25	1,3812.46	,,
(f) Payments for relief from natural disasters	Crop insurance scheme	77.90	174.06	329.70	693.26	,,
(i) Structural adjustment assistance provided through investment aids	Dry land farming / rain-fed farming	18.18	18.91	13.3	14.72	,,
(j) Payments under environmental programmes	Soil conservation	4.62	30.06	20.28	31.08	,,
	Integrated watershed management	*	335.81	372.11	538.94	,,
TOTAL		**6,183.34**	**16,927.45**	**17,381.25**	**19,479.05**	,,

Exchange rate: US$1 = Rs. 44.93 (2004-2005); US$1 = Rs. 44.27 (2005-2006); US$1 = Rs. 45.28 (2006-2007); US$1 = Rs. 40.24 (2007-2008); US$1 = Rs. 45.99 (2008-2009); US$1 = Rs. 47.42 (2009-2010); US$1 = Rs. 45.56 (2010-2011); MoA- Ministry of Agriculture.

43. G/AG/N/IND/10/Corr.1, 1 October 2014 (14-5509) Page: 1/3, Committee on Agriculture Original: English at 3.

Suorce: Auther created on the basis of WTO Deta, G/AG/N/IND/10/Corr.1, 1 October 2014 (14-5509) Page: 1/3, Committee on Agriculture, English at 3.

According the recent report of Committee on Agriculture Compliance with notification obligations which was published on 2 September 2016[44] India notify only upto 2010 (G/AG/GEN/86/Rev.25, 2 September 2016) domestic support and under these notification Crop insurance schemes notify as a green box.

Figure 1: Trend in Domestic Support in India

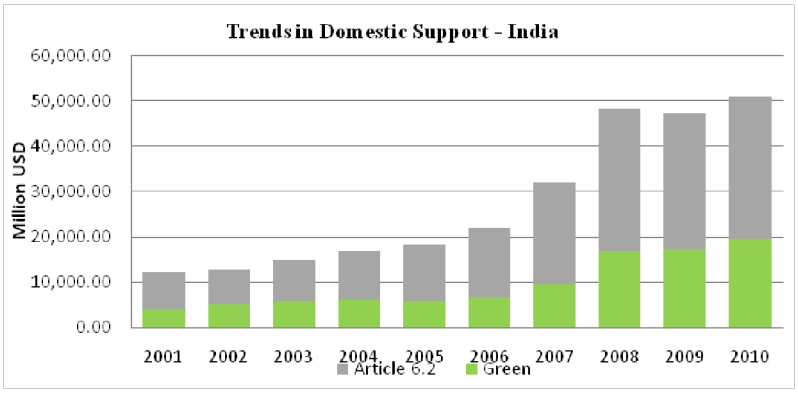

Table 3: Trends in Domestic Support – India

Support Type	2001	2005	2007	2009	2010
AMS					
CTAMS USD	0.00	0.00	0.00	0.00	0.00
PS AMS USD	-5,114.80	-3,963.61	243.40	900.80	2,117.10
NPS AMS USD	0.00	0.00	0.00	0.00	0.00
Green Box					
USD	4,002.30	5,907.28	9566.52	17,381.22	19,479.05
Article 6.2					
USD	8,252.81	12316.22	22311.56	29,857.27	31,610.27
Total					
Total Support USD	12,255.11	18,223.50	32121.48	48,139.29	53,206.42
Totals Relative to VOP					
VOP USD	94,422.00	135,629.00	199,633.00	206,781.00	230,774.00
CTAMS/VOP	0.00%	0.00%	0.00%	0.00%	0.00%
Green Box/VOP	4.24%	4.36%	4.79%	8.41%	8.44%
Article 6.2/VOP	8.74%	9.08%	11.18%	14.44%	13.70%
Total Support/VOP	12.98%	13.44%	16.09%	23.28%	23.06%

44. G/AG/GEN/86/Rev.25, 2 September 2016, (16-4685) Page: 1/25, Committee on Agriculture, Compliance With Notification Obligation

Source: **Committee on Agriculture, WTO, annual report**

1. Expenditures for all currencies are denoted in millions.
2. Domestic support and VOP data is sourced from the following notifications: G/AG/N/IND/7 and G/AG/N/IND/10
3. For the purposes of calculating 'all support' totals negative AMS is given a value of zero
4. VOP data for 2004 onward refers to the gross value of agriculture production in current USD available at: *http://faostat3.fao.org/faostat*

In case of domestic support, India has no obligation to reduce domestic support AoA. The product specific subsidy was negative for all crops except sugarcane. However, the picture is totally different in developed nation. USA, Japan and Australia are providing support to agriculture sector through Amber box, whereas in case of India, the AMS is below the *de minims* level. It is also relevant to mention that in a situation if Indian argument, that its present crop insurance subsidy falls in green box, is not accepted an alternative basis to continue with the present plan can be provided in the argument that our AMS is below the *de minimis* level and Indian policy is allowed under amber box. In developed countries the product specific support is highly concentrated on few products. Across all the countries, the green box accounted for the major share in the total domestic support to agriculture sector. High support given to agriculture sector by developed nations creates distortion in international trade. Various programmes under three boxes (Amber, Blue and Green) enable the developed nations to enjoy artificial comparative advantage in agriculture trade. This lead to excess production in developed nations and downward trend in international prices of agriculture commodities. In this way, it hampers the competitiveness of agriculture sector and so the welfare of people (as large portion of population is dependent on agriculture sector) in developing countries.[45]

VI. CONCLUSION

One common feature of any agricultural insurance programs is public support for agricultural insurance and the *Pradhan Mantri Fasal BimaYojana* (PMFBY), 2016 is not an exception. Despite eligibility for treatment as a green box policy, most high-income countries classify their agricultural insurance subsidies as amber box policies largely because their insurance programs fail to meet one or more of the criteria outlined in paragraphs 7 and 8 of Annex 2 of the AoA and Most countries notify part of their agricultural insurance support as non-product-specific amber box support.

With special reference to developing countries the overall economic welfare effects of crop insurance programs is ignored by economists. The forgoing also indicates that there is a strong case of liberalizing the para 8 of annexure 2 of AoA. As mentioned before the current form of the provision is not sufficient to enable the developing nation to meet the needs of all inclusive crop insurance scheme. It is further relevant to note that many issues including the aspect of payment of assured sum to an individual farmer under the scheme is yet to be settled. An alternative argument on the line of *de minimis* box may be used as a safety valve following the trend followed by the most of the countries as mentioned before. However, studies must be conducted to present justification for establishing the present Indian scheme and the amount of subsidy falls in green box.

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45. Ratna, RajanSudesh, Sharma, Sachin Kumar, Kallummal, Murali& Biswas, Anirban, (2010) "Agriculture under WTO Regime: Cross Country Analysis of Select Issues", *Centre for WTO Studies Indian Institute of Foreign Trade,* 2010, at 71.

Notes & Comments

RECONSIDERING THE EXERCISE OF PREROGATIVE OF MERCY BY STATE EXECUTIVES UNDER NIGERIAN LAW

K.O. MRABURE*

ABSTRACT : This paper traces the origin of the concept of prerogative of mercy and its reception into the Nigerian legal system. It is provided for in sections 175 and 212 of the 1999 Constitution of the Federal Republic of Nigeria (CFRN as amended). Prerogative of mercy is a great dispenser of justice if exercised judiciously and judicially by state executives. However, the reserve is the case. The detestable and distasteful exercise of it is evident in the Nigerian cases of Commissioner of Police v Alhaji Salisu Buhari and Chief Alamieseigha when it was used to pardon political allies. There is a need for legislative intervention in Nigeria by way of amendment to sections 175 and 212 in other for its exercise by state executives to serve the true ends of justice in the legal system and society

KEY WORDS : Prerogative of mercy, State executives exercise, Constitution, Abuse, Amendment.

I. INTRODUCTION

Prerogative of mercy also known as the royal prerogative or executive clemency means the power of a President or a Governor to pardon a criminal or commute a criminal sentence[1] Dicey[2] says it is the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the crown. Blackstone, a renowned scholar in his book[3] describes the royal prerogative as those powers that "the King enjoys alone, in contradistinction to others, and not to those he enjoys in common with any of his subject".

The statutory prerogative of mercy evolves from the statutory rolls of the Anglo-Saxon monarchs during the reign of King Ine of Wessex in 668 to 725 A.D.[4]

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1. BRYAN GARNER BLACK'S LAW DICTIONARY 87 (West Group, St. Pauls. 7th ed 1999). See also CECIL ROLPH THE QUEEN'S PARDON 85 (Cassell Ltd,1978).Note that the term "Prerogative of mercy" will be used in this article interchangeably with "concept" and "power".In this article,Prerogative of mercy shall simply be 'POM'.
2. ALBERT DICEY INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 17 (St.Martin's Press 10th ed1959).
3. WILLIAM BLACKSTONE COMMENTARIES ON LAWS OF ENGLAND OF PUBLIC WRONGS 466 (Beacon Press 1962).
4. William F. Duker, *The President's Power to Pardon: A Constitutional History,* 18 Wm. & Mary L. Rev. 475 (1977). (Dec. 12 ,2016) http://scholarship.law.wm.edu/wmlr/vol18/iss3/3. It must be noted

Prior to the seventeenth century, the English monarch's power to pardon[5] was absolute. His royal prerogative was as sacred[6] to him as the rights of Englishmen were to the individual, so sacred, in fact, that not even the king could diminish the royal tradition[7].

POM[8] found its route into Nigeria[9] following the Berlin conference of 1884-1885[10], which was summoned by the Chancellor of Germany, Otto von Bismark. The conference amongst other things empowered Britain to control the coast from Lagos up to Calabar thereby making Nigeria a British Colony. Sequel to this development, laws that were enacted and passed for Britain in the British Parliament before the year 1900 were made applicable to Nigeria[11] as a British colony as statute of general application.

It is imperative to state that the concept of POM[12] in effect came into Nigeria through the conduit pipe of statute of general application and since then have remain indelible in the Nigerian legal history[13].Section 175 of the 1999 Constitution[14] of the Federal Republic of Nigeria (as amended) retained the concept of POM.

A perusal at the meaning of POM stated above, one would notice the use of the word pardon. The exercise of POM automatically invokes the coming into operation of a sort of pardon which may unconditional or conditional.

We may have to borrow the meaning of this word as enunciated by the American courts.

In United States v Wilson[15], the word pardon was explained by the court as "an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individuals, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive.

Biddel v. *Perovish*[16] states that it is a part of the constitutional scheme to be exercised

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that in this early medieval times, the prerogative of mercy was rather fashioned more to facilitate the king's safety than to spare him the sight of insolent behaviour and was later focused on the preservation of public order, promotion of peace and reconciliation.

5. Stanley Grupp *Historical Aspects of the Pardon in England* 7 American Journal of Legal History 51 (1963).
6. Gary T Trotter *Justice,Politics and the Royal Prerogative of Mercy:Examining the Self Defence Review* 26 Queens Law Journal 345 (2000-2001).
7. *Id*.
8. ANTHONY BRADLE, KEITH EWING CONSTITUTIONAL AND ADMINISTRATIVE LAW 415 (Pearson Education Ltd 2007).
9. Kereseakara Usendu, Esq.*The Prerogative of Mercy Under the Nigerian Criminal Justice System and the Quasi-Judicial Power of the Executive* (Dec.6, 2016) https://legalresearchersnigeria.wordpress.com/2016/08/13/the-prerogative-of-mercy-under-the-nigeria-criminal-justice-system-and-the-quasi-judicial-power.
10. It had to do with the partitioning of Africa by Europe.The aim was for trading through exploitation.
11. *Id*.
12. Claudia Card *On Mercy* 81 Philosophical Review 182-3 (1972).
13. BEN NWABUEZE THE PRESIDENTIAL CONSTITUTION OF NIGERIA 144 (Hurst and Company 1981).
14. Section 101 of 1963 Republican Constitution, Section 161 of the 1979 Constitution contained extinct provisions on prerogative of mercy.Obviously,this concept had been in previous constitution.
15. 32 U.S. (7. Pet.) 150 (1833).
16. 274 U.S.A. 480, 486 (1972).

for the public welfare and that a pardon in our day is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed[17].

So the President or the Chief executive by the Constitution is empowered to make "exceptions in favour of unfortunate guilt" but ordinarily is not obliged[18] to except in cases where a compelling moral claim has been established. President grants pardon as a more general[19] obligation of office. This duty of he's to pardon is neither grounded in nor limited by considerations of law or morality, but is essentially one of politics which has been abused.It is an issue of politics centered on the discretion of the provisions of the law which must be exercised equitably for the public good.

Pardon is exercised for the innocent but must often it is exercised for the guilty based on extraneous reasons of political manoevours to get some political advantage.

II. APPLICABLE LAW

Section 175 of the 1999 constitution[20] (as amended) whose provision is in tandem with the provisions of section 212 retained the concept of POM. It provides as follows:

(1) The President may:

a) grant any person concerned with or convicted of any offence created by an Act of the National Assembly a pardon, either free or subject to lawful conditions;

b) grant to any person a respite, either for an indefinite or for a specified period, of the execution of any punishment imposed on that person for such an offence;

c) substitute a less severe form of punishment for any punishment imposed on that person for such an offence; or

d) remit the whole or any part of any punishment imposed on that person for such an offence or of any penalty or forfeiture otherwise due to the State on account of such an offence.

(2) The powers of the President under subsection (1) of this section shall be exercised by him after consultation with the Council of State.

(3) The President, acting in accordance with the advice of the Council of State, may exercise his powers under subsection (1) of this section in relation to persons concerned with offences against the army, naval or air-force law or convicted or sentenced by a court-martial.

Section 212 relates to state Governors as they can also exercise the power of POM.

Succinctly, the above provisions pertaining to the exercise of POM by the

17. See In Re Grossman, 267 U.S. 87,120,12 (1925).

18. Solomom Ekwenze *Presidential Pardon and Prerogative of Mercy: A Necessary National Soothing for Social Justice.* (Dec.26,2016) https//papers.ssm.com/so13/papers.cfm?abstract_=2541929.

19. Id.

20. Constitution of the Federal Republic of Nigeria.Simply "CFRN" in this article.

President must be exercised[21] by him on the advice of the council of state. This is the only clause in the provision that seems to inhibits the exercise of this power .But if the President exercises unilaterally, the law does not provide any ensuing corresponding sanction. Therefore, the advice of the council of state is merely directory and not mandatory. The President can discretionally exercise this power. However, it is most desirable he does exercise this power based on the council of state's advice as decisions that will emerge from such a process will be in-depth, more inclusive and robust.

III. CASE LAW AND INSTANCES OF ABUSE OF PRESIDENTIAL PARDONS

The Nigerian court in the case of Obidike v. State[22] while considering the provisions of the CFRN 1979 relating to prerogative of mercy held that by virtue of sections 161 and 192, the President and state Governors respectively can grant pardon to a convicted person or grant a respite or remission of punishment, among other things, in respect of conviction of any offence created by an Act of the National Assembly or the law of a state as the case may be.

We concur with the decision of the court as it rightly states the ambit of the exercise of this power within the applicable provision of the law.

In *Falae v Obasanjo*[23], the Court of appeal, Abuja division, acting as the presidential election tribunal, following the 1999 elections[24], rejected the argument that Obasanjo[25] was not granted "full pardon" by Abubakar[26], after his conviction for involvement in the phantom 1995 coup plot, and that he was, therefore, not qualified to contest the 1999 presidential election. It was held by Musdapher, JCA who delivered the lead judgment as follows:

In Exhibit 11, the head of state granted Olusegun Obasanjo pardon. The word used under Section 161 (1) and exhibit 11 is "pardon", and in this context, pardon may be with or without any conditions. It is clear from Exhibit 11 that the pardon granted to the 1st Respondent was not made subject to any conditions. In my view, under the Nigerian law, a "pardon" and " full pardon" have no distinction. A pardon is an act of grace by the appropriate authority which mitigates or obliterates the punishment the law demands for the offence, and restores the rights and the privileges forfeited on account of the offence. The effect of a

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21. The exercise of Prerogative of mercy was granted by General Gowon,a military head of state in Nigeria from 1966 to 1975 to Chief Obafemi Awolowo,Premier of Western Nigeria and a great political leader of the Action Group (AG) and later Unity Party of Nigeria (UPN) during the first to the third republic of government in Nigeria. Same was also exercised by Alhaji Shagari, the President of Nigeria in the second and aborted third republic under the National Party of Nigeria (NPN) on Chief Odumegwu Ojukwu on his return to Nigeria from exile. In both cases,the grant of this pardon was under section 175 of the CFRN.
22. [2001] 17 NWLR (743) 601.
23. [No. 2, 1999] 4 NWLR (Part 599) at 476.
24. Olu Falae contested the election as the Presidential candidate of the Alliance for Democracy (AD) and this was the third republic elections into democratic government after so many years of military rule in Nigeria.
25. He was military head of state from 1976 t0 1979 after the assassination of General of Murtala Mohammed.He contested as one of the candidates in the Presidential election under the Peoples Democratic Party (PDP).He ruled Nigeria as a democratic elected President from 1999 to 2007.
26. He was the military head of state in Nigeria from 1998 t0 1999 after the demise of General Sanni Abacha.He conducted the 1999 elections and handed over to a democratic elected government.

pardon is to make the offender, a new man (novus homo), to acquit him of all corporal penalties and forfeiture annexed to the offence pardoned. I am of the view, that by virtue of the pardon contained in Exhibit 11, the disqualification of the 1st Respondent was to suffer because of his conviction, has been wiped out. His full civil rights and liberties are fully restored and accordingly, he has not been caught by the provisions of Section 13(1) (h) of the Decree.

Contrariwise, the ugly instance of the exercise of this power was manifested in *Commissioner of Police* v *Alhaji Salisu Buhari*[27] .The accused person was summarily tried under section 157 of the criminal procedure code and convicted. He was a member of the House of Representatives and was Speaker. In 1999, he won election into the House of Representatives with fake National Youth Service Corps (N.Y.S.C.) discharge cer-tificate and university degree allegedly from the University of Toronto, Canada. When the News magazine published these facts, Buhari denied and sued the magazine claiming damages for libel. While the suit was pending, the University of Toronto wrote back to say that Buhari was never a student in the university. The heat was too much for Buhari to endure and he caved in and was subsequently charged to court for the offences of forgery and uttering and perjury,He made a public apology[28].

He pleaded guilty upon arraignment and was convicted. In convicting him,the court held thus: "Judicial notice is taken that many Nigerians are sympathetic to the convict regard being had to the humiliation he has suffered as a result of his own acts. But it is pertinent that those advocating for forgiveness ought to know that the offence committed by the convict are not compoundable ones. The public may decide to forgive him but the law must take its course."

The court convicted him and sentenced him to a term of years with an option of fine, which option he promptly exercised.

Subsequently, in the year 2000, the President, Chief Obasanjo exercised the power of POM in his favour,

The exercise of the power was hastily exercised based on political affiliation and considerations thereby eroding the confidence the citizenry had on the government. It was a clear violation of the rule of law because of the person involved was a very distinguished person and a big political figure.A sense of reason was obviated and the discretionary power was exercised arbitrarily by the powers that be. There was no proper rationale or convincing reasons for the exercise.

In same vein, the exercise of this power was abused again on Alamieseigha . His first brush with the law started in the United Kingdom in the of case of *R. (on the application of Alamieyeseigha) v Crown Prosecution Service*[29] .

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27 [2000] FWLR (Part 1) at 164.

28. The Nigeria Lawyer *Legal Effect of President,Governors'Exercise of Prerogative of Mercy* (Dec15,2016) www.legal-effect-of –-president- governors-exercise-of-prerogative-of-mercy. "I apologise to the nation.I apologise to my family and friends due to the distress I have caused them. Everything in life is for a purpose and my prayer is that my humiliation will illustrate that in our democracy, nobody, no matter how highly placed, will be above the law. As I look up from the ground following my fall from grace, I solemnly ask for forgiveness."

29. 2005 EWHC 2704(Admin).

In 2005, following investigations by the proceeds of corruption unit of the metropolitan police in the United Kingdom and the economic and financial crimes commission (EFCC), Alamieyeseigha was arrested in London, questioned and charged with three counts of money laundering. A worldwide criminal restraint order was obtained by the crown prosecution service over his assets. He sought to quash the decision to prosecute him in London on the grounds that, as a result of his position as Governor of the state of Bayelsa in Nigeria, he was entitled to state immunity in criminal proceedings brought in the United Kingdom. The argument was rejected by the trial judge who held that as a Governor of state which is a constituent part of Nigeria, the applicant was not entitled to sovereign immunity in respect of criminal proceedings brought in the United Kingdom.The case could not be completed in the UK due to intervening circumstances[30] that reared its head.

On his return to Nigeria, he was impeached as the Governor of Bayelsa state by the Bayelsa state house of assembly on 9 December 2005 and he was arrested by the EFCC on allegations of corrupt practices and money laundering. The conclusion of investigation by the EFCC led to his arraignment before the Federal High Court Lagos on a six-count charge of corrupt practices and money laundering. He pleaded guilty to the six-count charge and was accordingly convicted and sentenced by the trial court in July 2007 to two years in imprisonment on each count of the charge. Several of his assets were also ordered to be forfeited to the government of Bayelsa state.[31]

Jonathan[32] in exercise of the power of POM granted Alamieyeseigha pardon[33] on March 12 2013 in respect of the said conviction for corrupt practices and money laundering.

It is trite that the section 175(1) of the CFRN 1999 (as amended) confers the pardoning power on the President in respect of federal offences and makes him the ultimate judge of the entitlement of any person to be granted pardon.

It is argued[34] that the Presidential pardon granted Alamieyeseigha does not offend the strict letters of section 175(1) CFRN but such exercise could jeopardise the performance by the state of the sacred duty imposed upon it by the self-same constitution to abolish corrupt practices and abuse of power.

The condemnation[35] of the presidential pardon was predictably fierce and critics[36]

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30. Chief DSP Alamieseigha escaped from London disguised as a woman to Nigeria.
31. Alamieyeseigha was earlier arrested and detained by the London Metropolitan Police in September 2005 over similar allegations of money laundering.
32. The President of Nigeria from 2010 to 2015.
33. Four retired military officers and two other civilians were also granted pardon alongside Alamieyeseigha by President Jonathan. See *How Pardon was Granted to Alamieyeseigha, Others* (Dec 9,2016) http://www.thisdaylive.com/articles /how-pardon-was-granted-to-alamieyeseigha-others/142114/ ThisDayLive.
34. Zacchaeus. Adangor *The Presidential Pardon Granted Chief D. S. P. Alamieyeseigha: Time To Revisit The President's Pardoning Power Under Section 175 Of The Constitution Of The Federal Republic Of Nigeria, 1999 (as amended)* (Dec 17, 2016) www.iiste.org/journals/index.php/JLPG/article/download/24476/25052.
35. Olusola Akasike and Mike Odiegwu *Ikimi, others Blast Jonathan for Alamieyeseigha's Pardon* (Dec 17.2016) http://www.punchng.com/news/ikimi-others-blast-jonathan-for-alamieyeseigha's-pardon/ Punch.
36. Yemi Adebowale, *US Condemns Presidential Pardon forAlamieyeseigha* (Dec 20,2016) http://www.thisdaylive.

and relied on several grounds to support their outrage. For instance, the former President was accused of abusing the exercise of a sacred constitutional power for the undeserved benefit of his former political boss whom he recently described as his political benefactor.[37]

According to Agbedo[38] as a special kind of power held in public trust by the Governor or President, it ought to be exercised with the highest sense of responsibility, probity and circum spection by the person vested with such powers. State pardon is a discretionary power to be exercised judiciously and judicially and not meant to be used as an instrument of patronage for political benefactors or for self enhancement and aggrandizement but must be exercised in a reasonable manner devoid of bias and public umbrage and strictly consistent with the letters and spirit of the law and the code of conduct for all public officials.

Ogunye[39] reasons that when the provision of section 175 CFRN is construed, it is clear that the authority that exercises the power of pardon in relation to offences created by an Act of the national assembly is the President, and not the council of state. The council of state merely advises the President. There is also the alleged claim by certain members of the council of state that they were not availed of the memorandum requesting pardon for Alamieyeseigha until they were seated at the council meeting of March 12 2013.

The federal government on its part has attempted to justify the pardon on the ground that Alamieyeseigha has shown sufficient remorse after serving his jail term and deserved reintegration into the society. It claimed further that Alamieyeseigha has enormous political influence in the Niger Delta region which he has deployed and could still deploy in assisting the federal government to stabilize the amnesty programme[40].

According to Azangor, the consequences of the pardon could be summarized thus:

> a pardon affords a complete defence in criminal law and may be pleaded in bar to a new charge founded upon the same facts. Thus, s. 36 (10) of the Constitution of the Federal Republic of Nigeria 1999

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com/articles//us-condemns-presidential-pardon-for-alamieyeseigha/142294/ ThisDayLive. See also Mike Ikhariale *The Law and Politics of a Pardon* http://www.punchng.com/columnists /trivia-constitutional/alamieyeseigha-the-law-and-politics-of-a-pardon/ Punch.

37Mike Odiegwu *Alamieyeseigha, my Political Benefactor-Jonathan* (Dec 20,2016) http:// www.punchng.com/news /alamieyeseigha-my-political - benefactor-jonathan/ Punch. President Goodluck Jonathan had served as the deputy Governor of Bayelsa State during Alamieyeseigha's tenure as Governor.

38. *Presidential Pardon under the Constitution* (Dec.18,2016) www.thenationonlineeng.net/ presidential-pardon- under- the- constitution The Nation. Chief Agbedo of Crown Law Chambers is based in Lagos.

39. Jiti Ogunye *Legal Implications of Jonathan's Pardon* (Dec 22,2016) www.premiumtimes.ng.com/ opinion/

125017-legal -implications- of- Jonathan's- pardon Premium Times. It is instructive that President Olusegun Obasanjo, and three former military heads of State, Muhammadu Buhari, Ibrahim Babangida, and Abdulsalami Abubakar were not at the council of state meeting, where the President "consulted" on the issue of the pardon.

40. Amnesty was granted to the militants of the Niger Delta oil rich region by President Musa Y'Adua in 2008 to pacify them against incessant bombing of oil facilities,kidnappings and other societal vices prevalent.This amnesty continues till now. According to one of the Presidential aides, Alamieyeseigha's contribution in this regard has 'impacted positively on the overall economy of the nation, bringing crude oil exports from the abysmally low level of 700,000 bpd to over 2.4million bpd hence the pardon.

> (as amended) provides that 'No person who shows that he has been pardoned for a criminal offence shall again be tried for that offence.' Similarly, s. 221(1)(b) of the Criminal Procedure Act provides that any accused person against whom a charge or information is filed may plead that he has obtained a pardon for his offence. If the plea is proved by the accused to the satisfaction of the trial court through the production of the instrument of pardon, the court must sustain it and dismiss the charge or information and acquit the accused accordingly[41].

Ogunye on his part sums the abuse of exercise and the grant of this power thus:

> The presidential pardon is unwise, unjust, promotive of corruption in Nigeria's public life, and does amount to a violation of the provisions of the Constitution, including Section 15(5) of the Constitution (Fundamental Objectives and Directive Principles of State Policies-Political Objectives-),which provides that: "the State shall abolish all corrupt practices and abuse of power", and also a violation of the Oath of Office of the President, wherein the President swore that the would strive to preserve the Fundamental Objectives and Directive Principles of State Policies, that he would not allow his personal interest to influence his official conduct or official decisions, that he would to the best of his ability preserve, protect and defend the Constitution, abide by the Code of Conduct contained in the Fifth Schedule to the Constitution, and that he would do right to all manner of people, according to law, without fear or favour, affection or ill will.

We concur with the above as the exercise of this power has been abused and this negates public good which is a strong pre-requisite for patriotism needed for nation building, a virtue for an orderly society based on the dictates and tenets of the rule of law where everyone is equal.

IV. CONCLUSION

Consequently, the abuse of the exercise of POM is prevalent as illustrated by relevant case law in Nigeria. To check this arbitrary exercise in Nigeria by state executives, sections 175 and 212 should be amended. A new subsection, that is section 175(4) and 212(4) should read thus:

"Without prejudice to the foregoing paragraphs, if the President in the exercise of POM fails or neglects to consult with the council of state ,this act shall be termed gross misconduct liable for impeachment by the national house of assembly.

The ultimate aim is the need for state executives in the exercise of this power to meet and serve the ends of justice in the society particularly in the Nigerian society.

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41. Azangor *supra* note 34.

Book-Review

Constitutional Law-I (Structure) by Udai Raj Rai, (1st ed., 2016), Eastern Book Company, Lucknow, Pp.XLVIII+660, Price Rs. 595.00- (Paperback)

> 'We hold these truths to be self evident, that ALL MEN ARE CREATED EQUAL; that they are endowed by their creator, with certain inalienable rights; that these are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just power from the consent of the governed; that whenever any form of government becomes destructive of those ends, it is the right of the people to alter or abolish it, and to institute new government, laying its foundations on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate, that governments, long established, should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the form to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object evinces a design to reduce them under absolute despotism, it is their right, it is their duty to threw off such government, and to provide new guards for their future security…….. To prove this, let facts be submitted to candid world.'
>
> -Thomas Jefferson[1]

The Constitution being *sui generis* encompasses uniqueness. The Constitution is not merely an assembly of words; it is blended with politics, governance and its ethics, rule of law, fundamental rights and duties of individual, philosophy of justice, and the story of relationships in developing societies. The Constitution of a nation provides steel framework of governance of a society and reflects its political and socio-economic aspirations and limitations. It inoculates the Nation to save and protect from all kind of democratic breakdown that may occur elsewhere. The Constitution of India has witnessed many political upheavals in the last sixty- five years. Nevertheless, the Indian Constitution gives us all the pride to remain India a Sovereign, Socialist, Secular and Democratic Republic to which 'we the people' of India has given ourselves to secure to all its citizens justice, liberty and equality. Although

1. Philadelphia, General Congress, July 4, 1776, Unanimous Declaration of Independence passed by the US Congress by the representatives of the American people[United States ; https://www.loc.gov/recourse/ rbpe34.34604400.

some apprehensions have also been voiced against these inherent values of the Constitution[2]. The Constitution of India was very self-consciously crafted as a document that sought to sweep away the parochialism and social decay of Indian society and to user in a new era of republican freedom[3]. The brutality of social practices, especially those stemming from caste, could hardly be denied and the protector of liberal values the State was expressly called in by the new document to spark what the constitutional historian G. Austin called a social revolution.[4] Thus, dealing with the matters as stunningly diverse as social equality, the Constitution envisioned a significant role for a sovereign power in the making of a new society free from both imperial subjection and moral decay. Therefore, it is necessary to be acquainted with the spirit and notion called for under the provisions of the Constitution.

Writing a book of Constitution of India, a capacious text and keeping it abreast with the time by incorporating all the developments coming time to time in the field of constitutional law is a fatiguing task, which can only be accomplished by a man of the highest degree of commitment who is indulged constantly in the analysis of new horizons emerging out by the new interpretations given by the court of law. The ability to communicate the mandate of the Constitution to the readers is one of the most important aspects of such writing that is reflected in the tactics adopted by the author under it. This is a *ne plus ultra* work of the author. The book under review[5] fulfils the long-felt need providing a comprehensive account of the constitutional provisions.

The well organized book is divided by the author into eighteen chapters. All the chapters are also divided in several parts and sub parts to emphasize upon a detailed analysis of constitutional provisions as well as judicial pronouncements. Under various parts of chapter, author gives an insight about the Constitution, Constitutional Law and Constitutionalism for refreshing reading to everyone interested to know the basic concepts and ideas. After referring to the meaning given to the term constitutionalism in *Concise Oxford Dictionary* and to the view expressed by the thinkers, jurists and writers of eminence, he finds that constitutionalism is a wider term comprising both international checks and external limitations which together ensure that governance is not only non-arbitrary but is also responsible to the needs and aspirations of the people. In his view democracy and constitutionalism are not adversaries rather complimentary to each other. Constitutionalism protects democracy and it is only in a democracy that constitutionalism can flourish. [6]

The subject- matter of the Chapter 2 is historical background of Indian Constitution. The author narrates the inspirational character of the Constitution in a lucid manner. He points out a few glaring examples to realise the wide gap that still exists between the

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2. As per P.B. Gajendragadkar CJ, *Secularism and the Constitution of India*, "it is my firm conviction that democracy will not be able to achieve its objective of establishing a new social order based on social equality and economic and political justice unless the whole of the Indian community accepts the doctrine of secularism without any mental reservation and makes it a part of its life, individual and collective …… Without secularism no community can come to terms with modernism…… and fanaticism will continue to pose a grave danger to our democratic way of life," *the Telang Memorial Lectures* (1971),p ii, (preface).
3. *Ibid*.
4. G. Austin, *The Indian Constitution* : *Cornerstone of a Nation*, p. 32, OIP.
5. Udai Raj Rai, *Constitutional Law-I, Structure*.
6. *Id*. at 17.

constitutional precept and reality in the area of democratic process.[7] In the chapter 3 of the book, the author examines the relevance of the Preamble of the Constitution in reference as to the source of authority of the Constitution; the nature of polity and its objectives and goals. The author next refers to interpretative significance of the Preamble with the help of a series of the cases as interpreted by the apex court and notes that Preamble, though a part of the Constitution, is not an operative part of the Constitution because it neither confers powers nor does it impose any limitations on the powers of the governmental institutions created by the Constitution.[8]

In Chapter 4, the author discusses the necessity of the doctrine of separation of power, its origin, purpose and importance in modern form. He clarifies that the Supreme Court of India is of the view that the Constitution of India did not embody the doctrine of separation of powers in a rigid form. Towards end of this chapter author clarifies by saying that it can very well be argued that the doctrine of the separation of powers pertains to theory and its subject-matter belongs, more appropriately, to that branch of study which we call Political Science. But, it becomes very relevant to be studied by a student of constitutional law when it is discovered that many important and practical issues of constitutional law explicit or implicit presence in the Constitution or not.[9] In chapter 5, entitled 'Executive', the author elucidates the nature of Executive power by dividing the subject into various parts. He discusses parliamentary and presidential forms of executive and respective merits of the two systems. He points out the biggest merit of the parliamentary system is that it provides a strong government. The legislative and executive wings do not howl at each other nor do they point accusing fingers at each other. They speak in one voice and work in concert. It saves time and energy of the wings.[10] Pointing out merits *vis-à-vis* demerits of both systems, author focuses on President, Vice-President, Council of Ministers and President and Council of Ministers. In the humble submission of the reviewer, the author would have contributed immensely to the contemporary discussion of executive functions in various aspects in the happening of various incidents by textual interpretation.

In chapter 6, the author describes the mercy power of the President and Governors and scope of Executive Legislation in Centre and States both. While giving a critical analysis of several judicial pronouncements relating to legislative powers of the executive, author submits that the President can not be exactly equated with the Parliament nor can the Governor be with the State Legislature.[11] In chapter 7 , author explores 'Legislature' where he explains the composition, functions, procedure of passing bills, qualifications and disqualifications of its members as well as parliamentary privileges. He discusses the relevance of unicameral and bicameral legislature. In chapter 8, under the caption 'Judiciary: Organisation of the Courts', author examines the higher and subordinate Judiciary from different angles. He also discusses independence of judiciary and analyses invalidation of NJAC. He focuses on institutional independence, independence of Judges, independence from other influences including one's own leanings and at the end, he points out some lacunae. Under chapter 9, he explains respective powers and jurisdiction of the Supreme Court and the High Courts. Discussions

7. *Id*. at 35.
8. *Id*. at 47.
9. *Id*. at 62.
10. *Id* at 69.
11. *Id* at 169.

made under it are very useful. Chapter 10 deals with the federal idea and an overview of Indian federalism in which author points out that the ruling political party in the Centre converted the constitutional issues into party issues, and they were often disposed of at party forums from 1950 to 1980. Since, the party structure itself was very much centralised, even Chief Ministers were selected and appointed by the people in Delhi and State Legislature parties only worked as registering forums,[12] hence, during first three decades, the idea of federalism could not be strengthened. Unfortunately, this practice still continues. In chapter 11, 12 and 13, the author concentrates on Centre- State Legislative Relations, where he discusses in detail legislative, administrative and financial relations between the Union and the States. Chapter 14 proposes emergency provisions and their impact on distribution of powers. Author explains various cases decided on failure of constitutional machinery in the State and concludes that proclamation of State emergency by the President under Article 356(1) of the Constitution is justifiable. The satisfaction of the President is subjective but it must be based on concrete relevant objective facts[13].

In Chapter 15, author explores the concept of freedom of Trade, Commerce and Intercourse throughout the territory of India. Author outlines this topic in the backdrop of the constitutions of other countries like US, and Australia and analyses the relevant cases. This chapter contains a very useful discussion of the trade, and business. He explains relationship between Articles 301 and 19(1)(g) of the Constitution of India. Chapter 16 of the book devotes to the Civil Services and Election Commission where author discusses the importance and position of the civil services as well as of election commission. He discusses the relevant cases at appropriate place to clarify constitutional mandate. In the discussion of chapter 17, author examines amendment of the Constitution in two ways- first in its general and introductory nature, and second, procedural limitations on amending power of Parliament. He focuses on substantial limitations on the amending power, which is discussed in series of cases by the Supreme Court of India and finally emergence of basic structure doctrine. Finally, in the last chapter 18, he gives an overview to the judicial review, where he discusses meaning and nature of judicial review; various techniques of judicial review, and institutional relationship. He observes that a discussion of institutional relationship in terms of judicial review should be considered in the context of democracy. Democracy and constitutionalism are two pillars on which the Indian Constitution is resting. Democracy is obviously the basic virtue as it defines the mode of governance which is the primary purpose for which the political system is brought into existence, and all other objects are expected to be achieved through proper and efficient governance. But constitutionalism is no less important. Its purpose is to ensure that governance is carried on in accordance with the Constitution.[14]

In the book in hand, author presents the subject in a systematic way and clarifies all the basic ideas of the Constitution of India. The book is an important addition to the existing literature on Constitution of India. The book has been written in the characteristic lucid style of the author. The author's presentation is descriptive in large part, but he sets forth effectively and with conviction the philosophy which suffuses the Constitution. The language is not tough, it is reader friendly. Table of cases and Footnotes are quite informative and supportive.

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12. *Id* at 382.
13. *Id* at 493.
14. Id. at 645.

Index - the back matter is accurate. The distinguishing feature of the book is an 'overview' given in the beginning of each chapter which helps in drawing out an outline about the subject. Format- layout and binding of Book is good. There is no bibliography. The book is not too bulky to be held in hand for reading contains 660 pages of materials. The economy paperback volume is priced at Rs. 595/- which seems reasonable and affordable even for a student. The printing style is modern, binding is good and get-up is simple and attractive. Of course, the book is endowed with distinct novelty and utility to justify its publication and commendation. The zeal of the publisher is amply justified as the book will certainly cater to the needs of different segments of its readers and all those concerned with the subject.

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