International Journal of Law
ISSN: 2455-2194, RJIF 5.12
www.lawresearchjournal.com
Volume 2; Issue 4; July 2016; Page No. 01-04

Historical development of geographical indication law under international arena

Dr. Varun Shukla

Guest Lecturer, Govt. Law College Rewa, Madhya Pradesh, India

Abstract
A geographical indication is a name or sign used on certain products which corresponds to a specific geographical location or origin. The use of a geographical indication may act as a certification that the product possesses certain qualities or enjoys a certain reputation due to its geographical origin. Geographical indications are generally traditional products produced by rural communities from generations that have gained reputation for their specific qualities. When products with geographical indications acquire a reputation, some other products may try to pass off themselves as the original geographical indication products. This kind of competition is often seen as unfair as it may discourage traditional producers as well as mislead consumers. Although there was no legal recognitions, geographical indications had earned global recognition even from the medieval and colonial period. The very legal concept of geographical indications as a form of Intellectual property can be traced from Paris convention for the protection of Industrial Property, 1883.

Keywords: Geographical Indications, Reputation, Owners, Consumers, Origin

1. Introduction

A Geographical Indication is a concept having roots within intellectual property rights. Man was supposed to reap benefit of his physical labour from time immemorial. As the society advanced the intellectual inputs gained more importance than the physical labour and it became important that one's intellectual labour gets duly rewarded to that it sustains the motivation of creator to contribute for welfare of society at large. God gifted a wonderful thing called brain to Man and nature endowed him with the abundant biological resources on the earth. He has also been gifted with imagination and creativity. With his imagination and creativity he has been producing various articles or products for his needs and comfort. With the passage of time the importance and value of these creations was realized. The commercial aspect started playing a significant role in these creations. By the end of Twentieth century the things created and invented by the human mind were recognized as an intellectual property of the owner. The owner's right over these properties was accepted and is known as an Intellectual Property Rights. A new set of laws called Intellectual Property Rights laws, were enacted to protect these property rights. These Intellectual Property Right laws provided a protection to the owners under different categories and names like Patents, Copyrights, Geographical Indications, Trademarks etc. Geographical Indication signifies the name or sign used in reference to the products which are corresponding to the particular geographical area. Geographical Indication grants to its holder certification mark which shows that the specified product consists of the same qualities and is enjoying reputation due to its origin from the specified geographical location [1].

International agreements

Although there was no legal recognitions, geographical indications had earned global recognition even from the medieval and colonial period. Examples are many to illustrate this; Indian spices impelled Christopher Columbus to sail all the way from Europe to India. Scotch Whisky, Arabian horses, Dhaka muslin, Kashmiri Carpets, Chinese clay pots, Indian rubber, Damask table cloth etc. are a few to name the age-old examples of globally renowned products representing the fame of certain regions.

It can be presumed that the expression 'appellations of origin' is the precursor of the expression 'geographical indication'. The very legal concept of geographical indications as a form of Intellectual property can be traced from the Paris convention for the Protection of Industrial Property, 1883.

1. The Paris Convention for the Protection of Industrial Property, 1883

The first international legal framework to grant protection for indications of geographical origin on goods was the Paris convention [2]. The Paris convention for the protection of Industrial Property was concluded in the year 1883. Thereafter, it was revised at Brussels (1900), Washington (1911), The Hague (1925), London (1934), Lisbon (1958) and Stockholm (1967) [3]. This convention arose out of the need of certain countries to protect their industrial property and intellectual property beyond their national territories. It is concerned with all forms of industrial property and intellectual property and not specifically geographical indications.

The Paris convention does not use the term "geographical indications" but it is the first multilateral agreement which provided for protection of "indications of source" and "appellations of origin". Article 1(2) of the convention includes 'indications of source or appellations of origin' as the objects, inter alia, of industrial property protection. The convention, however, does not define 'indications of source' or 'appellations of origin'.

Further, under Article 1(3), the convention says that 'industrial property' shall be understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manufactured

or natural products for example, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers and flour.

A provision prohibiting the use of a false indication of source appeared as early as in the original text of the Paris Convention of 1883. However, that protection was rather limited, since the prohibition was only applicable where the false indication of source was used in conjunction with a fictitious or non-existing trade name. Article 10 of the Paris Convention makes the sanctions and set forth that, in cases of direct or indirect use of a false indication of the source of the goods or the identity of the producer, manufacturer or merchant, Article 9 of the Paris convention should be applicable. Article 9 provides that good bearing a false indication of source are subject to seizure upon importation into countries party to the Paris convention, or within the country where the unlawful affixation of the indication of source occurred or within the country of importation. However, Article 9(5) and (6) of the Paris convention allow that countries party to the Paris convention whose national laws do not permit seizure on importation or inside the country to replace those remedies by either a prohibition of importation or by any other nationally available remedy.

Article 10(b) of the convention obliges member to assure their nationals effective protection against unfair competition. Unfair competition is defined as any act of competition which is contrary to honest practices in industrial or commercial matters. Paragraph 3, Article 10 (b) of the convention prohibits indications, the use of which are liable to mislead the public as to the nature, manufacturing process, characteristics, the suitability for their purpose or the quantity of the goods since these would amount to unfair competition. Tracing the history of the convention and its various revisions at the 1958 Lisbon conference, a new Article 10 (b) was proposed as follows:

> *"Indications or appellations, the use of which in the course of trade is liable to mislead the public as to the nature, the origin, the manufacturing process, the characteristics the suitability for their purpose or the quantity of the goods".*

Although this proposed was passed and became Paragraph 3(3) of Article 10 (b), the words 'the origin' were struck out by the United States by exercising veto [4].

Paris Convention has following Limitations:

(i) It does not define an appellation of origin or an indication of source.

(ii) It deals only with false indications and not misleading indications. Though the Paris Convention does not contain any definition of what constitutes a false indication, a reading of Article 10(2), which defines an 'Interested Party', provides an indirect definition of the same. For example, a producer of Darjeeling tea in India would quality as a person with an interest in the true indication and thus, have the locus standi to object to any use of such indication on a label to describe a product produced in a place other than that identified by the indication. However, there is no clear and direct definition of a false indication.

(iii) The Paris convention does not deal with genericide of an indication outside the home country.

(iv) In case, if a country's laws do not permit seizure on importation or prohibition of importation or seizure inside the country, sanctions are to be within the framework of the national laws.

2. The Madrid Agreement (Agreement for the Repression of False or Deceptive Indications of Source of Goods 1891)

Adopted in 1891 and revised at Washington (1911), The Hague (1925), London (1934) and Lisbon (1958), the Madrid Agreement also does not use the term 'geographical indications' [5].

The relevant term used in the agreement is 'indications of source' and has almost identical provisions for seizure of goods which use 'false' or 'deceptive' indications of source [Articles 1(1), 1(2) and 1(3)]. The Madrid Agreement accommodated the shortcomings of the Paris convention by specifically providing for 'false' as well as 'deceptive' indications of source.

Further, under Article 3 (b) is of the agreement, the use of false representations on the product itself and in advertising or other forms of public announcements is prohibited. Still further, under Article 4, the courts of each member country could decide what appellations, on account of their generic character, are excluded from the provisions of the agreement. However, there is a specific exclusion of 'products of the wine' from the operation of this provision.

The Madrid Agreement, however, does not provide for use of false or deceptive indications used in translation or accompanied by qualifiers such as 'kind', 'type', 'style' etc. For instance, use of expressions such as 'champagne style' for a sparkling white wine produce outside champagne would not actionable under the provisions of this agreement.

The Madrid agreement is still in force but is not part of the TRIPS Agreement.

6. The Lisbon Agreement (1958)

This agreement was concluded in Lisbon in 1958 and subsequently, revised in Stockholm in 1967 and amended in 1979 [6].

This agreement sets a relatively higher standard of protection and was relied upon as a model while drafting the TRIPS provisions on geographical indications.

The Lisbon agreement is the first of such agreements to define the term "appellation of origin". However, it does not use the term 'geographical indications'.

Under Article 1 of the agreement, once registered, an appellation of origin is protected in other member countries. Article 2(1) of the agreement defines 'appellations of origin' to mean the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality, and characteristics of which are exclusively or essentially due to the geographical environment, including natural and human factors'.

Hence, an appellation of origin to be protected under the agreement has to be necessarily a geographical name. Further, the quality and characteristics of such appellation of origin should be essentially linked to the geographical environment.

Under Article 3 of the agreement, protection is extended to include any usurpation or imitation, even if the true origin of the product is indicated in translated form or accompanied by terms such as "kind", "type", "make", "imitation" or "the like". The expression used here is 'usurpation' and may be interpreted to include any kind of wrongful usage.

Hence, member countries would have to ensure that kind of usurpation or imitation including use of qualifiers such as 'kind' 'type' 'style' etc. as referred to in this article is prohibited under their laws. Further, use of an appellation of origin a dissimilar goods may also be considered an usurpation of the appellation.

The Lisbon agreement, therefore, takes care of the short comings of the Paris convention and the Madrid agreement.

1. The Lisbon agreement has following limitations:-
2. The name to be protected must be a proper geographical name. This limitation would exclude as ineligible subject matter non-geo-graphical names which have acquired secondary meaning as geographical indications (such as Basmati, Feta, Cava etc.).
3. The agreement does not cover those appellations of origin which possess merely a certain reputation, for protection under the agreement, it is necessary that certain qualities and characteristics of the product must be essentially linked to the geographical region. For instance, Sheffield cutlery, although a well-known geographical indication may not be eligible for protection under the Lisbon agreement since the only criterion relevant to its protect ability is the availability of raw materials such as iron ore in Sheffield, and not human factors such as skill and craftsmanship handed over generations.
4. The definition of 'appellation' of origin would, by the large, be applicable to agricultural products or handicrafts which have a nexus, natural or human, with the geographical region in question. It may not be applicable to products of industry for the reason that the qualitative link stipulated under the agreement between the product and the region may not be applicable to all industrial products. However, there may be products of human labour or endeavour which do not have any qualitative nexus with human skills and thus, may not be the subject matter of a Lisbon registration.
5. The member countries are obliged to protect without exception even those appellations which have become generic in other member countries.

3. The Draft Treaty on the Protection of Geographical Indications (1975)

This treaty drafted with a view to enacting a new multilateral treaty instrument on the protection of geographical indications.

The work started in 1974 and the first draft of the treaty was ready in 1975. The treaty adopted a new definition of geographical indications for the provided to both appellations of origin and geographical indications. The scope of the definition was larger than that provided under the Lisbon agreement. It was not mandatory for the signatories to the treaty to have domestic laws for the protection of appellations of origin.

The treaty provided for prohibition of registration or use of denominations, expressions or signs which constitute or directly or indirectly contain false or deceptive geographical indications as to the source of products or services.

Under the treaty a geographical indication which fulfills any of the following conditions was considered eligible for international registration.

(i) The geographical indication must consist of the official or usual name of the filing state or the name of a major circumscription of a state or of a denomination which serves to indicate the source of a product.
(ii) The indication is declared by the filing state to be a reference to itself as the state of origin;
(iii) The indication is used in the course of trade in relation to products originating in the state, and the said state certifies such use.

The protection under the draft treaty was unlimited in time; however, continued protection depended on the payment of maintenance fees. Although the draft treaty had provisions for sanctions and the right to bring an action, it was still possible to settle disputes through diplomatic channels.

However, when preparations for the revision of the paris convention started in the late 1970s, it become apparent that those preparation also extended to geographical indications, and consequently, to avoid overlap, the work on the draft treaty was not continued.

4. TRIPS Agreement

The most recent international agreement on 'Indications of geographical origin' is the Agreement on Trade – Related Aspects of Intellectual Property, Rights, of 1994 (TRIPS). TRIPS as part of the WTO Agreement, is binding on all WTO Member states. It is, in addition, the first international legal instrument in which the term geographical indications (GIs) appears. Section 3 of the TRIPS agreement consisting of Articles 22, 23 and 24, deals exclusively with geographical indications.

Article 22.1 of TRIPS Agreement defines geographical indications as follows:

"Indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, Where a given quality, reputation or other characteristics of the good is essentially attributable to its geographical origin".

Under Article 23, there is a more specific level of protection extended to wines and spirits alone. Such addition protection entails that even where there is no possibility of misleading the public, such geographical indications are protected.

Article 24 of TRIPS Agreement provides certain minimum exceptions to the protection of geographical indications. However, members are free to implement in their law more extensive protection than is required by TRIPS, thereby leaving it open to them to dispense with these exceptions. The only prohibition is that such protection must not contravene the provisions of the TRIPS Agreement.

Comparing the TRIPS definition with the definition of 'appellations of origin' in the Lisbon Agreement

Article 22 (1) resembles at first glance to Article 2 of the Lisbon Agreement, yet it differs from Lisbon on a number of points:

(i) Appellations of origin' under the Lisbon Agreement are necessarily geographical indication name of a country, region, or locality, while geographical indication under TRIPS are any indication pointing to a given country' region or locality.
(ii) 'Appellations of origin' under Lisbon designate a product while a geographical indications under TRIPS identifies a good, the term traditionally used in GATT/WTO contexts to differentiate goods from services. It is not clear, however, that a different meaning (between "product" and "good") was intended.
(iii) Lisbon limits appellation to the quality and characteristics of a product, while TRIPS also mention its reputation.
(iv) The mechanism for the registration of appellation of origin under the Lisbon Agreement is in the hands of the government/states with their inherent bureaucratic delays and processes. On the other hand, TRIPS leaves such

mechanism to the member countries without laying down any specific guidelines in this behalf.

The Additional Protection for wines and Spirits under Article 23 of the TRIPS Agreement

Article 23 of the TRIPS Agreement provides additional Protection for geographical indications for wines and spirits only, which is expressed in two ways. Firstly, Article 23 (1) provides that Member states shall provide the legal means, for interested parties to prevent use of a geographical indications identifying, wines and spirits not originating in the place indicated by the geographical indications. This protection should be available even where such use would not misled the public, would not amount to unfair competition, where the true origin of the goods would be indicated or where the geographical indication would be used in translation or accompanied by expressions such as "Kind", "Style", "imitation", or the like. Secondly, Article 23 (2) permits the refused or spirits, which contain or Consist of a geographical indications, where such wines and spirits do not have the stated origin. Here again, the additional protection would also be granted in situations where the public is not misled.

The preamble of the TRIPS Agreement states that "Members, Desiring to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights and to ensure that measures and procedures to enforce intellection property rights do not themselves become barriers to legitimate trade".

However, Article 23 of TRIPS Agreement, while provides the preferential and discriminatory treatment to geographical indications relating to Wines and Spirits, does not appears in the line of the preamble of TRIPS Agreement. The intellectual property community seems to have turned bipolar with one end taking a view that Article 23 must be extended to geographical indications relating to products other than wines and spirits as well and the other end taking the view that there is no need for such an extension and that the status quo should be maintained.

References

1. Latha R Nair, Rajendra Kumar. Geographical Indications: A Search for Identity, Lexis Nexis, New Delhi, 2005.
2. Paris convention for the Protection of Industrial Property of March 20, 1883
3. http://www.wipo.int/treaties/en/documents/pdf/d-paris.ptd.
4. Albrecht Cohrad. The Protection of GIs in the TRIPS Agreement, Trademark Reporter, Published by the International Trade mark Association, Vol. 86.
5. http://www.wipo.int/treaties/en/documents/word
6. http://www.wipo.int/treaties/en/documents/word/Lisbon.doc

International Journal of Law
ISSN: 2455-2194, RJIF 5.12
www.lawresearchjournal.com
Volume 2; Issue 4; July 2016; Page No. 05-09

Constitutional provisions and control of national resources in Nigeria: Implications for national cohesion

[1] Job Imharobere Eronmhonsele, [2] Chukwuemeka Egberase Okuchukwu

[1] Senior Programme Officer, Centre for Population and Environmental Development (CPED), Benin City, Nigeria.

[2] Centre for Population and Environmental Development (CPED), Benin City, Nigeria.

Abstract
The paper aims to examine the constitutional provisions and control of national resources in Nigeria with a focus on the Petroleum Act and Petroleum Industry Bill. It also examines the implications of constitutional provisions and control of national resources on national cohesion. Oil (Petroleum) remains major revenue earner for the government of Nigeria and as such can be regarded as a major national resource in Nigeria. The methodology adopted in this study was the secondary data source and historical method. It was discovered that constitutional provisions like that of the Petroleum Act has over the years vested the entire ownership and control of national resources (especially Oil) to the Federal Government of Nigeria and this has led to resource control agitation by littoral states and other southern states of Nigeria. The paper recommends that the constitutional provisions like that of the petroleum Act that vested the entire ownership and control of national resources like oil to the federal government should be reviewed and amended by the national assembly to give room for states to partner with the federal government in the control of national resources and federal government should urgently address the agitation for resource control in Nigeria through the means of national dialogue to avoid militarised conflict and the disintegration of Nigeria.

Keywords: Constitutional provisions, Petroleum Act, National resources, National cohesion and Nigeria

1. Introduction

Nigeria as a country is richly endowed with natural resources deposits, which are located in different states of the country. The natural resources which are mainly found in Nigeria include: Oil and gas (Rivers, Cross River, Akwa Ibom, Delta, Edo, Imo, Abia and Bayelsa), Coal (Enugu), Cocoa (Ondo, Oyo and Cross River), Iron ore (Ajaokuta, and Aladja), Ignite (Asaba), Tin (Jos), Salt (Abia and Ebonyi), Rubber (Cross River, Delta and Edo), Marble (Igbeti), Lead Zinc (Abakaliki and Ogoja), Limestone (Sokoto, Ewekoro, Ukpilla and Abeokuta), Gold (Sokoto and Illesha). These natural resources as identified above also show the different states and places in Nigeria where they are located or found. From all these natural resources identified above, oil and gas remains a major revenue earner for the government of Nigeria and as such can be regarded as a major national resource in Nigeria. This is because Oil and Gas ownership and control is entirely vested in the Federal Government of Nigeria. In Nigeria, "the oil and gas sector accounts for about 35 per cent of gross domestic product, and petroleum exports revenue represents over 90 per cent of total exports revenue" (Organisation of the Petroleum Exporting Countries (OPEC). This figure however supports the above assertion that oil and gas is a major revenue earner and national resource in Nigeria.

There are constitutional provisions which are relevant to the control of national resources in Nigeria. These provisions deal on the modalities and laws on how national resources such as Oil (petroleum) should be controlled and who should control these resources. The central question of this paper is how and who controls national resources such as oil (petroleum) in Nigeria? The Petroleum Act is a reference point when discussing constitutional provisions and control of national resources such as Oil (petroleum) in Nigeria. The Petroleum Act is "an act to provide for the exploration of petroleum from the territorial waters and the continental shelf of Nigeria and to vest the ownership of, and all on- shore and off- shore revenue from petroleum resources derivable there from in the Federal Government and for all other matters incidental there to" (Petroleum Act, 1969) [11]. The Petroleum Act vested the entire ownership and control of all petroleum in, under or upon any lands to the state (the state in this case means the Federal Government of Nigeria). The Petroleum Act (1969) [11] Section 1(1) states that the entire ownership and control of all petroleum, under or upon any lands to which this section applies shall be vested in the state". And Section 4 (1) of the same, Petroleum Act (1969) [11] states that "no person shall import, store, sell or distribute any petroleum products in Nigeria without a licence granted by the Minister". This section however is a provision on the control of petroleum products which is a major national resource in Nigeria.

The above provisions of the Petroleum Act which vested the entire ownership and control of petroleum (Oil) to the federal government of Nigeria has tremendous implications for national cohesion. One of such implications is that constitutional provisions and control of national resources in Nigeria has led to resource control agitations by littoral states and other southern states which has negative consequence on national cohesion. This can result in the disintegration of the Nigerian state if resource control agitations and the constitutional provisions that vested the entire ownership and control of national resources like Oil (Petroleum) to the federal government is not given crucial attention.

However, this paper aims at understanding constitutional provisions and control of national resources in Nigeria with a

focus on the Petroleum Act and Petroleum Industry Bill. It also examines the implications of constitutional provisions and control of national resources on national cohesion.

1.1 Statement of Problem

In Nigeria, constitutional provisions and control of national resources are major challenges confronting the Nigerian state. The constitutional provisions like that of the Petroleum Act of 1969 which vested the entire ownership and control of national resources like oil (petroleum) to the federal government of Nigeria has generated great controversy and agitation by littoral states and other southern states where these national resources especially oil (petroleum) are located and exploited. To solve the above problem, there is the present introduction of the Petroleum Industry Bill (PIB) to the National Assembly as an attempt to reform the oil sector and the constitutional provisions that vested the entire ownership and control of national resources like oil (petroleum).

In spite of the attempt at reviewing the constitutional provisions the problem of control of national resources remains unsolved. The question now is can the PIB resolve the problem of control of national resources like oil (petroleum) in Nigeria?

It is in view of the above question that this paper aims at understanding constitutional provisions and control of national resources in Nigeria with a focus on the Petroleum Act and Petroleum Industry Bill and also examines the implications of constitutional provisions and control of national resources on national cohesion with a view to proffer recommendations to the problem.

1.2 Conceptual Framework

For the proper understanding of this paper, a conceptual framework is adopted to explain constitutional provisions and control of national resources in Nigeria. This is the Concept of Resource Control.

Before one can conceptualise the term 'resource control', it is first and foremost pertinent to define the term 'resource'. "The word "resource" can simply be interpreted to mean the wealth, supplies of goods, raw materials, minerals, etc., which a person or a country has or can use for development or production" (Adesopo and Asaju, 2014:281) [1]. What then is the concept of 'resource control'?

According to Orobator, Ifowodo and Edosa (2005:44) "resource control as the concept implies simply means control of natural resources under normal circumstances should be the responsibility of the indigenes of the area where the resources are naturally deposited but is not so in this part of the world". In another perspective, Adesopo and Asaju (2004:281) [1] asserts that "in Nigeria context, the term "Resource Control" means the right of a community to a measure of control of its natural resources, the usage relating to crude oil". By this they meant that "Resource Control is all about the demand by the littoral states and other southern states of Nigeria (where the nation's resources are derived) to be allowed to be controlling /managing the revenue accruing from the oil and other natural resources in line with the tenets of true federalism" (Adesopo and Asaju, 2004:281) [1]. Resource control creates an avenue for component states to control its resources derived from such component states. "By this, each state would have a full control of its resources and contribute an agreed percentage towards the maintenance of common services of the government at the centre as the case was in the first republic and as it is being practised in the places like Canada, Switzerland, France, and even United States of America where Nigeria copied her system of governance" (Adesopo and Asaju, 2004:281) [1]. It can be stated that "resource control is a burning issue of discourse in Nigeria today" (Egom, 2006). Resource control agitations calls for more attention as it has been a major subject in many political discourse and debate. As Adesopo and Asaju (2004:281) [1] rightly opined that "the agitation has become a major subject of debate today, especially since the Supreme Court's Judgement on the politicised on-shore/off-shore dichotomy". It can be stated that in Nigeria, "resource control is a movement championed by south- south state governors (spearheaded by Chief James Ibori, governor of Delta State (1999- 2007) in protest to allow state control the resources in their various states and pay taxes to federal government" (Edafejirhaye and Edafejirhaye, 2008:98) [3]. Furthermore, it can also be stated that "expectedly, the Governors of the 17 southern states rose from its third summit in Benin City, the Edo State Capital, March 27, 2001, and proclaimed its preference for fiscal Federalism based on the principles of national interest, need and derivation" (Dafinone, 2001) [2]. Thus "its communiqué at the end defines resource control as 'the practice of true federalism and natural law in which the federating units express their rights to primarily control the natural resources within their borders and make agreed contribution towards the maintenance of common services of the government at the centre" (Dafinone, 2001) [2].

The concept of resource control is however relevant and crucial to this present study. This is because the entire ownership and control of crude oil (petroleum) which is a major national resource in Nigeria has been vested to the central or federal government, this is why littoral state and other component states of southern Nigeria has now adopted an agitation for resource control. This concept however explains that littoral states and other southern states of Nigeria where these national resources like oil (petroleum) are derived should be allowed to control their resources and pay a certain percentage to the centre. This is regarded as one of the tenets of true federalism. This is because, "put together, resource control is an indication of the practice of true federalism" (Okolo and Akpokighe, 2014:102) [8].

However, the concept of resource control can be said to be a crucial concept when explaining constitutional provisions and the control of national resources in Nigeria.

2. General Discussion

This section is a general discussion with an overview of Petroleum Act as well as control of national resources in Nigeria with a focus on Oil (petroleum) resource. It also discusses an attempt at oil sector reforms with a focus on the Petroleum Industry Bill (PIB) and its implications for national cohesion.

2.1 An Overview of Petroleum Act and Control of National Resources in Nigeria: A Focus on Oil (Petroleum) Resource

The petroleum Act commencement date was on 27th November, 1969. The petroleum Act is an Act to provide for the exploration of petroleum from the territorial waters and the continental shelf of Nigeria and to vest the ownership of, and all on-shore and off- shore revenue from petroleum resources derivable there from in the Federal Government and for all other matters incidental thereto. The Petroleum Act has sixteen

(16) sections and four (4) schedules. However, Sections 1 and 4 are very important to this study. Section 1 is on vesting of petroleum in the state, etc. And Section 4 is on control of petroleum products.

Over the years, in Nigeria, the control of National resources like oil (Petroleum) has been solely vested in the central (federal) government. There are constitutional provisions especially that of the Petroleum Act that vested the entire ownership and control of oil which is a major national resource to the State (the state in this case is the central or federal government of Nigeria). As, Section 1(1) of the Petroleum Act explains this fact and states that, "the entire ownership and control of all petroleum, under or upon any lands to which this section applies shall be vested in the state" (Petroleum Act, 1969) [11]. This section of this Act however deprived littoral states and other southern states of ownership and control of their Oil (Petroleum) resource. This section of the Petroleum Act that vested the ownership and control of oil in the central government did not give any consideration to states in the federating unit to control the resources in their various states. This has led to resource control agitations especially from southern and littoral states where these oil explorations take place.

In retrospect, it can be argued that "the British administered the country initially mainly from the proceeds from oil palm trade derived largely from the then Eastern Region" (Dafinone, 2001) [2]. Thus "derivation was not given any prominence" (Dafinone, 2001) [2]. It can further be argued that "when groundnuts and tin from the North and cocoa and rubber from the West became major earner of revenue, derivation, to use the words of Dr. S. J. Cookey in his report, 'was catapulted into a major criteria for the allocation, thus underscoring the linkage between regional control of the political process and the dominant criteria for revenue allocation at any given time" (Dafinone, 2001) [2]. Thus, "this linkage was further underscored when, following the increasing importance of petroleum derived mainly from the Eastern States (now Niger Delta) as a revenue yielding source, derivation was again de-emphasised" (Dafinone, 2001) [2]. The point however is "that the exclusive federal jurisdiction over a natural resources apply only to oil and gas, and not to cocoa, palm oil, hides and skin, bitumen, marble, etc" (Dafinone, 2001) [2]. The above is the basis of argument for resource control agitation. On the other hand, over the years, "agitation for resource control and a larger share of the oil revenue by the oil- producing states came under strong criticism, particularly from the non- oil-producing states in the North and South- West, who accused them of having access to wealth at the expense of others" (Raji, Grundlingh and Abejide, 2013:9) [13]. Thus "the argument by the opponents of increased derivation for the Niger Delta states is anchored on the thesis that, any increase will impoverish the non- oil producing states" (Natufe, 2005) [7].

2.2 Oil Sector Reforms in Nigeria: A Focus on the Petroleum Industry Bill

There has been an attempt at oil sector reforms in Nigeria. There has been the recent introduction and consideration of a bill to the National Assembly known as the Petroleum Industry Bill (PIB). It can be asserted that "at the centre of the reform initiative is the Petroleum Industry Bill (PIB)" (Omotoso, 2010:333) [9]. This is because "the Petroleum Industry Bill, when passed into law, is expected to rewrite Nigeria's decades-old relationship with its foreign oil partners, altering everything from the fiscal framework for offshore oil projects to the involvement of indigenous firms in the sector and bringing the industry in line with global trends and standards" (Omotoso, 2010:333) [9].

The Petroleum Industry Bill (PIB) is still before the National Assembly for consideration and enactment into law. In the opinion of Omotoso, "essentially, the reform seeks to transform the Nigerian National Petroleum Corporation (NNPC) from its present status as a 'guardian' of Government Oil and Gas Assets into an integrated, international commercial oil and gas corporation driven by revenue generated and profit oriented motives" (Omotoso, 2010:333-334) [9]. The Petroleum Industry Bill (PIB) is a major oil sector reforms, if enacted into law by the National Assembly will restructure and transform the Nigerian National Petroleum Corporation (NNPC) and the Nigerian oil industry in varying dimensions. That is "the PIB seeks to streamline operations in the nation's oil and gas industry such that the major tasks of policy, regulation, commercial operations and national assets management are carried out by separate public entities as opposed to current conflicting roles by the NNPC" (Omotoso, 2010:334) [9].

According to Omotoso (2010:334) [9] "the successful restructuring of the industry is expected to lead to the emergence of separate institutions with clearly defined roles as follows.

1 1 Policy body (namely; National Petroleum Directorate)
2 4 Regulatory agencies (namely; National Petroleum Inspectorate, Petroleum Products Regulatory Authority, National Assets Management Agency and National Frontier Exploration Services)
3 1 Commercial centre (namely; Nigerian National Petroleum Company Limited)
4 1 Research and Development centre (namely; National Petroleum Centre)
5 2 Fund organizations (namely; Petroleum Technology Development Fund, and Petroleum Equalisation Fund)"

The major achievement that is expected of the PIB is very clear and simple. The achievement will be that "the reform covers the desire to achieve optimum utilization of the country's gas potentials" (Omotoso, 2010:334) [9]. It can be stated that "in this vein a National Gas Master Plan was initiated to meet the challenges of connecting the country's abundant gas resources base to the huge domestic and export markets" (Omotoso, 2010:334) [9]. It can be argued that "it has been expected that the PIB, would respond and fill the gaps in existing laws such as the Petroleum Act of 1969 [11] but despite its seeming comprehensive nature, the PIB is an incremental duplication of many unresolved environmental issues in many previous and existing law" (Environmental Rights Action/Friends of the Earth Nigeria and Oil watch Nigeria, 2012:5) [5]. It can also be argued that "one of the highlights in the draft Bill (at the time of preparation of this brief) is the provision for the establishment of a Host Community Development Fund" (Environmental Rights Action/Friends of the Earth Nigeria and Oil watch Nigeria, 2012:5) [5]. It has been discovered that "if passed into law, ten percent of net profits of oil companies could be given to oil bearing communities" (Environmental Rights Action/Friends of the Earth Nigeria and Oil watch Nigeria, 2012:5) [5], this the case of the PIB.

However, this further attempt at oil sector reforms like the introduction of a draft Bill to the National Assembly known as the Petroleum Industry Bill (PIB) it is discovered that this bill if passed into law will not adequately resolve the problems of constitutional provisions like that of the Petroleum Act (1969) [11] and control of national resources especially oil (petroleum) due to the foresight that the PIB did not provide for the full control of national resources like oil to be fully controlled by states where this resources are located.

2.3 Implications for National Cohesion

The promulgation of Petroleum Act of 1969 [11] by the then Gowon administration which vested the entire ownership and control of national resources especially oil (petroleum) to the Federal Government of Nigeria was intended solely for the purpose of promoting national cohesion. Constitutional provisions like that of the Petroleum Act that vested the entire ownership and control of national resources especially oil (petroleum) to the Federal Government of Nigeria has a tremendous implication especially as regards national cohesion. The implication is that the constitutional provisions that vested control of national resources like oil to the Federal Government of Nigeria has led to resource control agitations by southern and littoral states of Nigeria, which if not carefully resolved can result in the disintegration of the Nigeria state.

The present Petroleum Industry Bill before the national assembly does not cover much aspect of control of national resources like that of the Petroleum Act of 1969 [11] in Nigeria which vested the entire ownership and control of national resources to the federal government of Nigeria which has also resulted in resource control agitation by littoral and other southern states of Nigeria where these resources are located and exploited.

3. Discussion of Findings

The findings of this study are very crucial because it is thought provoking and remains critical as it can result in more agitations. This study however reveals that constitutional provisions like that of the Petroleum Act has over the years vested the entire ownership and control of national resources especially Oil (Petroleum) to the Federal Government of Nigeria and that this has led to resource control agitation by littoral and other southern states of Nigeria. By resource control they meant that each component state should control its resources and revenue derived thereof and pay a certain percentage to the centre. This resource control agitation is a recurring issue and a major issue confronting federalism in Nigeria. Resource control has been seen by its proponent as a basic tenet of true federalism as it is obtainable in developed countries like the United States of America (USA) etc.

3.1 Summary, Conclusion and Recommendations

In summary, oil and gas remains major revenue earner of the government of Nigeria and as such can be regarded as a major national resource in Nigeria, because Oil and Gas ownership and control is entirely vested in the Federal Government of Nigeria. This study has been able to critically analyses constitutional provisions with a focus on the Petroleum Act and the control of national resources in Nigeria with a view to explaining its implications for national cohesion. It is discovered in this paper that constitutional provisions like that of the Petroleum Act has over the years vested the entire ownership and control of national resources (especially Oil) to the Federal Government of Nigeria and this has led to resource control agitation by littoral states and other southern states of Nigeria.

Conclusively, oil resource which has been a major national resource in Nigeria as a result that oil is major revenue earner of the government of Nigeria, its control and ownership has generated immense controversies between the central government and oil producing/ littoral states of Nigeria. These controversies have led to the clamour or agitation for resource control by littoral and oil producing states in Nigeria. These agitations have tremendous implication for national cohesion. This is because if these agitations are not properly addressed it is capable of disintegrating the Nigerian state.

3.2 This paper recommends that

- For a law to stand the test of time, it must be open to constructive criticisms and review from time to time to give room for the prevailing circumstance or event. For this major reason the constitutional provisions like that of the petroleum Act that vested the entire ownership and control of national resources especially oil (petroleum) to the Federal Government of Nigeria should be reviewed and amended by the national assembly to give room for states to partner with the federal government in the control of national resources especially oil.
- Federal government should urgently address the agitation for resource control in Nigeria through the means of national dialogue to avoid militarised conflict and disintegration of the Nigerian state.

However, if the above recommendations are carefully implemented by the Nigerian government it will effectively address the problems of constitutional provisions and control of national resources in Nigeria.

4. References

1 Adesopo AA, Asaju AS. Natural resource distribution, agitation for resource control right and the practice of federalism in Nigeria. J Hum. Ecol. 2004; 15(4)277-289.

2 Dafinone D. Resource control: The economic and political dimensions. Urhobo Historical Society, 2001. Retrieved from www.waado.org/nigerdelta/essays/resource control/Dafinone.html on June 22, 2016.

3 Edafejirhaye V, Edafejirhaye E. Effective public relations and sustainable development in Niger Delta. Orerokpe: Egbosun Press, 2008.

4 Egom PA. Resource control: The problem & solution. Nigeria Village Square, 2006, February 11. Retrieved from www.nigeriavillagesquare.com/forum/articles-comments/3037-resource-control-problem-solution.html on June 23, 2016.

5 Environmental Rights Action/Friends of the Earth Nigeria and Oilwatch Nigeria, 2012.

6 Making policies work: Between environmental policies and environmental protection. A Policy Brief by Environmental Rights Action/Friends of the Earth Nigeria and Oilwatch Nigeria, 1-14.

7 Natufe OI. Resource control and federalism: A reply to Mobolaji Aluko, 2005. DAWODU.COM, June 30. Retrieved from https://dawodu.com/natufe1.htm on June 22, 2016.

8 Okolo PO, Akpokighe OR. Federalism and resource control: The Nigerian Experience. Public Policy and Administration Research, 2014; 4(2):99-109.
9 Omotoso F. Nigeria and the challenges of the Niger Delta crisis. Ibadan: Netview Books. Organisation of the Petroleum Exporting Countries (OPEC) Nigeria facts and figures, 2010. Retrieved from www.opec.org/opec_web/en/about_us/167.htm on September 11, 2015
10 Orobator E, Ifowodo F, Edosa E. (Ed.) Federal state & resource control in Nigeria, 2005.
11 Benin F. Parker Publishing Company. Petroleum Act. 1969, 27.
12 Raji AOY, Grundlingh L, Abejide TS. The politics of resource control in Nigeria: Example of Niger Delta Region, 1990s-2010. Kuwait Chapter of Arabian Journal ofBusiness and Management Review, 2013; 3s(2):1-18.

International Journal of Law
ISSN: 2455-2194, RJIF 5.12
www.lawresearchjournal.com
Volume 2; Issue 4; July 2016; Page No. 10-21

Rape as a tool of terrorism: Exploring the situation in northeastern Nigeria and scrutinizing the legal frameworks

[1] Adekunbi Imosemi, [2] Abangwo Nzeribe

[1] Lecturer, Department of Jurisprudence and Public Law, School of Law and Security Studies, Babcock University Ilishan-remo, Ogun State, Nigeria.

[2] Lecturer, Department of Private and Commercial Law, School of Law and Security Studies, Babcock University Ilishan-remo, Ogun State, Nigeria.

Abstract
This article reviews and examines the use of rape as a tool of terrorism in the North Eastern part of Nigeria. The study will examine the causes of terrorism in North Eastern Nigeria and why women prefer to be quiet about being raped by terrorists. The issue of granting amnesty to terrorists and whether they will still be prosecuted will be explored. More so, existing legal framework that addresses the prosecution of rape during and after armed conflict will be reviewed. It is recommended that the National Assembly should enact an Act that will explicitly deal with the crime of rape during and after armed conflicts in Nigeria especially so as to take care of emerging and unforeseen circumstances.

Keywords: Rape, Sexual Terrorism, Boko Haram, and Victims

1. Introduction

Globally, terrorism is becoming a household word as there is no country that is completely absolved from its effect. Globalization has drastically influenced the growth of terrorism as the event in one part of the globe has direct or an indirect consequence on others. This elucidate why war, violence and other forms of trans-national political brutality are in a lot of ways more threatening today than ever before as civilian casualty has been on the high [1].

It is however difficult to come up with a single definition for the term "terrorism" which has evolved over time, but its political, religious, and ideological goals have practically never changed [2].

To Bruce Hoffman, "Terrorism is ineluctably political in aims and motives, violent—or, equally important, threatens violence, designed to have far-reaching psychological repercussions beyond the immediate victim or target, conducted by an organization with an identifiable chain of command or conspiratorial cell structure (whose members wear no uniform or identifying insignia), and perpetrated by a subnational group or non-state entity [3]."

The UN General Assembly Resolution 49/60 which was adopted on December 9, 1994 described terrorism as: "Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them [4]."

Also, according to Schmid, "Terrorism refers, on the one hand, to a doctrine about the presumed effectiveness of a special form or tactic of fear-generation, coercive political violence and, on the other hand, to a conspiratorial practice of calculated, demonstrative, direct violent action without legal or moral restraints, targeting mainly civilians and non-combatants, performed for its propagandistic and psychological effects on various audiences and conflict parties [5]."

Rape is one of the most insidious yet least acknowledged human rights violations in the world [6]. Rape has severe short and long-term effects on the survivors, perpetrators, families, communities, ethnic groups, region, and the ability of the nation to become whole once again. The violence penetrates and cut through flesh as well as souls, and the successful healing of both is not guaranteed. Serious complications with childbirth, menstruation, urination, and fecal removal are common. Many victims are rendered sterile as a result of the trauma, operations, or scar tissue [7]. In addition to causing injury, rape increases women's long-term risk of a number of unintended pregnancy, sexually transmitted infections (STIs), and adverse pregnancy outcomes. In fact, the children born from mothers who are victims of rape during terrorism are stigmatized in the in the Internally Displaced Persons Camp in the Northeastern part of Nigeria.

Rape during conflict constitutes one of the most common and the most intense forms of violence against women [8]. The rape of women in conflict is used as "a deliberate strategy to undermine community bonds, weaken resistance to aggression." [9] The act of rape as an instrument of terrorism is continuously employed by the Boko Haram sect to terrorise women and girls in North Eastern part of Nigeria. Several accounts of rape and other sexual violence have been given by women and girls who were abducted from their villages by the Boko Haram sect.

This article reviews and examines the use of rape as a tool of terrorism in the North Eastern part of Nigeria. The study will examine the causes of terrorism in North Eastern Nigeria and why rape is being use as a strategy for inflicting terror on women and girls. More so, existing legal frameworks that

address the prosecution of rape during and after conflict will be reviewed.

1.1 Causes of terrorism in North Eastern Nigeria

The acts of terror gained global attention in September 11, 2011, when Osama Bin Laden, the leader of Al Qaeda, a deadly terrorist group, bombed the World trade center in United States of America. This calculated attack that took the most powerful nation and the world by surprise, has heartened the resolve of other smaller terrorist groups to carry out attacks in other parts of the world.

In North-Eastern Nigeria, a violent terrorist group named Boko Haram has waged a bloody asymmetric war on the country. Boko Haram sect whose formal name in Arabic is Jama'a Al-Sunnah li-da'wa wa al-jihad, a Sunni Group for preaching and Jihad was initiated by Mallam Lawal when in 1995 he started the Muslim Youth Organization under the name shabaab. In 2002, when Lawal left to continue his education, the leadership of the group was taken over by Mohamed Yusuf. It was under his leadership that the group gained political influence and recognition in Nigeria [10].

Prior to the use of violence and terror by the group, scholars and analysts have maintained that Yusuf was a nomadic preacher that established an Islamic school free of charge to publicize its ideology. He at the same time started a farm, provided welfare and employment for its member. It was in the school that Yusuf recruited unsuspecting and innocent Almajari to its cause [11]. With time, the group became increasingly rebellious and also engaged in the abduction of women and girls as wives and sex-slaves. The Nigerian government lunched a violent attack on the organisation to put an end to its spread across north-eastern Nigeria in 2009. The uprising led to the death of 800 Boko Haram members, including Yusuf [12].

There have been arguments around the death of Yusuf as many believed he was extra- judicially killed by the law enforcement agency. This view thus increased his "martyrdom" position in the eyes of his followers [13]. With the killing of Yusuf, his second in command, Abubakar Shekau in 2010 becomes known as the leader of the organization with one of the most radical and destructive terror crusade against the nation Nigeria and its people. He declared in these frightening words to journalists that: "jihad has begun" [14].

The terrorist sect is greased by the obnoxious philosophy-western education is evil and the sects' devotees appear to be meticulously programmed in the incomprehensible doctrine of the absurd. The terror group has embarked on ruthless human rights abuses and war crimes such as forced conversion of people of other faith to Islam; murder, torture and persecution of members of other religions; wanton attacks on churches and mosques and killing and raping of women, children and civilian (noncombatant) populations [15]. At this junction, one may ask "what are the root causes of Boko Haram terrorism in Nigeria"?

Poverty in Nigeria is one of the root causes of Boko Haram insurgency. The North Eastern region of Nigeria is the least developed region in the country. This is in spite of the fact that Nigeria is blessed with rich human and material resources. When the gap between the rich and poor is incomparable, there comes a breaking-point where there is bound to be a class conflict that materializes in various forms of insurgency. Similarly, former president of America, Bill Clinton has noted that the reality about Boko Haram insurgence is the poverty rate in the North, which is three times more than what it is in Lagos [16]. Furthermore, when poverty and lack of knowledge are garbed with religious, ethnic or other partisan sentiments, then there is bound to be violence and senseless devastation of lives and property.

Unemployment is another catalytic factor to Boko Haram insurgence in Nigeria. As a result of the drying up of Lake Chad, many people whose livelihood depends on the lake lost their source of livelihood, thereby becoming unemployed. The unemployment rate in Nigeria especially among the youths is quite alarming. The unemployment rate in Nigeria rose to 23.9 percent compared to 2.1 percent in 2010 [17]. The sect finds the unemployed youths as fruitful ground to indoctrinate their misguided beliefs. It must be noted that Mohammed Yusuf's radical belief gained a following among disaffected young men and the unemployed youths, who are forced to make a livelihood between the twin divide of creativity and criminality [18].

Bad leadership and corruption among the political class also contributed to emergency of Boko Haram terror group in Nigeria. Good governance as described by the World Bank entails the following:

> "Efforts to create an enabling environment and to build capacities …..
> Ultimately, better governance requires political renewal. This means attack on corruption from the highest to lowest level [19]."

Lack of good governance therefore suggests that the socio-political environment is infested with administrative injustice, human rights abuse, poor state or lack of infrastructures, abuse of office, inequality and endemic corruption. The expected response to such unjust social formation is for the oppressed to seek for liberation through membership of terror group. This is a sort of pay-back to the government that has failed to take care of their people.

In addition, the rate at which radical jihadist fundamentalist groups is growing around the world also contributed to Boko Haram insurgency. The progress made by such terrorist groups like Taliban, Islamic State of Iraq and Syria (Isis), Al-Qaeda, Al-shabaab among others have promoted the course of Boko Haram insurgency in Nigeria. In 2014 for instance, Boko Haram leadership swore allegiance to Islamic State (IS) [20].

1.2 Why Rape?

Rape of women and girls has long been a widespread feature of war and terrorism. For many years, perpetrators of sexual attacks during acts of terrorism and other forms of conflicts have benefited from effective impunity. Women and girls have being raped by men in practically all wars, and of course all rapes are aggressive assaults. However, sexual violence in today's conflict is cruel enough to necessitate a separate naming. In the Democratic Republic of the Congo, for example, war ''atrocities against women have been so horrific and extensive'' that this violence is variously referred to as ''a war within a war,'' ''murderous madness,'' or the ''war against women'' [21]. Some also call it 'rape jihad'; others opt for 'sexual terrorism' or 'forced marriage' [22].

Whatever one may choose to call it, it is the use of sexual abuse (under the guise of religion) to spread terror with the intention of controlling or manipulating the government or

parts of a population. By intimidating and humiliating families, terrorists hope to exert influence over their targeted audience Emphasizing its patterned and nature, Green refers to today's war rape as ''collective rape,'' and notes that group rape is ''generally more intense and more violent than other forms of rape…''[23]. During the civil war in Bosnia in the late 1980s, the term ''genocidal rape'' was introduced to depict the Serbian use of rape to destroy the Muslim ''enemy'' by ''sexually contaminating'' their women as an example of the ''new extreme of men's inhumanity to women in war'' [24]. Some of this violence is likely genocidal in either intent or outcome, and ''murderous madness'' is an appropriate descriptor.Public description of war tends to focus on the victories and defeats of military troops or perhaps on the impacts on a degendered civilian population, such as displacement or death as 'collateral damage' [25].

Until lately, the ways in which conflicts impact on women and children in particular received very little attention. At least since the International Criminal Tribunals for Rwanda and Yugoslavia, there is a growing consciousness and concern in both public awareness and among legal and political leaders, of the extent and need to deal with the rape of women and girls during conflict. The occurrence of rape during conflict is such that Major General Patrick Cammaert, former Commander of the UN Peacekeeping operations in Democratic Republic of Congo (DRC) in 2008, declared that 'it is now more dangerous to be a woman than to be a soldier in modern conflict' [26].

The rape of women and girls has been used as a tactic of terror in wars since the beginning of armed conflicts [27]. Catherine MacKinnon observed that "it appears to go through three main stages: First, rape is a routine and expected reward to the victors. Secondly, rape occurs due to a lack of military discipline. Finally, rape occurs as a military technique to demoralize the opposition" [28].

Rape has been utilized as an instrument of war many times in the past centuries. In the organized "rape of Nanking" in 1937, Japanese soldiers killed 300,000 Chinese, and at least 20,000 women and girls were raped, including the elderly, infants, and the infirmed. In the Second World War, sexual mortification and rape were commonly used against Jewish people. Rape took place in prison camps, as well as in brothels created by the Germans. Acknowledged proof suggests that it is highly likely rape was used as a systematic weapon of terror and retaliation against enemies [29].

Bosnian women were purposefully raped and impregnated as a part of ethnic purification and during the battle for Bangladeshi independence in 1971 from Pakistan, an overwhelming 200,000 women and girls are estimated to have been raped. Some of these women and girls died from the physical consequences of gang rape, and some afterward committed suicide [30].

In Rwandan genocide in 1994, rape was utilized in an extensive manner, and in the ongoing conflicts in Darfur and the Congo rape has been used since 2000 [31]. In the Democratic Republic of Congo, where the occurrence of rape is described as the worst in the world, with one estimate putting the number of rapes in 2011 alone at 400,000 [32]. These memories live on today.

Even though the International Criminal Tribunal for the former Yugoslavia confirmed rape as a crime against humanity in 2001 and thereby challenged mainstream understandings of rape as an inevitable by-product of war, religion-based terrorists are committing violence against women and girls that we have never witnessed before in history. Today, women's bodies are becoming 'battlegrounds' or "territory to be conquered" [33].

Sexual terrorism is usually classified as being gendered in nature, as a result of the fact that the victims are chiefly girls or women. In sexual terrorism, the rape or assault is part of a broader objective: to spread terror or send a message, a motivation similar to that found in the use of suicide bombings. They validate sexual terrorism by claiming that the Prophet Mohammed sanctioned the rape of both non-Muslims (infidels) and Muslims who do not stick strictly to Islam [34]. Boko Haram, Nigeria's terror group, whose name roughly translates as "Western education is forbidden" in local Hausa tongue; has kidnapped more than 1,000 women and girls in north-eastern Nigeria since 2009, and has committed copious physical and psychological abuses against them in captivity [35].

Due to the terror inflicted on the Nigeria State by the Boko Haram sect, several women and girls were subjected to physical and psychological abuse; forced labor; forced participation in military operations, including carrying ammunition or luring men into ambush; forced marriage to their captors (with a reputed "bride price" of ₦2,000 each); and sexual abuse, including rape [36]. Even before the abduction of the Chibok girls', Director of Defence Information has reported the outlandish and bizarre discovery of "several used and unused condoms" in the captured terrorists' camps [37]. Although the rape of women and girls abducted by Boko Haram has been underreported because of a culture of silence, shame, and disgrace around sexual abuse in Nigeria's conservative North; below are account of some girls and women on the sexual abuses they suffer as documented in Human Rights Watch's 2014 report entitled: "Those Terrible Weeks in their Camp: Boko Haram Violence against Women and Girls in Northeast Nigeria".

An 18-year-old victim described how a Boko Haram combatant sexually abused her when she went to use the bathroom:

> ''I did not know he followed me when I walked a short distance away from the tree under which we slept. He grabbed me from behind, roughly fondling me while trying to take off his pants. I screamed in fright and he hurriedly left me as I continued to shout for help [38].''

Another woman, who was raped in 2013 in a Boko Haram camp near Gwoza, described how a commander's wife appeared to encourage the crime:

> ''I was lying down in the cave pretending to be ill because I did not want the marriage the commander planned to conduct for me with another insurgent on his return from the Sambisa camp. When the insurgent who had paid my dowry came in to force himself on me, the commander's wife blocked the cave entrance and watched as the man raped me [39].''

A 15-year-old who was abducted in 2013 and spent four weeks with Boko Haram told Human Rights Watch:

> ''After we were declared married I was ordered to live in his cave but I always managed to avoid him. He soon began to threaten me with a knife to have sex with him, and when I still refused he brought out his gun, warning that he would kill me if I shouted. Then he began to

> rape me every night. He was a huge man in his mid-30s and I had never had sex before. It was very painful and I cried bitterly because I was bleeding afterwards [40].''

A 19-year-old woman, who was married and had children, described how she and one other woman were raped after having been abducted with four other women in April 2014*:*

> When we arrived at the camp they left us under a tree. I managed to sleep; I was exhausted and afraid. Late in the night, two insurgents shook me and another woman awake, saying their leader wanted to see us. We had no choice but to follow them, but as soon as we moved deep into the woods, one of them dragged me away, while his partner took the other woman in another direction. I guessed what they had in mind and began to cry. I begged him, telling him I was a married woman. He ignored my pleas, flung me on the ground, and raped me. I could not tell anyone what happened, not even my husband. I still feel so ashamed and cheated. The other woman told me she was also raped, but vowed never to speak of it again as she was single and believes that news of her rape would foreclose her chances of marriage [41].

A 20-year-old woman, abducted in September 2013, told Human Rights Watch that the insurgent she was "married" to wore a mask all the time, even when he raped her. Even though she had since escaped, she said,

> "I am still afraid to go anywhere because he could be any one of the people around me. Every time I see a huge dark man, I jump in fright that it might be him coming to get me back. I stay awake some nights because I dream of those terrible weeks I spent in their camp [42]."

Apart from the above disturbing narratives documented by Human Rights Watch, Stephen Davis, an Australian negotiator, who visited Nigeria to mediate the freedom of the Chibok girls adopted by Boko Haram, gave chilling accounts of girls taken captive by the terrorist group.

> "Girls tell how they were raped every day, week after week. One girl was raped every day, sometimes several times a day by groups of men. Some did not survive the ordeal [43]."

Likewise, a clergy and specialist on counter-terrorism, Oladimeji Thompson, of The Omoluabi Network, who has been working with other groups to help victims of the abduction conquer their pains, gave a terrifying narration based on an explanation of one of the Chibok girls' escapees. He said, "*One of the girls I interviewed was being raped 15 times by 15 men every day."* He said the girl was traumatised and confused.

> "It's obvious this girl needs to be managed. She looked confused. She found it hard to talk to me but after much prodding; she confessed to me that she was raped 15 times by 15 men throughout the time she was with the Islamic insurgents before she could escape from their den [44]."

The examples above are only a little of the accounts of sexual slavery, gang rape and other forms of sexual violence used by Boko Haram terror group against women and girls in north-eastern Nigeria. Many more of the victims live in silence; either too scared of reprisal or too ashamed to talk as a result of the sexual stigmatization that is associated with rape in this Part of the world.

1.3 Silence and Stigmatization

In spite of the increase in the occurrence of rape during sexual terrorism, reported numbers from observation is a tip of the iceberg, since countless cases of sexual terrorism go unreported pointing to the fact that the existing data on sexual terrorism may not be sufficient to approximate the true scale of the problem.

Sexual violence can be described as a universal problem with women and girls being mostly susceptible as a result of their subordinates' status [45] during armed conflicts, the ugly situation worsens and the number of occurrences are alarming.

The possibility that male might experience sexual violence from same sex or opposite sex is not ruled out, nevertheless, the predominance is higher among girls and women. The pitiable side of it is that a lot of these assaults happened without being reported. It is not easy to create correct statistics on the occurrence of rape in conflict for a range of social and methodological reasons including the extensive under-reporting of rape due in no small part to the social stigma attached to the status 'raped woman' and the disintegration of social infrastructure which would ordinarily assist in the collation of such information, such as health services, police, courts, and psychosocial services [46].

Records have it that African women experience sexual violence at disturbing rates but they are less liable to reveal or seek assist in the aftermath of the sexual violence [47]. Also, the National Crime and Safety Survey have it on record that sexual violence in Nigeria is under-reported when match up to other major crimes [48]. Although it was also revealed that *o*ver 700,000 women are raped or sexually assaulted yearly with fewer than half reporting the crimes [49]. Most women prefer to be silent about being raped even during armed conflicts.

Different studies have it recorded that sexual violence in any situation is underreported worldwide. For example, one out of five women reports sexual assault and one out of three girls reported forced initiation into sexual acts [50].

Many reasons may be implicated for the non-disclosure of assault [51] and the explanations for non-reporting of sexual violence are complex and multifaceted. The poor revelation of sexual violence has made many perpetrators escaped prosecution since majority of the victims kept silent either due to the fear of being stigmatized or closeness of the assailants. Among the many reasons for under reporting sexual violence to experts include shame, concerns for confidentiality, guilt and fear of not being believed [52]. Furthermore, many families do frown at public acknowledgment of being sexually violated.

Non-reporting of rape and other sexual assault has been linked with shame, humiliation, guilt, cultural taboos, to avoid victimization at the hand of medical authorities [53] and stigmatization. It is also acknowledged that the age of the abused, affiliation between perpetrator and sexual category of the assaulted and cognitive variable and the likely outcome of disclosure as factors encourage silence [54]. Also, cases of sexual violence may go unreported because many perpetrators of reported cases went unpunished owing to lack of proof or disbelief. It has also been discovered that the major reason

survivors do not report is that they think that people will believe them and that various authorities, particularly legal and medical authorities, will be aggressive to them [55].

Sexual violence remained extremely stigmatized in all settings, thus levels of the admission differ among regions but precisely it is a widely under-reported phenomenon [56]. Sexual violence is under reported by sufferer for horror of stigmatisation and rejection by colleagues and the society [57]. Nobody wants to be professed as a victim of sexual terrorism and other forms of sexual violence. The assumed dishonor connected with rape may promote silence. For example, the social stigma associated with rape in Nigeria forces victims to cover up rape and other violent sexual assault in other to save self from shame and communal humiliation [58].

To aggravate the issue, the social stigma associated with rape makes it hard for victim and the family to reveal the rapists. The victims of sexual violence in most cases reported stigmatization experiences in their environment [59]. On the other hand, knowing the perpetrator by the assailant could make reporting of sexual violence complicated as this may cause conflicting emotions such as fear and loyalty. In cases which the rapist is the father of the victim the possibility of reporting the sexual violence will be low. Also, relatives, family, friends or relations who take the advantage of their closeness or relationship to prey upon vulnerable girls may do alike with impunity because it is doubtful that such cases will be reported.

Kareem Haruna, who is a Leadership Newspaper Correspondent, argued that "there may be hundreds of more women out there that have been raped in their homes or in various camps of the Boko Haram; some may have been inflicted with HIV/AIDS, or left with undesirable pregnancies or children which they have to care of alone, or even claim it belongs to their husbands. So many of them have been affected psychologically and may not be able to get remedy till they die" [60].

Unfortunately, Northeastern Nigerian women's value is still so closely associated with virginity, wifehood, and bearing children, rape can and often does result in "social murder" [61]. Unmarried girls who are raped have little prospect for getting married and the married women are often prone to stigmatization as survivors of sexual crime. Therefore most of the victims of rape prefer to remain silent since they would be stigmatized.

1.4 Legal framework on rape in Nigeria

It is important to note that sexual violence in armed conflict is only a part of the wider problem of sexual violence against women. Although in Nigeria there is no single Act that addresses sexual violence against women and girls during conflict. The closest Acts that can be said to tackle the issue of rape in Nigeria is The Violence against Persons (Prohibition) Act, 2015, The Criminal Code Act and The Penal Code Act.

1.5 The Violence against Persons (Prohibition) Act, 2015

The Act was signed into law on the 25th of May 2015 after over ten years in legislative process. It is a combination of diverse bills which sought to eradicate all outdated laws relating to matters such as rape, assault and so on [62]. It aims to improve upon similar provisions on violence as contained in Nigeria's Criminal and Penal Code. Exclusively, The VAPP Act comprehensively dealt with one of the most vexed forms of sexual violence, rape, from which existing penal laws protected only females and limited to vaginal penetration. The VAPP Act is the first criminal legislation in Nigeria to enlarge the idea of rape beyond penetration of the virginal and anus by the penis and to include penetration of the mouth by the penis.

Section 1(1) of the VAPP Act provides a narrative description of Rape. A person commits rape at any time he or she intentionally uses any part of his/her body or thing to penetrate the vagina, anus or mouth of another person, provided the other person did not assent or the consent was obtained by deceit or by any other unlawful means [63].

Furthermore, Section 2 of the VAPP Act states that a person if found culpable of rape is punishable with life imprisonment. However, this is not a binding sentence. This is born out of paragraphs (a)–(c) of Section 1(2)6 which give the judge discretion to enforce sentences less than life imprisonment. In situation where the offender is below 14 years, he may be sentenced to a maximum of 14 years imprisonment. Offenders, who are 14 years and above are liable to a minimum of imprisonment for 12 years. In situation of gang rape, the offenders are jointly and severally liable to a minimum of 20 years imprisonment [64].

There is no hesitation that the VAPP Act has expanded the Nigerian Criminal Jurisprudence on Rape. The Act imposes severe punishment for rape than the existing Criminal Code Act and Penal Code Act. Under the VAPP Act, apart from cases of children below 14 years, the minimum sentence for rape is 12 years imprisonment [65]. Although the penalty for rape under the criminal Code Act is life imprisonment, the Courts have not interpreted it to mean a fixed sentence. For example, in Popoola v. State, [66] the complainant was charged under Section 358 of the Criminal Code Law, Laws of Ogun State 1978, which is parallel to Section 358 of the Criminal Code Act [67]. The complainant was alleged to have raped a student of Abeokuta Grammar School, Ogun State. He was sentenced to 5 years imprisonment, which sentence was affirmed by both the Court of Appeal and the Supreme Court [68].

Also in Iko v. The State, the plaintiff was sentenced to seven (7) years imprisonment for rape of a school girl. However, the ruling was disallowed by the Supreme Court for want of validation [69]. In all cases of rape, the prosecution must prove that there was penetration.

The Supreme Court has held that penetration is the most important ingredient of the offence of rape, and penetration no matter how slight is sufficient. It is not necessary to prove that there was a rupture of the hymen or an injury to constitute the offence of rape [70].

Another key element of rape is corroboration. Corroboration is not an obligation of law but a rule of practice [71]. But, it is usually required. In the same case, Kalgo JSC referred with endorsement to the explanation of corroboration by Lord Reading in R v. Basker Ville [72], to wit: "…evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime." In other words, it must be evidence which incriminate the accused and validated in some material particular not only the commission of the crime but also that the accused committed it.

In D.P.P v. Hester [73], Lord Diplock observed the risk which the rule on corroboration is intended to hinder. In the view of his Lordship, the danger is that the story told by the witness

may be inaccurate. Whether the danger is of intentional inaccuracy, as in the cases of accomplices or unintentional inaccuracy as in the case of children and some complainants in cases of sexual offences [74]. Another reason for the rule requiring validation is to keep a person from being framed up for rape.

It is essential to point out that neither a husband nor a male person below the age of 12 years under Section 6 and 30 of the criminal code Act respectively could not be guilty of rape. Section 30 provides an indisputable presumption of law that such a male person is incapable of having carnal knowledge. But, a husband will be culpable of rape where the marriage has been divorced [75] or as was held in R v. Clarke [76] where there is a disconnection order which contains a clause that a woman is no longer bound to live together with the husband and as so long as the order is in force, it is rape to have carnal knowledge of the woman without her approval. In other words, the separation order amounts to an extraction by the wife of the approval implied by the marriage. However, under section 357 of the criminal code act, a woman could not be culpable of rape since this offence can only be committed by a man [77].

Unlike Section 30 of the criminal code act, Section 1(2) (a) of the VAPP Act accentuates the fact that a male person below 12years may have reached the full state of puberty and thus capable of having carnal knowledge [78]. Therefore, the Act provides that a person below the age of 14 years who breaches provisions of Section 1(2) (a) of the VAPP Act will be liable to a term of imprisonment up to 14 years. These provisions were buttressed by a case in New Zealand in which an 11 years old boy impregnated a woman of 36 years [79].

1.6 The Penal Code

The Penal Code (Nigerian Laws Cap 89), which is applicable in the north of Nigeria, criminalizes both rape and defilement. Section 282(1) of the Penal Code defines rape as:

"A man is said to commit rape who, save in the case referred to in subsection (2),

has sexual intercourse with a woman in any of the following circumstances –

(a) against her will;
(b) without her consent;
(c) with her consent, when her consent has been obtained by putting her in fear of death or hurt;
(d) with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married;
(e) with or without her consent, when she is under fourteen years of age or of unsound mind [80]."

The clarification to Section 282(1) states that "*mere penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape*" [81]. It is assumed in this definition that only penetration of a vagina by a penis is what constitutes rape, but this discriminates against women and girls who may have been raped by use of a foreign object or who have been penetrated orally anally by the penis.

The unlawful offence of rape is punishable by imprisonment of up to 14 years, which can be combined with a fine [81]. The Penal Code also makes stipulation as regards to children less than 16 years who are sexually assaulted by those in positions of power.

Section 285 on acts of gross indecency provides a punishment of imprisonment for up to seven years and a fine:

"Provided that a consent given by a person below the age of sixteen years to such an act when done by his teacher, guardian or any person entrusted with his care or education shall not be deemed to be a consent within the meaning of this section [82]."

1.7 The Criminal Code

Section 357 of the Criminal Code Act (Nigerian Laws Cap 38), which is applicable in the southern part of Nigeria, defines rape as:

> "Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of an offence which is called rape [84]."

"Carnal knowledge", as clarified in Chapter 1 of the Criminal Code, implies penetration. This could be interpreted as including penetration by a foreign object and therefore the Criminal Code presents a broader definition of rape than the Penal Code, which uses 'sexual intercourse' rather than 'carnal knowledge'.

Under Section 358, rape is punishable by life imprisonment, with the possible addition of caning [85]. Rape of a girl under 13 years is referred to as "defilement" and is grouped as an offence against morality in the Criminal Code.

Section 218 provides:

"Any person who has unlawful carnal knowledge of a girl under the age of thirteen years is guilty of a felony, and is liable to imprisonment for life, with or without caning [86]."

The law sets a limit of two months within which charges must be brought in a case of 'defilement'. This restricts the number of prosecutions of "defilement" cases according to many human rights defenders, prosecutors and others whom Amnesty International interviewed. This limitation imposed therefore discriminate young girls who are raped on bringing a case before the courts and by the definition of the crime.

The crime of rape is considered a crime against morality rather than a form of child abuse or assault. While violence against women is not a specific criminal offence within the Criminal Code, it does include other relevant offences such as common assault or indecent assault. Provisions for these offences, however, discriminate against women and girls, including those who have been raped. For example, Section 360 of the Criminal Code defines indecent assault against a woman as a transgression punishable by up to two years' imprisonment, whereas if the victim is a man a sentence of up to three years' imprisonment applies [87].

Under Section 222, a person who "*unlawfully or indecently deals with a girl under 16 years of age is guilty of a misdemeanour and is liable to imprisonment for two years, with or without caning*" [88]. If the victim is a boy under 14 years of age, however, the sentence is seven years' imprisonment [89].

1.8 International Human Rights Law

Nigerian is a signatory to The Convention on the Elimination of all Forms of Discrimination against women, [90] which sets out a thorough command to encourage fairness between women and men and to forbid unfairness against women.

Rape of women and girls is an act of gender-based violence and represents "discrimination" as forbidden by CEDAW.

The Committee on the Elimination of All Forms of Discrimination against Women has established that the definition of discrimination against women contained in Article 1 of CEDAW includes violence against women:

> "The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty [91]."

The Optional Protocol to CEDAW presents women a direct way for seeking remedy at the international level for violations of their rights under CEDAW. Nigeria approved CEDAW with no doubts on 13 June 1985, as well as the Optional Protocol on 22 November 2004. On 22 August 2006, a bill for the Domestication of CEDAW had its first reading in the Nigerian Senate, following long-term and continuous demonstration by NGOs in Nigeria. By ratifying CEDAW, Nigeria has undertaken to:

> "condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women [92]."

Article 5(a) of CEDAW is also particularly important:

> "States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women [93]."

Brutality against women reveals the unequal power relations between men and women. The right not to be differentiated against on the grounds of race, sex, sexual orientation, gender expression and identity, age, birth, or religion, is an inherent human right of every woman, man and child. Articles 2(1) and 3 of the ICCPR, ratified by Nigeria in 1993, provide that:

> "2(1). Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." 3. The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant [94]."

Though the Convention against Torture, which Nigeria ratified on 28 June 2001, does not particularly include rape, it has become established that rape is a form of torture [95]. The UN Special Rapporteur on torture and other cruel, ruthless or degrading treatment or punishment stated in 1992 that;

> "since it was clear that rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, they accordingly constituted an act of torture" [96].

Rape can sum up to torture where it is intentionally imposed for purposes such as obtaining information or an admission from the victim or a third person; punishing the victim; intimidating or coercing the victim or a third person; or for any reason based on discrimination of any kind. The veto of torture and other cruel, brutal or degrading treatment or punishment under international law obligates states to study and act against such violations [97].

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, ratified by Nigeria on 18 February 2005, specifically necessitates states to accept suitable and efficient measures to ratify and impose laws to forbid all forms of violence against women, including unwanted or mandatory sex, to penalize the perpetrators of violence against women, and put into practice programmes for the rehabilitation of women victims.

In Article 1, the protocol defines violence against women as:

> "all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflict or of war [98]."

Article 4 of the Protocol states that "*Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited*", and requires states to prohibit, prevent and punish "*all forms of*

violence against women including unwanted or forced sex whether the violence takes place in private or public [99]." The Protocol also compel states to "*prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognized international standards* [100]"

The Rome Statute of the International Criminal Court (Rome Statute), adopted in 1998 and approved by Nigeria in 2001, recognizes a wide range of sexual and gender-based violence as crimes against humanity and war crimes. These include rape, sexual slavery, imposed prostitution, forced pregnancy, imposed sterilization, or any other form of sexual violence of equivalent gravity [101]. The Rome Statute also criminalizes gender-based maltreatment [102] and 'rage upon personal pride, in particular embarrassing and degrading treatment [103].

1.9 Can a pardoned terrorist still be prosecuted?

There are new developments to acts of terrorism in Nigeria. In the past few weeks, news of members of Boko Haram Islamic Sect surrendering to the military in large numbers filled the dailies.

As reported by The Punch newspaper, the Director, Defence Information, Brig. Gen Rabe Abubakar reveals that the military authority has announced the establishment of a rehabilitation camp for repentant Boko Haram members [104]. The rehabilitation camp is established under Operation Safe Corridor which was created as a platform to rehabilitate and integrate repentant members of the sect to the society where they would be made to go through vocational training under the programme and empowered for reintegration into the society.

Although this is a very good initiative but a lot of things need to be put into consideration because this is the first time Nigerians will be faced with this kind of terror.

Amnesty is an official pardon for people who have been or ought to be convicted. The question of the genuineness of the terrorists surrendering is a very important factor that must be put into consideration taking a lesson from the Niger Delta amnesty pogramme which was just used to enrich kidnappers and oil pipeline vandals. Unfortunately, the Niger Delta Militants are fully back, vandalizing gas and pipelines thereby, drastically cutting down Nigeria's crude oil output by 1 million barrels per day.

More so, let us imagine what will happen in this scenario; a woman who was a victim of sexual terrorism sees the man/men who used her body as a weapon of terrorism going through rehabilitation in the so called Operation Safe Corridor, while she is going through emotional and psychological trauma, stigmatization, and silence or nursing a baby with an unknown father at an IDP camp. Is she to be happy or sad that these terrorists are pardoned? Has the Nigerian Government created awareness and enlightened the victims of Boko Haram sexual terrorism on this new development of rehabilitation for the terrorists? What happens if these Boko Haram members later engage in terrorism, just as Niger Delta militants are back to militancy after being granted amnesty? Another factor that needs to be considered is how do the victims of the numerous Boko Haram attacks who are left to fend for themselves in IDPs without government helping them to restore their livelihoods or women and girls that were raped, kidnap, and forced into marriage forgive and accept these terrorist back to the society? There is need for victims of the various Boko Haram attacks to be adequately catered for and livelihoods and properties destroyed restored before the act of granting amnesty to Boko Haram terrorist can be seen as just to the people of North Eastern Nigeria.

Impliedly, terrorists who are pardoned and rehabilitated cannot be prosecuted and they are free from all the crimes (rape, kidnapping, arson, murder, abduction, etc), committed while the armed conflict persisted. On the other hand, if a terrorist after being granted amnesty commits any act of sexual terrorism again, he can be prosecuted.

If amnesty is not granted to repentant terrorists, they can be prosecuted for sexual terrorism and other offences.

1.10 Trials after armed conflict

There is no doubt that the most serious events concerning human rights and international peace and security, particularly in the twentieth century, are armed conflicts [105]. It has been estimated that internal conflicts during the twentieth century have resulted in more than 170 million deaths [106]. Despite the fact that the idea of prosecutions after armed conflicts by international tribunals gained hold, very few of them were established [107].

In considering whether prosecutions after an armed conflict are essential, some important points should be known. Firstly, from a legal point of view, even though in the situations where prosecutions and trials have been established, they often do not provide the necessary guarantees for a due process of justice. In such prosecution, if they are decided to be established "*Justice must not only be fair, but must also be seen to be fair* [108]."

Secondly, only certain individuals often prosecuted after an armed conflict if tribunals are established. For instance, Tokyo was limited in trying to prosecute war criminals representing the enemy powers for crimes committed by them during the conflict. Such a tribunal had no power to prosecute war crimes committed by any member of the related armed forces. Thus, it was criticized as representing more than "victor's justice [109]."

The International Humanitarian Law and International Criminal Law prohibits the infliction of sexual violence, upon enemy civilians, members of the armed forces and persons accompanying them, prisoners of war, during international armed conflict, and, upon persons no longer engaged in combat during non-international armed conflict [110].

Rape, as an explicit prohibition was articulated, in Article 27 of the Fourth Geneva Convention Relative to Civilians under the prohibitions aimed to protect civilians who were under enemy occupation. Article 27 stated, *inter alia*, that,

> "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault…" [111]

Nevertheless, common articles 12 of the First and Second Geneva Convention and article 14 of the Third Geneva Convention, reprise the language of the Article 3 prohibition found in the 1929 Geneva Convention, namely, that "(w)omen shall be treated with all consideration due to their sex [112]." Most importantly, Article 3, common to the First, Second, Third and Fourth Geneva Conventions of 1949, regulated conflict of a non-international character and used the phrase "outrages upon personal dignity, in particular humiliating and degrading treatment [113]".

2. Recommendations

There is need for government to enact an Act that will explicitly deal with the crime of rape during and after armed conflicts in Nigeria especially so as to take care of emerging and unforeseen circumstances. The VAPP Act, the Penal Code and the Criminal Code do not have provisions for sexual terrorism during armed conflict.

The education of youths should be made a priority by government as this is the key tool to break the cycle of poverty in the northern region of Nigeria. Education equips the youths with prerequisite skill whether in agriculture, entrepreneurship and other fields of human endear ours.

There should be round- the -clock security in schools to protect school girls from abduction, rape and forced marriage by Boko Haram terrorist group.

Community policing strategy should be strengthened to provide public safety and the needed intelligence to government security apparatus involved in the fight against Boko Haram. This owes to the fact that community members know their own people and can easily identify "strangers" in their midst. Children of Boko Haram members should not be treated like outcast as it is being done presently in IDP's where they are discriminated and stigmatized by separating them from the rest of the people making them to have no sense of belonging. They should not be made to pay for the sins of their fathers because they are not responsible for the evil actions of their fathers.

There shall be collaboration between the Nigeria government and the international communities especially Nigerian neighbouring countries (Chad, Cameroon and Niger) in the fight against Boko Haram. Religious leaders should propagate the message of peace and respect for women's right in their communities. Also, there should be sanctions against religious cleric that incites violence against women or any minority religious group in the communities.

The government (state and national) should collaborate with international donor agency to provide cash transfer grants to assist mothers and their kids (girls) who are in internally displaced homes in the north eastern part of Nigeria. This will go a long way in building confidence and encouragement on indigent mothers to send back their children to schools.

3. Conclusion

Rape is the most frequent type of violence used against women during violent conflicts and often occurs next to state terrorism as a strategy to disgrace, ethnically cleanse, or silence opponents. Rape is a plague with wide-reaching and lasting effects for its victims. It is without doubt a practice which needs intensive consideration aimed at prevention, prosecution and healing for survivors.

The prosecution of rape in war in some ways marks a radical departure from previous responses, but must also be scrutinised for inadvertent effects such as the potential for reinforcing unhelpful gendered ideals and its approach to rape in war as exceptional, thereby reinforcing a delinking from sexual violence in peace and from other types of violence that women experience. If rape, during war and peace, is to be efficiently addressed we require a thorough restructuring of gender relations in society. Women need to be freed from the trouble of honour and recognised legally, politically and socially as independent rights bearing human beings in their own right. This task requires a more holistic approach engaging prosecutions, health, reparations, long term attitudinal change programs and community development approaches.

Boko Haram has abducted many women and girls in north-eastern Nigeria and has perpetrated numerous physical and psychological abuses against them in custody.

Although government is adequately responding to prevent attacks and protect victims as the government is presently winning the battle against Boko Haram and weeks by weeks news of government troops rescuing scores of abducted women and girls but a lot still needs to be done by the government to provide mental and medical care for victims of sexual terrorism or other violations as apart from the Chibok girls that escaped from Boko Haram captivity, none of the other victims of abduction or other violations had received any government-supported mental health or medical care. Like other forms of sexual assault, responding to sexual terrorism requires criminal justice, medical, psychological and social initiatives.

4. References

1. Horne C. Terrorism Today, London: Frank Cass Publishers, 2002.
2. Sloan S. Terrorism: The Present Threat in Context. Oxford: Berg Publishers, 2006.
3. Hoffman B. Inside Terrorism (2nd ed.). New York: Columbia University Press, 2006, 43.
4. The UN General Assembly Resolution 49/60 (adopted on), titled Measures to Eliminate International Terrorism cited in Various Definitions of Terrorism, 1994. [online] Available: http://www.azdema.gov/museum/famousbattles/pdf/Terrorism%20Definitions%20072809.pdf, (April, 28 2016)
5. Schmid A (Ed.). Handbook of Terrorism Research. London: Routledge, 2011. [online] Available: http://www.terrorismanalysts.com/pt/index.php/pot/article/view/schmid-terrorismdefinition/html, (April, 28 2016)
6. Staudinger L, Ortbals C. Terrorism and Violent Conflict: Women's Agency, Leadership, and Responses. New York: Springer Briefs in Political Science 8, 2013. DOI 10.1007/978-1-4614-5641-4
7. Marion L, Leah W. Sexual Terrorism: Rape as a Weapon of War in Eastern Democratic Republic of Congo, USAID/DCHA Assessment Report 2004, 9-16. [online] Available: http://pdf.usaid.gov/pdf_docs/pnadk346.pdf, (April, 27 2016)
8. Watts C, Zimmerman C. Violence Against Women: Global Scope and Magnitude. The Lancet, 2002; 359:1232-1237.
9. Ibid, pg 1233.
10. Tonwe D, Eke S. State fragility and violent uprisings in Nigeria, Africa Security Review. 2013; 22(4):232-24.
11. Okoli A, Lortyer P. Terrorism and Humanitarian Crisis in Nigeria: Insights from Boko Haram Insurgency, Global Journal of Human-social science. 2014; 14(1):39-49.
12. Adesoji A. The Boko Haram uprising and Islamic revivalism in Nigeria. Africa spectrum, 2010; 45(2):95-108.
13. IRIN News, Anaysis: Understanding Nigeria's Boko Haram radicals, 2011. [online] Available: http:/www.irinnews.org/report/93250/analysis-understanding-nigerias-boko-haram-radicals, (April 26, 2016).

14. Zenn J. Boko Haram's recruitment strategies, combating terrorism centre, 2013. http://www.cts.usma.edu/posts/boko-harams-international connections, (April 27, 2016). [online] Available:
15. Human Rights watch News. Boko Haram abducts women, recruits children, 2013. [online] Available: http://www.hrw.org/news/2013/11/29/nigeria-boko-haram-abducts-women-recruits-children. (April 27, 2016).
16. latunji S. Poverty fuelling Boko Haram insurgency-clinton, 2013. [online] Available: http.//www.punchng.com/new/poverty-fuelling Boko Haram insurgency-clinton (April 29, 2016).
17. Nnodim O. Nigeria's unemployment rate rises to 2.9%-NPC, 2014. [online] Available: http://www.punch.com/businesss/busines-economy/nigerias-unemployment-rate-rises-to-23-9-npc. (April 24, 2016)
18. Okoli A, Lortyer P. Terrorism and humanitarian crisis in Nigeria: Insights from Boko Haram insurgency. Global Journal of Human-social science, 2014; 14(1):39-4.
19. GDRC. Understanding the concept of good governance, 2015.
20. British Broadcashing corporation (BBC), Nigeria Boko Haram pledges allegiance to Islamic State- BBC News, 2015. [online] Available: http://www.bbc. com/news/world.africa-31784538. (April 22, 2016)
21. Ward J. Broken bodies broken dreams: Violence against women exposed. Nairobi, United Nations OCHA/IRIN, 2005.
22. Salifu U. Sexual Terrorism in Africa: A Case of Two Crimes in One, 2013. [online] Available: http://www.issafrica.org/iss- today/sexual-terrorism-in-africa-a-case-of-two-crimes-in-one, (April 22, 2016)
23. Green J. Uncovering collective rape: A comparative study of political sexual violence, International Journal of Sociology. 2004; 34(1):97-116.
24. Hynes P. On the Battlefield of Women's Bodies: An Overview of The Harm of War to Women, Women's Studies International Forum. 2004; 27:431-445. [online] Available: http://www.feministpeacenetwork.org/Hynes.htm, (April 23, 2016).
25. Palmieri D, *et al.* Writing the History of Rape In Wartime', in Branche, R and Virgili, F. (eds.) Rape in Wartime, Palgrave Macmillan, London. 2012, 153-168.
26. Chaikel. As sited by Fiske L, Shackel R. (2014), ''Ending Rape in War: How Far Have We Come? Cosmopolitan Civil Societies Journal, 2011, 6(3).
27. Eileraas K. Rape, Legal Definitions of. Encyclopedia of Women in Today's World. Ed. 2011.
28. MacKinnon C. Rape: On Coercion and Consent. In Katie Conboy, ed., Writing on the Body: Female Embodiment and Feminist Theory. New York: Columbia University Press, 1997.
29. Robinson A. Weapon of War. New Internationalist Magazine, 1993. [online] Available: http:// www.org/features/1993/06/05/rape/, (April 25, 2016).
30. Staudinger L, Ortbals C. Terrorism and Violent Conflict: Women's Agency, Leadership, and Responses. New York: Springer Briefs in Political Science 8, 2013. DOI 10.1007/978- 1-4614-5641-4
31. Marion L, Leah W. Sexual Terrorism: Rape as a Weapon of War in Eastern Democratic Republic of Congo, 2004. USAID/DCHA Assessment Report January 9-16, 2004, [online] Available: http://pdf.usaid.gov/pdf_docs/pnadk346.pdf, (April 25, 2016)
32. Staudinger L, Ortbals C. Terrorism and Violent Conflict: Women's Agency, Leadership, and Responses. New York: Springer Briefs in Political Science 8, 2013. DOI 10.1007/978- 1-4614-5641-4
33. World Health Organization. Violence against women in situations of armed conflict and displacement, 1997. [online] Available: http://www.who.int/gender/violence/v7.pdf, (April 27, 2016).
34. Barkindo A, Gudaku B, Wesley C. Our Bodies, Their Battleground: Boko Haram and Gender-Based Violence against Christian Women and Children in North-Eastern Nigeria since 1999, Working Paper for the Nigeria's Political Violence Research Network NPVR. 2013. [online] Available: https: //www.world watchmonitor.org/research/3117403, (April 27, 2016).
35. Human Rights Watch, Those Terrible Weeks in their Camp Boko Haram Violence against Women and Girls in Northeast Nigeria, 2014.
36. Ido A. How Boko Haram militants raped us, slaughter many others – Escaped victims narrate order, 2014. [online] Available: http://ynaija.com/how-boko-haram-militants-raped-usslaughter-many-others-escaped-victims-narrate-ordeal/, (April 25, 2016)
37. Omonobi K. Emergency: Condoms, narcotic drugs flood Boko Haram camps, 2013. [online] Available: http://www.vanguardngr.com/2013/06/emergency-condoms-narcotic-drugs-floodboko-haram-camps/#sthash.Wu9tDCNx.dpuf, (April 25, 2016)
38. Human Rights Watch interview with victim (name withheld), Abuja, 2014.
39. Ibid.
40. Human Rights Watch interview with victim (name withheld), Lagos, 2014.
41. Human Rights Watch interview with victim (name withheld), Yola, 2014.
42. Ibid.
43. Daniel S. 160 Days after Chibok Abduction: Girls tell how they were raped every day, 2014. [online] Available:http://www.vanguardngr.com/2014/09/160-dayschibok-abduction-girls-tell-raped-every-day-negotiator-stephen-davis/, (April 27, 2016).
44. Dumoh E. Chilling Revelations: Escaped Chibok Girl Raped 15 Times By 15 Men Every Day, 2014. [online] Available: http://www.punchng.com/news/chilling-revelations-escaped-chibokgirl-raped-15-times-by-15-men-every-day/, (April 27, 2016).
45. Abrahams N, *et al.* Worldwide Prevalence of Non-partner Sexual Violence: A Systematic Review, Lancet, 2014; 383(9929):1648-1654.
46. Palmieri D, *et al.* writing the history of rape in wartime, in Branche, R and Virgili, F. (eds.) Rape in Wartime, Palgrave Macmillan, London, 2012, 153-168.
47. Tilman S, *et al.* Shattering silence: Exploring barriers to disclosure for African American sexual assault survivors. Trauma, Violence and Abuse. 2010; 11(2):59-70.

48. National Crime and Safety Survey, Summary of Findings of 2011 National Crime and Safety Survey, Cleen Foundation, 2012. [online] Available: www.cleen.org/SUMMARY%200F%202012%20National%20Crime, (April 24, 2016).
49. Kiesel J. Partnering with practitioners: rape care and health care. CCEB Newsletter, 2006, 1(2). [online] Available: www.cceb.upenn.edu/news/newsletter, (April 26, 2016).
50. Eze U. Prevention of sexual assault in Nigeria. Annals of Ibadan Postgraduate Medicine. 2013; 1(2):65-70.
51. Abdulkadir I, *et al.* Child sexual abuse: a review of cases at General Hospital Suleja, Niger State, Annals of Nigerian Medicine. 2011; 5(2):15-19.
52. Sable M. *et al.* Barriers to reporting sexual assault for women and men: perspectives of college students. Journal of American College Health. 2006; 55:56-162.
53. Odu B, *et al.* Prevalence of violent sexual assault on South West Nigeria Girls, European Scientific Journal. 2014; 10(7):471-481.
54. Abdulkadir I, *et al.* Child Sexual Abuse: A Review of Cases at General Hospital Suleja, Niger State, Annals of Nigerian Medicine. 2011; 5(2):15-19.
55. Abe I. Defining and Awareness of Sexual Harassment among Selected University Students in Lagos Metropolis, Nigeria. Journal of Emerging Trends in Educational Research and Policy Studies (JETERAPS). 2012; 3(3):212-218.
56. Human Security Report, Sexual Violence, Education and War: Beyond the Mainstream Narrative, Human Security Research Group, Simon Faser University, Canada. Human Security Press, 2012.
57. Kullima A, *et al.* Sexual Assault against Female Nigerian Students, African Journal of Reproductive Health. 2010; 14(3):189-194.
58. Achunike H, Kitause R. Rape Epidemic in Nigeria: Cases, Causes, Consequences and Response to The Pandemic. International Journal of Research in Applied and Social Sciences. 2014; 2(1):31-44.
59. Verelst A, *et al.* The Mediating Role of Stigmatization in The Mental Health of Adolescents Victims of Sexual Violence in Eastern Congo, Child Abuse and Neglect. 2014; 38(7):1139-1146.
60. Haruna K. Our Ordeal in Hands of Rapists in Boko Haram Camps, 2014. [online] Available: http://leadership.ng/features/353367/ordeal-hands-rapists-boko-haram-camps, (April 27, 2016).
61. Penn M, Nardos R. Overcoming Violence against Women and Girls: An International Campaign to Eradicate a Worldwide Problem. Lanham (MD): Rowman & Littlefield, 2003.
62. Violence Against Persons (Prohibition) Act, Nigeria. Legislation, 2015. [online] Available: htpp:// www.refworld.org/ docid/556d5eb14.html, (April 25, 2016).
63. Violence Against Persons (Prohibition) Act, Section, 2015, 1(1).
64. ibid, Section 2(a)-(c).
65. ibid, Section 1(2) (a)-(c).
66. 17 NWLR, (Pt 138), 2013.
67. Criminal Code Act, s.358.
68. Ibid.
69. 14 NWLR, 2001, (732)221.
70. Iko v State, supra, at 245.
71. Anthony N. Nwazuoke, A Critical Appraisal of the Violence Against Persons (Prohibition), 2016.
72. Act, Journal of Law, Policy and Globalization. 2015; 47:69-70.
73. All E.R. 1916-17, 38at 43.
74. AC 296 at 315, 1973.
75. AC 296 at 315, 1973.
76. Iko v. State, supra at, 242.
77. R v. Clarke (1949) 33 CR. APP.R. 216.
78. Okonkwo and Nash, Criminal Law in Nigeria; (2nd ed.) London, Sneet and Maxwell, 1980, 272.
79. Ibid.
80. James Rush, Boy, 11, fathers child with 36 year Old mother of school friend prompting calls for reform of New
81. Zealand's Rape laws" [online] Available: www.dailymail.comuk/news/article-2342015/Boy-is-fathers-child-36years-oldmother-school friend-promptingcalls-reform-NewZealands-rape-laws.html, april 13, 2016.
82. The Penal Code, S. 282 (1)
83. Ibid.
84. The Penal Code, S. 283.
85. Ibid, S. 285.
86. Ibid, S. 357.
87. The Criminal Code Act, S. 358
88. Ibid, S, 218
89. Ibid, S, 360
90. Ibid
91. The Criminal Code Act, S. 216
92. Herein after referred to as CEDAW in this article
93. CEDAW General Recommendation No. 19, (Violence against Women), UN Doc. A/47/38, 29 January 1992, para. 6.
94. CEDAW Art. 2.
95. CEDAW Art. 5(a).
96. The International Convention on Civil and Political Rights, Art. 2(1) and 3
97. Aydin v Turkey 23178/94 ECHR 75, 25 September 1997; Raquel Martí de Mejía v Peru 1 March 1996, Report 5/96, Inter-American Court of Human Rights, 1997.
98. UN Doc. E/CN.4/1992/SR.21, para. 35, MC v Bulgaria, [2003] ECHR 646, 2003.
99. Human and Peoples' Rights on the Rights of Women in Africa, Art. 1.
100. Ibid, Art. 4.
101. Ibid, Art. 5.
102. Rome Statute of the International Criminal Court, Article 7 (1) (g) (Crimes against Humanity), or Article 8 (2) (b) (xxii)
103. ibid, Article 7 (2) (h).
104. ibid, Article 8 (2)(xvi).
105. The Punch Newspaper, April 16, 2016
106. Saif Al-Rawahi. Prosecutions After Armed Conflicts, International Journal of Business, Economics and Law. 2015; 8(4):171-172.
107. Hassner, P, Violence and Peace: From the Atomic Bomb to Ethnic Cleansing, 1995, A Central European University Press and Rummel RJ, Death by Government, New Brunswick, Transaction Publishers, 2015.

108. Saif Al-Rawahi. Prosecutions After Armed Conflicts, International Journal of Business, Economics and Law. 2015; 8(4):171-172.
109. The Role of International Criminal Prosecutions in Reconstructing Divided Communities, Public Lecture by Carla Del Ponte, Prosecutor, International Criminal Tribunal for the Former Yugoslavia, given at the London School of Economics, on 20 October 2003, Discussion 24-3. [online] Available: http://www.lse.ac.uk/Depts/global/Publications/DiscussionPapers, (April 28, 2016).
110. Forsythe PD, Human rights in international relations, (2nd ed), Cambridge University Press. 2006, 91.
111. Common Article 3 and the two Additional Protocols of to the four Geneva Conventions, 1977.
112. Article 27 of IV Geneva Convention of 1949.
113. Article 12 of the First Geneva Convention Relative to Wounded on Land, Article 12 of the Second Convention relative to the Shipwrecked and Wounded at Sea, and Articles 13 and 14 of the Third Convention Relative to Prisoners of War.
114. Article 3, common to the First, Second, Third and Fourth Geneva Conventions of 1949.

International Journal of Law
ISSN: 2455-2194, RJIF 5.12
www.lawresearchjournal.com
Volume 2; Issue 4; July 2016; Page No. 22-23

The information technology Act, 2000: No one act syndrome

[1] Dr. Swapnil Sudhir Bangali, [2] Dr. Harita Swapnil Bangali

[1] Asst. Professor, Symbiosis Law School, Pune, Maharashtra, India.

[2] Independent Practitioner and Consultant, Symbiosis Law School, Pune, Maharashtra, India.

Abstract
The Information Technology Act, 2000 was passed with the intent to include electronic commerce into our legal framework. But, it also included certain allied subject matters such as creation of digital signature, civil wrongs and penalties in the form of contraventions and cybercrimes. The whole gamut of criminal law and compensation made most of the people think that Information Technology Act, 2000 is a technical piece of legislation and it will be applied separately and exclusively. In reality, it is not a carrying any "One Act Syndrome".

Keywords: One Act Syndrome, Information Technology Act, 2000, Section 77

1. Introduction

There is a paradigm shift in the jurisprudence of technology laws all across the globe due to technological advancements and India is not an exception to it. The Information Technology Act, 2000 in India has brought up intangible rights in place of tangible rights in respect of information and communication technology based devices. This leads to social and legal reformation because society is in urgent need of laws governing new technology.

The Information Technology Act, 2000, as a legislation is a progressive step to include electronic commerce imported through UNCITRAL Model Law, which predicted the need for international trade based on digital mechanism and information and communication technology. To keep pace with the social and technological developments, the Act was amended in 2004 and 2008.

The Amendment of 2008 marginally enhanced the scope of Section 43 and the remedies for the victims of contraventions under Section 43 of the Act. But, still it carried certain limitations in it.

> *"The questions have been raised whether the Act has sufficient 'byte' to become an effective legislation. Then there are so called concerns over certain grey areas within the Act… lack of confidence building measures, consumer protection,…. draconian powers of police… silent on intellectual property rights, taxation…. the list is endless. In short, critics are questioning legislative competence in framing the Act [1]."*

1.1 One Act Syndrome

The Information Technology Act, 2000 certainly has limitations and grey areas. One enactment cannot answer all the questions. As a nation adopting for progressive legislation, there is a need to legislate on ancillary areas such as intellectual property, new formed technology, uncovered technologies, technology which creates threat to privacy, etc. The approach shall be changed even in respect of those ancillary and related legislations involving investigative powers of police, collection and custody of electronic evidence, procedure for trial against foreigner and jurisdictional challenges to courts, especially, civil courts, the powers of the Cyber Appellate Tribunal and the confusing jurisdiction of primary court and tribunal.

There is also a need to bring the existing legal framework in parity with the new technological developments. The legislature, judiciary and people must accept the fact that one statute cannot deal with all the questions in digital world. On the similar lines, one must also accept that the reading of two or more provisions is also not an alien process in India and that is why, there has to be parity amongst statutes which are ancillary to each other. One needs to take the law beyond the traditional 'One Act Syndrome' for granting effective remedies for the victims.

In this scenario, the only option left for us is to emulate US and UK, which is the most common approach in every field in the recent past. The issue in relation to "One Act Syndrome" comes in question due to certain statistical data, that is, The Information Technology Act, 2000 and the amendments made in it are equivalent to 45 or more US Federal enactments and 598 or more US State enactments and 16 or more UK enactments [2].

1.2 Limitation of Schedule-I

Even after having comparatively such a huge enactment, The Information Technology Act, 2000 has got a major limitation in the form of Schedule I. Schedule I of The Information Technology Act, 2000 provides for certain subject matter to which the Act is not applicable. Schedule I includes negotiable instruments other than cheques, power of attorney, will, trust deed and any instrument of conveyance of immoveable property. All these subject matters are excluded from the applicability of The Information Technology Act, 2000. The reasoning for excluding such subject matters from the applicability of The Information Technology Act, 2000 is not merely technological but also jurisprudential. There are already set principles of legal framework for all the subject matters in the Schedule I in India. There are separate legislations for

every single subject matter in the Schedule I of the Act. These legislations require that the identification of the parties and verification of parties is must under the law. Technically, there are so many challenges to authenticate, identify and verify the identity of the parties in relation to any of the documents mentioned in the Schedule I of The Information Technology Act, 2000. The applicability of the relevant laws is not denied due to any of the provisions of The Information Technology Act, 2000.

Application and implementation of any law is totally rested on courts in India. The Information Technology Act, 2000 is not an exception to this general rule. On the larger scale in India, one school of thought believes that the courts only interpret the law and they don't create the law. The role of the judiciary in India is to ascertain the legislative intent behind the Act and accordingly interpret the provisions of the law. The argument that the judges do not have technological temperament to understand and do justice in a given situation is based on a very shallow premise. The Information Technology law is dynamic piece of legislation and cannot be all the time interpreted traditionally.

Since the inception in the year 2000 and the enforcement of the Amendment in 2008, The Information Technology Act, 2000 there are not many guiding and descriptive judgments from the higher judiciary in India on the information technology law. In such a situation, it is obvious that the courts and the law enforcement agencies heavily rely on interpretation made by the foreign courts. Predominantly, such foreign court in India means courts in US and UK. In such a scenario, the threat is to over regulate or over codification of the laws, which may also generate "One Act" Syndrome in India like US.

There are certain efforts which can be seen in some of the judgments in Supreme Court, to oppose this "One Act" syndrome like US. In *State of Maharashtra v. Dr. Praful B. Desai* [3], Supreme Court held that;

> *"Video Conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you, i.e, in your presence... In video conferencing both the parties are in presence of each other... Thus it is clear that so long is the accused and /or his pleader are present when evidence is recorded by video conferencing that the evidence is being recorded in the "presence" of the accused and would thus fully meets the requirements of Section 273 of the Criminal Procedure Code. Recording of such evidence would be as per "procedure established by law".*

This shows, the Supreme Court of India, is not emulating any of the technologically developed country like US and UK, but fully establishing an approach which considers the effect of one legislation over the other. This is a sign of mature understanding and establishing a coherent application of the legal provisions of the different statues which is in anti-thesis to "One Act" syndrome.

1.3 Section 77

Another angle to the argument related to "One Act" Syndrome is that, The Information Technology Act, 2000 cannot be "One Act'' syndrome, due to its own provisions. For example, Section 77 of The Information Technology Act, 2000 provides that:

> *"No Compensation awarded, penalty imposed or confiscation made under this Act shall prevent the award of compensation or imposition of any other penalty or punishment under any other law for the time being in force."*

This provision of the Act makes it clear that the Act cannot be "One Act" syndrome. Section 77 of The Information Technology Act, 2000 states that any adjudicating process resulting in award of compensation, imposition of penalties or confiscation not to interfere with other punishments under any other law for the time being in force. This mandates that, the person if held guilty for any contravention under Section 43 or for any offence under Sections 65 to 74 of The Information Technology Act, 2000 is not immune from the liability under any other law for the time being in force.

The very provision of Section 77 of The Information Technology Act, 2000 is ensuring that The Information Technology Act, 2000 cannot be "One Act" syndrome.

2. References

1. Vakul Sharma, Information Technology Law and Practice, Universal Publishing House, 2014.
2. Vakul Sharma, Information Technology Law and Practice, Universal Publishing House, 2014.
3. 2003; (4):SCC-601

International Journal of Law
ISSN: 2455-2194, RJIF 5.12
www.lawresearchjournal.com
Volume 2; Issue 4; July 2016; Page No. 24-27

Measures for preventions of water pollution under the water (Prevention and control of pollution) Act, 1974: A critical analysis

Vikrant Sopan Yadav

PhD Research scholar, Dept. of Law, SPPU and Asst. Prof., Modern Law College, Pune, Maharashtra, India

Abstract
United Nations Declaration on Human Rights U/A 31 recognise the right to clean and accessible water that is adequate for health and wellbeing of an individual and family. Right to water is also a fundamental right U/A 21 of the Constitution of India.
In order protect this right Indian legislators have passed Water (Prevention and Control of Pollution) Act, 1974. This article is an attempt to critically analyse the law and judicial trend with respect to same.

Keywords: Water, Pollution

Introduction

"Water" falls under the category of "state subject" as provided under schedule VII of the Constitution of India. Under Articles 249 and 252 of the Constitution of India, the state has jurisdiction over the subject called "Water".

States like Assam, Bihar, Gujarat, Haryana, Himachal Pradesh, Jammu & Kashmir, Karnataka, Kerala, Madhya Pradesh, Rajasthan, Tripura and West-Bengal passed the resolution in both the houses of their respective state legislatures to pursue article 252(1) of the Constitution. The resolution was related to prevention and control of water pollution, which necessarily should be regulated by the Parliament, effective through law.

In accordance with the above resolutions, The Parliament enacted the Water (Prevention and Control of Pollution) Act, 1974.

Right to water has also been recognised as the fundamental right. In, *Susetha v. State of Tamil Nadu* [1]. The court has observed, the water bodies are required to be retained. Such requirement is envisaged not only in view of the fact that the right to water as also quality of life are envisaged under Article 21 of the Constitution of India, but also in view of the fact that the same has been recognized in Articles 47 and 48 A of the Constitution of India. Article 51-A furthermore makes a fundamental duty for every citizen to protect and improve the natural environment including forest, lakes, rivers and wildlife. It was also clarified that 'natural water storage resources are not only required to be protected but also steps are required to be taken for restoring the same if it has fallen to disuse.'

Water pollution and measure under the Water (Prevention and Control of Pollution) Act, 1974- An Analysis

Pollution – Defined

The act has defined the term "Pollution" in following words;

such contamination of water or such alternation of physical, chemical or biological properties of water or such discharge of any sewage or trade effluent or of any liquid, gaseous or solid substance into water (whether directly or indirectly) as may, or is likely to, create a nuisance or render such water harmful or injurious to public health or safety, or to the life and health of animals or plants or of aquatic organism [2].

This definition clearly enumerates the property which can be termed harmful, and which can be said to be the factor which is responsible for 'pollution'. In other words, if all the above-mentioned properties are present in a given amount of water, it can be termed as 'harmful. Nevertheless, even the presence of one of them is also enough to cause or initiate the contamination.

However, with the impact of globalization on human civilization, there is a constant pressure on natural resources, which keeps on changing the properties of pollution'.

The concept of "sewage effluent" is defined under Section 2(g) of the Act, which is as follows;

"Sewage effluent" means waste matter from any sewerage system or sewage disposal works that also includes sewerage from open drain.

It is thus, the waste matters, which is found in, the open drains.

Term "trade effluent" is categorically defined under Section 2(k) of the Act.

"Trade effluent" includes any liquid, gaseous or solid substance, which is discharged from any premises, used for carrying on any industrial operation or process, or treatment and said disposal system, other than domestic sewage

According to 2(gg), "sewer" means any conduct or channel, open or closed, carrying sewage or trade effluent.

Protection and prevention of water pollution is the primary object behind inclusion of these definitions. These definitions help in interpretation and speedier and correct determination of environmental disputes

Main objectives of the act

The main objectives of the Act are [3]:

- To provide for the preclusion and control of water pollution; and
- Maintaining or restoring of propriety of water;
- To establish the Central and State Boards for the prevention and control of water pollution;
- Conferring and assigning such powers and functions to the Boards relating thereto and for matters connected therewith,

- To establish Central and State water testing laboratories to enable the Board to assess the extent of pollution, lay down standards and establish fault or evasion.
- To provide penalties for the contravention of the provisions of the Act.

Prohibition on use stream or well for disposal of polluting matter etc.

A person is not permitted knowingly to use any venomous, lethal or polluting matter, which can be gravely injurious to the health of the citizens, into any of the flowing water body, such as a stream or a blocked water body, like well or in sewer or on land.

A person shall not knowingly allow into a flowing water body, or stream, any matter which in combination with other matters impede the proper flow of water of stream resulting into substantial, aggravation of pollution [4].

These restrictions, which are considerably imposed and thereby approved by legal authorization, and whereby the offender can be taken to the court of law of the relevant land.

Restriction on new outlets and new discharges

No person shall, without the previous consent of the state board,

- Launch any industry or any treatment and disposal system which is likely to discharge sewage or trade effluent into a stream or well, sewer or on land; or
- Suggest the use of any new outlet for the discharge of sewage; or
- Generate any new discharge of sewage [5].

In *Mahabir Soap and Godakhu Factory* v. *Union of India* [6] the consent for the continuation of industry was refused by the State Board. The refusal came because the factory was located in the populated area and there was a public complaint.

Thus, by virtue of the public complaint, and the fact that the location of the factory falls under the populous area of the said locality, the State Board has refused the continuation of the complaint. For the purpose of the statute, reasons cannot be said to be non-relevant.

Moreover, any refusal or denial is under the discretionary power of the State Board Hence, not through the Court to go into the modesty of reasons and substitute its own opinion in place of the decision of the State Board.Hence, the court cannot simply substitute its decision *over* the state Board decision.

In *M. C. Mehta* v. *Union of India* [7], the Supreme Court held that the financial capacity of the tanneries should be considered as irrelevant while requiring them to establish primary treatment plants.

Like in case of an industry, which is incapable of paying minimum wages to its workers should not be allowed to exist, in case of a tannery there should be an existence of a primary treatment plant.

Thus, even when the State Board approves it by a consent order, it is for the benefit of the population, that, it has to be made mandatory. While taking into consideration the benefit of the population, it has been mandatory that it does not entitle the incumbent to comply with the conditions mentioned in the consent order. Failure to comply with the requirement of putting up effluent treatment plant does results in the lapse of the consent, which is however, punishable under the court of law.

Furnishing of information by state board

If, due to an accident or any other unforeseen act or event, any venomous, noxious or polluting matter is being discharged, or is likely to be discharged at any place, and if the place happens to be nearby any industry, operation. Process or any treatment or disposal system is being carried on. Into a stream or well or on sewer or on land resulting into pollution, then the person in charge of such place shall intimate the occurrence of such accident. In other words, the person shall event it to the State Board and such other agencies or authorities as may be prescribed [8].

Pollution of stream or well - referring to emergency measures

In case of an accidental or unforeseen act or event, any harmful, venomous, noxious or polluting matter makes its presence or likely to enter into any stream or well or on (and. In such cases the Board may carry out operation by recording the reason in writing, and that too for any of the following purposes like:-

(i) Removing that matter and disposing it of;

(ii) Remedying or removing any pollution caused by its presence;

(iii) Issuing orders restraining or prohibiting the concerned person from discharging any poisonous: noxious or polluting matter [9].

Thus, the above stated reasons, if proved can be detrimental and can force the Board to take appropriate action against the party concerned. However, under section 33 of the Act the Board has the power to make application to the courts, which is for restraining apprehended pollution of water in streams or wells.

The court, on its behalf may direct such person to remove the polluting matter. If such a person fails to do so, the court may authorise the Board to remove it and recover the expenses from the concerned person.

Thus, recovering the expenses has been kept as a clause to be implemented while necessary.

In respect to that, the case of *Maharaja Shri Umaid Mills Ltd., Pali v. State* [10] deserves special mention. It was held under that case: that the proceedings under section 33 of the Act are criminal in nature. Therefore, if the complaint in proceedings under section 33 of the Act is dismissed, then the restoration of the same is not permissible as there is no provision in Criminal Procedure Code for review of order.

Thus, the supremacy of Section 33 of the Act was kept intact in order to ensure proper justice.

Directive powers

In 1988, a new provision under section 33-A was added. The stated provision says that the Board, while exercising its powers and performance of its functions can issue any directions to any person, which will include those for

(i) The closing, prohibition or regulation of any industry, operation or process; or

(ii) The stoppage or regulation of supply of electricity, water or any other service

However, it must be noted that the decision under section 33-A of the Act should not be based on irrelevant considerations

Thus, 'relevance' has been made the keyword which is incidentally not based on irrelevant considerations and which

will allow court action. It should be noted that it should not be taken arbitrarily.

While both irrelevance and arbitration is considered to be in inconsistence under the section act, it should also be noted that those provisions only would make the Board move the court.

This has been further exemplified in the *Mandu Distilleries Pvt Ltd.* v. *M.P. Pradushan Niwaran Mandal* [11]. Stating the precedence of the Court verdict, the Board ordered for the stoppage of production altogether. It also went ahead with the directions of closing down the industry.

But, notably, the grounds stated in the show-cause notice and basis of orders were not the same. There was a denial of principles of natural justice and consequent violation of inbuilt procedural safeguards. Both of them have been taken into consideration, while taking note of the said case However, the Court quashed the said order.

In another such case, called *Bhavani River V Sakthi Sugars Ltd* [12], directions were issued by the Pollution Control Board. The directions were reserved for the industry for ensuring proper storage of effluents in lagoons It also directs for proper treatment effluent.

Some of the said directions were not complied with and as a result of this some effluent reached the river Bhavani and polluted its water Despite enough time given, no remedial steps were taken by the industry. Thus, the Court directed the industry to be closed.

The above judgment of the Court envisages that the closure of the industry is essential since in spite of time given, the industry has not complied with the directives.

Penalties

The Act provides for different penalties. The prescription of them is related to violating different provisions of the Act.

- For failure to give information as required under section 20 of the Act, the punishment is imprisonment This punishment may be extended to three months or a fine is levied, which may be extended to ten thousand rupees or both. If, failure continues, an additional fine is to be levied, which may be extended to five thousand rupees per day during the period failure continues.

  Thus, negligence is taken into a cognizable offence category and thereby a fine is levied when there are any violations.
- For violation of orders or any direction prohibiting discharge of any polluting matter into stream or well or land, under section 32; or violation of court order restraining pollution of water, under section 33; or for violating the directions of the Board, under section 33-A the punishment prescribed is imprisonment from one year six months to six years and fine. If the failure continues, an additional fine which may extend to five thousand rupees per day during the period of failure. If the failure continues for beyond one year, then the imprisonment shall not be less than two years but which extended to seven years and with fine.

  Thus, direction prohibiting discharge of polluting materials are not only, punishable, but also an imprison able offence
- For permitting any poisonous, noxious or polluting matter into any stream, well or land, the punishment shall be imprisonment for a term of one year six months to six years and with fine.

  Thus, punishment prescribed for polluting stream, well, or land is punishable by law.
- For pollution of stream or well or land by discharge of sewage or trade effluent, the punishment shall be imprisonment for a term of one year six months to six years and with fine

  Section 45 of the Act provides enhanced penalty after previous conviction which shall be imprisonment for a term of two years to seven years and with fine.
- For violating any other provision of the Act, the penalty prescribed is imprisonment which may extend to three months or with fine which may extend to ten thousand rupees or both. In case of continuing contravention, an additional fine which may extend to five thousand rupees for every day during the period such contravention or failure continues.

All these prescribed punishment for the said offences does show the efforts of the national government in taking rigorous actions against individuals neglecting the cause of environmental pollution. It also establishes the attitude of the government in dealing these offences.

Power of the government to supersede the board

The Central Government has the power to supersede the Central Board or any Joint Board and the State Government has the power to supersede the State Board if the respective government is of the opinion:-

- That the Central Board/Joint Board or State Board, as the case may be, has persistently made default in the performance of the functions imposed on it by or under this Act; or
- That the circumstances exist which render it necessary in the public interest to do so.

However, the government cannot supersede the Board for a period exceeding one year and if the government is superseding the Board on the grounds mentioned above , it is required to give reasonable opportunity to such Board to show cause why it should not be superseded and it shall consider the explanation and objections, if any, of such Board.

Nevertheless, the case to supersede the Board is made available and that it is for the benefit of the environment issue.

The Central Government as well as the State Government has the power to make rules to carry out the purposes of the Act. However, no rules can have demonstrative effect.

The darker side- the reality

Even though the Act has provided for various measures to control the pollution of water, and established authorities to check the same, the practical realities are different. Almost all rivers in India are highly polluted, which forced the govt. to launch the Ganga Cleaning Campaign. Even the Supreme Court has highlighted this darker reality in many cases.

In *M.C.Mehta v. Union of India* [13], the tanneries were discharging effluent in Ganga and they were not setting up primary treatment plant in spite of being asked to do so for several years. They also did not put up their appearance in the Supreme Court to express their willingness to take appropriate steps to establish the pre-treatment plant. In view of these circumstances the Court directed them to stop working their tanneries.

In *State of M.P. v. Kedia Leather and Liquor Ltd* [14]., the M.P. State Pollution Control Board was neither taking any action nor

inspecting the various industries discharging pollutants in contravention of the provisions of the Water Act.

In *Delhi Bottling Co. Pvt. Ltd. v. Central Board for the Prevention and Control of Pollution* [15], the board took a sample of the trade effluents from a bottling company's discharge stream. The Board got the trade effluent analyzed and found that it did not conform to the requirements of the consent order granted to the company. The Board files a suit under Section 33 of the Act and accordingly the court issued an injunction requiring the company to establish a treatment plant. The order of the Court was challenged on the sample by the Board, had requested that the sample be analyzed by the Delhi Administration laboratory. The court held that the sample was not taken in strict compliance, the case was decided in favor of company was violating its consent orders. The Supreme Court held that the appellate authority under the Water Act, in this case, erred in holding that the principle of "promissory estoppel" was applicable to this case.

Conclusion

On November 18, 2014 The High Level Committee (Chair: Mr. TSR Subramanian) to Review Various Acts Administered by the Ministry of Environment, Forest, and Climate Change in its report recommended inclusion of relevant provisions of the Water (Prevention and Control of Pollution) Act, 1974, and Air (Prevention and Control of Pollution) Act, 1981 in the Environmental (Protection) Act, 1986, and repealing these two Acts. However this may not be good step, because something which is very basic and essential to all living things and hich is recognized as fundamental right, need a special attention. The establishment of National Green Tribunal is a welcome step as it is expected to provide speedy justice in case of disputes relating to water pollution. The only thing that is lacking and needs attention is awareness and proper implementation of this Act.

References

1. AIR2006SC2893, 2006(7)SCALE640
2. Sec. 2(e), the Water (Prevention and Control of Pollution) Act, 1974
3. The Long Title, the Water (Prevention and Control of Pollution) Act, 1974
4. Id. Sec. 24.
5. Id. Sec. 25
6. A.I.R. 1995 Ori 218
7. A.I.R. 1988 S.C. 1037 at 1045. See also *Vineet Kumar Mathur v. Union of India* (1996) 1 SCC 119
8. Section 31. Water Prevention and Control. Act. 1974.
9. Id, Section 32; see also 25 A.I.R 1998 Raj 9
10. A.I.R. 1998 Raj 9
11. AIR. 1995 M P. 57
12. (1998) 2 SCC 601. See also Re. Bhavani River-Sakthi Sugar Ltd., (1998)6 SCC 335: M.C. Mehta v. Union of India, (1996)4 SCC 35; M C. Mehta v Union of India. (1996) 4 SCC 750, F.B. Taraporawala v. Bayer India Ltd , (1996) 6 SCC 58, M C Mehta v. Union of India, A.I.R. 1988 S.C. 1037; Indian Council For Environment- Legal Action v Union of India, (1996) 3 SCC 212; Indian Council For Environment-Legal Action v Union of India. (1996) 5 SCC 281 and S. Jagannath v. Union of India, (1997) 2 SCC 87
13. 1992(1)SCALE196, 1992Supp(2)SCC633
14. [2003] Insc 385
15. AIR 1986 DEL 152

International Journal of Law
ISSN: 2455-2194, RJIF 5.12
www.lawresearchjournal.com
Volume 2; Issue 4; July 2016; Page No. 28-30

Law relating to bail in India: A study of legislative and judicial trends

Prakash Chandra Agrawal

Assistant Professor, Faculty of law, B.S.A College, Mathura, Uttar Pradesh, India

Introduction

The institution of bail like any other branch of law has its own philosophy and to understand the same it is necessary to go through its various stages of development. In ancient period and that too in uncivilized society one can hardly conceive the system of bail while in the civilized society it has become the rule.

No one can question the importance of bail in the administration of criminal justice system and it is a very valuable branch of procedural law. In the ancient period criminal justice was so quick and crime rate was so law that the criminal trial got concluded in a day or two. That is why the provision of bail was unknown to the society. With the passage of time the criminal trials got delayed day by day and a basic principle of law developed that one cannot be convicted unless the guilt of person is not proved. On the basis of the principle it was deemed unjust to keep a person behind the bar on the basis of an assumption that his guilt is likely to be proved after the conclusion of a trial. The concept of bail emerged to save a person from the police custody which may be for a longer period because the justice delayed has become the normal phenomenon of our criminal justice.

Webster's Dictionary defines bail as follow [1]:-

"Bail is a security given for due appearance of prisoner in order to obtain this release from imprisonment; a temporary release of a prisoner upon security; one who provides bail".

Wharton's Law Lexicon defines bail in the following manner:

"To set at liberty a person arrested or imprisoned, on security being taken for his appearance on a day and at a place certain, which security is called bail, because the person arrested or imprisoned is delivered into the hands of those who bind themselves or become bail for his due appearance when required in order that he may be safely protected from prison to which if they have, if they fear his escape, etc, the legal power to deliver him'.

Stroud's Judicial Dictionary defined "bail" as follows [2]:-

"Bail is when a man is taken or arrested for felony, suspicion of felony, indicated of felony or any such case, so that he is restrained of his liberty. And being by law bailable offereth surety to those which have authority to bail him, which sureties are bound for him to the king's use in a certain sum of money, or body for body, that he shall appear before the justice of Gaole delivery at the next sessions, etc."

In Concise Oxford Dictionary and Chamber's 20th Century Dictionary, the meaning of the world "bail" has been explained as a sum of money paid by or for a person who is accused of wrong doing, as security that he will appear at his trial, until which time he is allowed to be free.

Etymologically the world "bail" has been derived from the French old verb "bail" or having meaning of "to deliver" or "to give". Another view is that the world is derived from the Latin term "Bajalure" which means, to bear burden".

Hon'ble Mr. Justice M.R. Malick, in this book "Bail" has deducted the meaning of Bail [3] as a technique evolved for effecting a synthesis of two basic concepts of human values, namely, the right of an accused to enjoy his personal freedom and the public interest on which a person's release in conditioned on the surety to produce the accused person in court to stand the trial.

The concept of bail denotes a form of pre-trial release or removal of restrictive and punitive consequences of pre-trial detention of an accused. Corpus Juris Secundum defines bail as a means to deliver an arrested person to his sureties, on their giving security for his appearance at the time and place designated, to submit to the jurisdiction and judgment of the court. Halsbury's Laws of England defined it - "Bail in criminal proceedings means bail granted in or in connection with proceedings for an offence to a person accused or convicted of the of

The word "bail" has, nowhere, been defined in Code of Criminal Procedure. The old and the new Code have defined the expression "bailable" and "non-bailable offences" in section 4(1)(b) and section 2(a) respectively Bailable offence has been defined to mean an offence which is made bailable by any law for the time being in force; and the expression "non bailable" to mean any offence other than bailable.

The main object of bail is to remove the restrictive and punitive consequences of pretrial detention of the accused which is made by delivering the accused to the custody of a third party(s) i.e. surety by way of furnishing of surety bonds or to one's own self by ray of execution of personal bond only. Bail may be ordered to be allowed with appropriate conditions covering three different type of situations:

(a) Where the custody is deemed to be safe with the accused himself,
(b) Where it is delivered to the surety, and
(c) Where it may be given to the state for safe custody.

The institution of bail has been made to keep the accused available to answer the charge and in order to perform this function, the institution of bail has been made to deliver the accused to safe custody in aforesaid manner, but in all cases accused is assured of beneficial enjoyment of freedom in regulated manner.

Bail, a vital aspect of every criminal justice system, is a mechanism, which should seek to strike a balance between these competing demands. While presence of an accused person for trail must be ensured and any threat to the administration of justice and just social order warded off, he should not be disabled to continue with his life activities. Custodial remands are also financially burdensome for the

State, both in terms of the detention places, which have to be provided, and because the constant escorting of the accused to and fro from court eats into the resources of the prison staff. Further, detention in jail may have a deleterious effect on pretrial detainees because of the possibility of their developing delinquent tendencies.

Law of bail is one of the important braches of the legal regime, which governs the criminal justice system of any country. 'Bail or jail' constitutes an enigmatic question in the judicial decision-making process, of everyday occurrence and importance, The question of bail-jail alternatives needs to be answered at the stages of arrest, investigation inquiry and trail and also at the stage of appeal after conviction of the accused. The jurisprudence of bail should equilibrate the 'freedom of person' and the 'interests of social order'.

The 'golden principle' of presumption of innocence is of central importance, governing all stages of the criminal process until a verdict of guilty is reached. The law of bail has to be compatible with the principle of presumption of innocence. Any person held in custody pending trial suffers the same restrictions

on his liberty as one serving a sentence of imprisonment after conviction. By Keeping accused persons out of custody until tried convicted and sentenced, bail should protect against the negation or dilution of the presumption of innocence.

The quality of bail hearing by courts must improve in that full information about the accused's background should be taken into consideration, besides what the police submit. Schemes should be developed to has certain and verify the relevant information Courts must think more deeply and give reasons while refusing an application for grant of bail for the cost of pretrial detention is very high. Greater care must be taken in dealing with matters concerning bail. Bail should be treated a basic human and not refused mechanically. If need be, conditions of hail may be stringent, but its refusal must rare. Pretrial detainees may not be punished, but pretrial detention itself, unless justified by overwhelming necessity cannot realistically be viewed as other than a form *of* punishment. Precious human rights of under trail prisoners should not he held hostage to inadequacies of our legal system and various kinds of delays in our criminal justice administration system. Fleeing justice has to he forbidden and escape can he considered a separate crime, but denial of bail should neither be punitive nor 'preventive detention incomplete through, it becomes difficult to rationalize the exercise of discretion one way or the other in a particular case.

Personal liberty is deprived when bail is refused, is too precious a value of our Constitutional system recognized under Article 21 that the crucial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorize impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental one, suffering lawful eclipse which is possible only, in terms of "'procedure established by law." So deprivation of personal freedom, ephemeral or enduring, must be founded on the most serious considerations, relevant to welfare objectives of society, specified in the Constitution. Reasonable ness postulates intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for bifocal interests of justice to the individual involved and society affected [4].

Like any other Constitution of a civilized country, Article 21 of our Constitution provides: -

"No person shall be deprived of his life or personal liberty except according to procedure established by law." So what if in millions of cases, people are routinely being deprived of their personal liberty with "no bail but jail" in the absence of expedited triails and years after KRISHNA IYER, J., having raised the the questions of "Bail or Jail?" in his oft-quoted words!.

Article of 22 of Constitution of India provides [5]:-

(1) "No person who is arrested shall be detained in custody without being informed, as soon as may he, of the grounds for such arrest nor shall be denied the right to consult, and to be defended by, a legal practitioner of his choice.
(2) Every person who is arrested and detained in custody shall he produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.
(3) Nothing in clauses (1) and (2) shall apply-
    (a) To any person who for the time being is an enemy alien or
    (b) To any person who is arrested or detained under any law providing for preventive detention."

It is also recognized in the English Law and American Constitutions. VIth Article of American Constitution provided that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed which district shall have been previously ascertained by law and to be informed of the nature and cause of accusation.

To concept of bail in England may be traced back to the system of frank pledges adopted in England following Norman Conquest where the community as a whole was required to pledge its property as a security for the appearance of the accused at the trial. The concept of community's liability was later on replaced by the system of third person responsibility and there still remained the capacity of the accused to remain free till the conclusion of trial by furnishing security. Thus, under the Common Law of England, the system of interim release pending trial was prevalent, and the sureties had to be bound to produce the accused to face the trial on his failure to appear or to face the trial in his place. It was subsequently replaced by the issue of forfeiture of bond and surety and imposition of penalty upon the surety for failure to bring the accused to trial on the appointed date.

With the advent of British Rule in India, the common Law rule of bail was introduced in India as well and got statute recognition in Codes of Criminal Procedure, 1861 1872 and 1898.

The system of bail was also in use to some extent in the ancient period in India and to avoid pre-trial detention, Kautilva's Arthasastra also advocated speedy criminal trial. The bail system was also prevalent in the form of Muchalaka i.e. personal bond and zamanat i.e. personal bond and Zamanat i.e. bail in Mugal period.

After independence, the Law Commission of India in its 41st Report on Code of. Criminal Procedure also recommended the system of bail in the light of personal liberty guaranteed in the

Constitution and recognized the bail as a matter of right if the offence is bailable and matter of discretion if the offence is non-bailable, denial of power to Magistrate to grant bail if the offence is punishable with life imprisonment, death and conferring wide discretionary power on High Court and Sessions Judge to grant in such cases.

Reference

1. Webster's 7th New Judicial Dictionary.
2. Stroud's Judicial Dictionary, 5th edition.
3. Kamalapati v. State of West Bengal, AIR 1979 SC 777.
4. Babu Singh v. State of U.P., AIR 1978 sc 527 (529).
5. Indian Constitution.

International Journal of Law
ISSN: 2455-2194, RJIF 5.12
www.lawresearchjournal.com
Volume 2; Issue 4; July 2016; Page No. 31-33

Right of victim for compensation in India: A historical background

Rekha Rai

Assistant Professor, Faculty of law, B.S.A College, Mathura, Uttar Pradesh, India

Introduction

The provision of compensation which is being frequently used by courts of different countries and which is considered as a new modern phenomena, is not correct but awarding compensation to victims had a long history. It was a compensation which distinguishes the civil law and criminal law. While the object of civil law is based on the principle of payment of compensation for private wrongs, as a remedy which is pursued through the apparatus setup by the state for that purpose, the system of criminal law functions on the principle of punishing the persons whose behavior is morally culpable. In other words, the very goal of the civil law system is to provide compensation for private wrongs but whereas the system of criminal law aims at punishing the persons whose behavior is morally culpable [1]. It means that purpose of civil is compensation and the purpose of criminal justice is punishing the wrongdoer.

Now this very difference between civil and criminal law has been diluted and compensation is being awarded as a matter of right not in criminal law but also in constitutional law, environmental law and for violation of human rights etc.

The evolution of this concept can be traced both historically and theoretically. There is evidence to indicate that certain categories of the victims of crime were compensated in the older times either by the offender or his kinsmen, or by the sovereign. In earlier law, an injured person or the relatives of one killed could exactly take similar blood feud from the wrong order of his kin. Later it was accepted that Blood-Money could be pain in lien or pursuing the Blood-Feud. (Blood money means money penalty paid by a murderer to the relative of his victim.) Early legal system, commonly move from allowing blood feud to allowing and then requiring payment of blood money, and commonly specify in some detail in the amounts payable for causing the death of a injuries to victims of various degrees. Through the injured person or the relative was allowed by law the option of taking money or taking blood, and certain offence, for example treason were 'botless' or irredeemable and were punishable by death or mutilation & forfeiture of the offender's property to the king the money value set on a man according to his rank.

In the primitive societies the responsibilities of protecting one-self against crime and of punishing the offenders vested with the individuals which reflected the idea of private vengeance. Under this system compensation had to be paid by the wrong doer to the injured persons. As societies got organized in the form of state, the responsibility of punishing the violators of criminal law shifted from the hands of private individuals to the hand of political authorities. The principle however continued where compensation is being paid by the wrong doer to the victim or his family members. This was the position, obtaining from the old Germanic law the code of Hammu Rabi, law of Manu, and Ancient Hindu Law and Islamic Law. This was even confirmed by renowned jurist Sir Henry Maine "The penal law of ancient communities is not the law of crimes, it is the law of wrongs the person injured proceeds against the wrong doer by an ordinary civil action and recovers compensation in the shape of money damaged if he succeeds."

Historically the concept of compensation in crude sense was not only part of Hammurabi's but also existed in developed sense in ancient Greek city state. The concept of compensation was also not new to India and existed in more developed sense than the present, Manu in chapter III verse 287 clearly says that, "If limb is injured, a wound is caused or blood flows, the assailant shall be made to pay the expense of the cure or the whole". He further in verse 288 says that "He who damaged the goods of another, be it intentionally or un intentionally, shall give to the owner a kind of five equal to damage" the quotas regarding the same can be found even in the works of Brihaspati. In ancient India, injuries or loss caused due to offence committed by government officers were compensated by his subordinates or by his family members. Again traders or businessmen who lost their property while traveling through the kingdom were also compensated [2].

Similarly, Section 22 and 23, the code of Hammurabi (written sometimes in 2270 BC) provided that when a traveler had been robbed on a highway and the offender escaped, the entire community of the area had to contribute in order to compensate the victim [3]. At the end of medieval age, the idea of crime as an act against the state took its shape. In such a situation, the state was consider to be the proper authority to punish the offender, the victim of crime however became an irrelevant factor.

In the 19th century however the concept of compensation to the victim of crime was sought to be revived by eminent criminologists like Garofale and Ferry and Bentham in England under the influence of their theories a system of compensation was evolved whereby the victim had to be paid out of the fines imposed on the offender, the state also had accepted the responsibility of paying compensation in varying degrees. Thus, in 1926 Sweden introduced a system in which victims were paid compensation out of the fine imposed on the offenders; some concrete progress was made in Europe, USA and some other countries commencing from early sixties the scheme to pay the victims out of public funds were introduced in the southern and western countries of Europe, Canada, Australia, New Zealand and Switzerland [4].

The 'Anglo-Saxon' [5] first systematically used monetary payments in the form of damages or compensation to the victims of wrongs. Monetary compensation replaced the long standing tradition of self-help justice that allowed the victims

to retaliate directly against those who wronged them often with bloody and disruptive consequences. Some authors have urged that the threat to group life and property posed by victim relation was an important factor in the development and initial popularity of financial penalties. Under 'Anglo-Saxon' law, a sum was placed on the life of every free man, according to his rank, and a corresponding sum on every wound that could be inflicted on his person, for nearly every injury that could be done to his civil rights, honour or peace.

By the close of the ninetieth century, an old correctional aim which was prevalent in ancient societies but disappeared from penal practice at a later stage came up for the penal discussions in many countries as a means of securing social justice to the victim.

Compensation or restitution to victim has particular merit as a substitute for both fine and imprisonment. For over a century, opinion has been developing in favour of restitution to the victim or the victim's family by order of the court. At the beginning of the ninetieth century, some western countries had laws which provided that a person convicted of theft and related offences should return to the owner twice the value of the property stolen. This kind of reaction to crime is non-punitive and is probably a system for implementation of the general non-punitive reaction which has been gaining popularly in recent times in many countries. The great criminologist Lombroso so (in Mannheim pioneers, p. 279) was another voice (apart from Bourneville) in the field of penal reforms who supported the idea of victim compensation and recommended that the victim of a crime should be properly compensated for injury. This would not only be an ideal punishment but would benefit the victim as well. He recognized the difficulties in administering of such a proposal, but his idea was that "the victim should be legally entitled to receive a part of the proceeds from work done by culprit during detention."

Flar-falo supported this idea of compensation, he thought that the damages are to be assessed in sufficient amount not only adequate for complies indemnification of the injured party but to cover the expenses incurred by the state as a result of the offenders dereliction if the offenders means are thadequase, his labour must be devoted to the required reparation. The third International Juridical congress at Florence (1891) recommended the Institution of a "Compensation fund" [6].

Under Islamic law, compensation could be paid by the wrongdoer to the victim when so demanded by the victim or his heir as an alternative to retaliatory killing even in case of homicide [7].

In brief, the law relating to compensation to the victim of crime that even existed in ancient civilization of East as well as West, as far as tracing of gradual evaluation of the concept is concern the whole area till mid 1990 can be generally divided into the three parts. In initial year human civilization when the human started living together specially after stone Age, because of the absence of whole of law and authoritative political institution, right to punish or rather might to punish (in from for eye or money) was with the individual and hence in crude sense, the concept of compensation existed as that time even but line of canton that need to be bear in mind is the fast that in primitive society criminal-victims relationship was based on brutal mentality of attack being the best defense.

Then came the area in which the social control in terms of mechanical solidarity creped in the society and the offence against an individual lost its individualistic character and now the offence was considered to be against society due to advent of concept of collective responsibility. The third stage started with the advent of strong Monarch after medieval period in this stage on one hand law saw far reaching change in all its discipline but on other hand, the position of victim right to compensation remind unheard due to advent of more strong institution named state and crystallization of a notion that kind state is parent of his subjects and crime is breach of peace of king or state. So it was the kind state who had the right to punish and get monetary compensation. This position reminded as it is even with advent of democracy and the cause of victim revived unnoticed until 1950 and after that a movement started in USA and European countries and the concept again got prominence.

In India, the concept of compensation goes as far back as 1857, when as attempt was made to regulate the pollution produced by the oriental gas company by imposing fines on the company and giving a right to compensation against the for fouling water [8].

In India, the civil courts played a limited role to combat pollution and offered no relief for violation of environ-legal right. In personal injury cases, the courts hardly awarded compensation for non-pecuniary loss. However, the courts made awards for pain and suffering or loss for amenities of life but the compensation awarded was notoriously law. However, there was an exception when a substantial sum was awarded as a compensation against a persistent industrial polluter in Calcutta where the Calcutta High Court awarded damages of rupees one thousand [9]. In *Bhopal Mass Disaster case* [10] the civil court awarded compensation to victims of industrial Mass Disaster. Thus, a claim or action for compensation is result of harm which has been caused to an individual by a private person or public authorities through their acts, omissions and commissions. In *Monongahela Navigation Company vs. U.S.* [11] it was stated that "The noun compensation standing by itself carries the idea of an equivalent thus, we speak of damage by way of compensation, or compensatory damage as distinguished from punitive or exemplary damage, the former being the equivalent for injury done and the latter by way of punishment.

The emergence of right to compensation under India constitutional law is not very old. It was the late eighties, when such concept started to grow in India under constitutional law. This was the innovative concept developed by Indian judiciary for securing the justice. The compensation is awarded is generally on the basis of the entitlement of the claimant at the law. The modern concept of justice is more concerned with providing relief to victims then the necessities of legal principles.

Reference

1. Hall, Objectives of civil and Criminal Laws 1943; 13:753.
2. Sec. Arihasashrta by Acharya Vishnugupta (Chankya), Translated by Bharatiya Yogi, Ist Ed., Adhyaya 21, Adhikaran 2, 206.
3. See Mnelber, Tort, Crime & the primitive journal of crime L.G. & P.S. 1955, 317.
4. Ahmad Siddiquiee, Criminology: Problem and Perspective, 1993, 551.
5. Chad wick H, Studies on Anglo-Saxon Dustitutions (1905) High D. Barlow, Introduction to Criminology 1970, 453.

6. Quoted in: Subhash Chandra Singh, “Compensation and Restitution to the Victims of Crime”, 1992 Cri. L.J. p. 100-108 at 1032.
7. M. Cheri Bassionni. The Islamic criminal justice system, London, 1981.
8. SS. 15-17 Oriental Gas Company Act, 1857 quoted in: V.S. Mishra, “Emerging right to compensation in Indian Environmental Law”, Dehli Law Review 58-79, at, 2001, 58.
9. Galstaun JC, Dunia lal V. Seal 9 CWN 612, 1905.
10. Union Cabridge Corporation VS. Union of India, AIR N. OC (50) M.P, 1988,
11. 149 U.S. 312, 1892.

International Journal of Law
ISSN: 2455-2194, RJIF 5.12
www.lawresearchjournal.com
Volume 2; Issue 4; July 2016; Page No. 34-41

DE facto partnership under the OHADA uniform Act

Dr. Victorine Kamgoui Kuitche

Senior Lecturer; Faculty of Law; University of Ngaoundere-Cameroon

Abstract

Moral personalities seem to gain grounds in law today, but loses at the practical level. While the personification of companies presents a progress, many of African entrepreneurs are out of the sphere. This situation usually results from, ignorance or disobedience. Those involve are not aware of the formality of registration [1]. For this reason, many entrepreneurs find themselves in uncomfortable situations. Their comportment towards each other results to their treatment as a regulated company. That is where de facto partnership intervenes.

According to article 4 of the Uniform Act of OHADA [2] relative to Commercial Companies and Economic Interest Groups, a company can be created by two or more people who accept through a contract to allocate to an activity, goods in cash, in kind, with aim to share the benefits that might result from it. The associates also engage themselves to share the deficit under the conditions provided by the present Uniform Act [3]. For such company to have a judicial life, it has to fulfill certain conditions, such as, the incorporation in the Trade and Personal Property credit Register (TPPR).

Moreover, the commercial character of a company is recognized either through its form or its object. The uniform act considers four forms of companies as commercial. They include; limited liability company (SARL) [4], limited joint stock company (SA) [5], "Société en Commandite Simple" (SCS) and "Société en Noms Collective" (SNC) [6]. Any commercial companies found in one of the member states of OHADA must respect the form of one of these companies. Otherwise, they will be under the regime of nullity.

The immoral effects of nullity, has caused the case law to remedy the situation to compensate good faith partners and third parties by conceiving of the theory of de facto partnership. It is defined by article 864 of the uniform act relating to commercial companies as "a situation whereby, two or more physical or moral persons behave as associates without constituting any of the legally recognized form of company".

The interpretation of this definition shows that de facto partnership is deduced from comportments, that is, it is a situation where two or more persons behave as associates, without expressing the will of forming a company [7]. De facto partnership is the fruit of behaviors between persons (concubines, parents, and friends). The legal qualification is done by the court or by the tax administration. This qualification is always done in cases where the partners officially had no legal relations between them. It can happen that, they were openly linked by a contract and the qualification of De facto partnership comes to establish the progressive transformation of their initial contractual link. that is why MM. Viandier and Caussain defines the facto partnership as " a subsidiary instrument whose utility and efficiency is seen only when the relations between the parties do not dwell in a real, perfect and well defined contract" [8]. This qualification intervenes generally at the occurrence of litigation either between associate or with third parties. The qualification can also be evoked out of court, by tax administration in its desire to submit behaviors to the tax regime of De facto partnership.

De facto partnership is under the regime of nullity, but the legislator finds the interest in its regulation in the uniform act. This regulation shows the interest with which the legislator wants to protect partners to an agreement and also third parties who contract with them, even in the informal sector. The regulation of De facto partnership highlights the OHADA legislator's worry to establish equality between parties to a contract and also to fight for the interest of good faith third parties. The questions we shall answer in this piece of work concerns the qualification of de facto partnership, and the legal rules that are applied it. To answer all these questions we shall examine the qualification of De facto partnership (I) and discuss its judicial regime (II).

Keywords: OHADA uniform Act, partnership, entrepreneurs

1. Introduction

The qualification of de facto partnership

De facto partnership is a sort of company which is not legally acknowledged. Its acknowledgement intervenes only during its dissolution. This is because at the constitution, the founders do not undertake any procedure for its judicial acknowledgement [9] neither do they have the intention to constitute a company.

The uniform act related to commercial companies and economic interest groups provided four legally recognized companies that can serve as a base for the operation of commercial activities [10]. These compagnies include; « Société en Noms Collective » [11], « Société en Commandite Simple » [12], « Société à Responsabilité Limité » [13], and « Société Anonyme ». In order to obtain their commercial character, they must be incorporated in the Trade and Personal Property Credit Register. There are other sorts of companies that operate without incorporation either because of ignorance or disobedience; they include "société en participation" and de facto partnership.

Our interest here is on the conditions for the acknowledgement of de facto partnership. It does not intervene before the moment of dissolution as is the case with other forms of

companies whose acknowledgement is automatic after the fulfillment of all the conditions of the constitution. Its existence is not based on an agreement between partners but rather, on the way they conduct themselves towards each other or towards third parties [14]. This conduct reveals itself most frequently in economic relations within the family [15], or even out of the framework of the family.

1.1 The acknowledgement of de facto partnership within the family

Most of the times, de facto partnership is being qualified within the members of a family. It is thus that, a famous court decision of 1974 decided that, de facto partnership can be qualified between an entrepreneur and his two brothers [16]. In this case, though the two brothers appeared in the pay book as wage-earners, they played an important role in the business; one of them acted a true animator, treating with suppliers and being considered by them as an associate. In this case, it was considered that, their contribution is by industry and their participation to the benefit result in that, the assets of the company is at their disposition. The situations where the qualification of de facto partnership is rampant are between concubines and between couples [17].

1.1.1 The qualification of de facto partnership between concubines

The law of 15th November 1999 integrated the definition of concubine in the civil code. According to article 515-8, the unique disposition of chapter two, of title seven in the first book of the civil code, defines the notion of concubine as "a union of fact, characterized by a common life, stability and continuity, between two persons of different or the same sex that live together as couples". It has a legal definition but it's not regulated by law. During the period of concubinage, so many activities are undertaken by the couples such as the involvement of one partner in the economic activities or business of the other. At the breach of this relationship, there is the need to regularize their patrimonial relations, which can be through the institution of an action of participation, destined to permit the equitable interest of each concubine. This specific action can lead to the qualification of de facto partnership [18].

There is much interest in the qualification of de facto partnership between concubines. Interest for creditors who can envisage it in other to operate a collective procedure against each of the concubines, and interest for one of the concubines who might have laboured in the personal business of his partner, they can request for the qualification of de facto partnership after the breach of their relationship, or at the death of the partner as a useful palliative to solve her problems [19].

The case law and the doctrine decided that, for the relationship of two concubines to be qualified as de facto partnership, it has to fulfill certain conditions. According to article 1832 of the civil code, the existence of de facto partnership between concubines demands the union of all the characteristic elements of a legal company which include; the existence of contributions, the intention to collaborate in an equal measure to the realisation of a common project, and the intention to participate in the benefits and the eventual deficits of the company; and finally, the determination of affectio societatis. The article also provides that, the cumulative elements have to be established separately and cannot be deduced one from the other [20].

Concerning contributions, it can be done in cash, in kind [21] or by industry. As to what concerns contribution by industry, it is greatly characterized in de facto partnership. The uniform act is contented in mentioning the existence of eventual contribution by industry without precising it regime. It is generally constituted by the hand work or the activities that the contributor effectuates or promises to effectuate in reason of his commercial or technical competence, or by the services to be rendered through his knowhow or his experience [22]. The contributor by industry is not subordinated to his co-associates; he does not receive a salary, but an eventual benefit from distributable dividend just as other associate. The contributor by industry has to be loyal to his co-associate; he has to conserve his industry only for the company and not to himself nor to the competitor [23].

Effectively, the particularity of de facto partnership is that, most of the contributions are done by industry. Especially, in de facto partnership between couples and concubines, where one of the spouse is founded to claim the existence of de facto partnership if her contribution is only by industry.

The acknowledgement of de facto partnership passes through the notice of the common search of benefits and the participation of every one to the positive results of the company [24] and even to the negative result [25]. The position of the case law is clear; there will be no acknowledgement, if one of the partners does not bear with others, the risk of the business.

Concerning affectio societatis, it is commonly called "the spirit of associate. It does not benefit from any legal definition. Gerard CORNU defines it as a psychological link between associates; it is one of the constitutive elements of a company whose components are the absence of subordination between associates, the will to collaborate to the advancement of the company by participating actively, or by controlling its management, and the acceptance of common risk. The constant case law gave a definition to affectio societatis in a decision rendered on the 9th November 1981. The commercial and financial chambers of the court of cassation estimated that, to decide for the existence of de facto partnership between concubines, instance judges have to examine, if the parties have the will to exploit their business in an equal measure, to share the benefits and the loses in case of deficit.

In the determination of the facto partnership between concubines, it is presented in a particular manner, given the fact that the member of de facto partnership does not manifest their will to be associates. The court essentially, verifies if the elements of affectio societatis are gathered. It is under these bases that, the case law is globally reserved in the establishment of de facto partnership. The case law considers that, the notion of de facto partnership used by concubines to remedy their patrimonial relations is a lame palliative, and that the simple community of life is not constitutive of the facto partnership. It is the same line that Jerome Bonard [26] says "affectio societatis is not affectio maritallis" [27]. In this case, two concubines envisage buying a land for construction. The man bought the land alone, both subscribed as co-lenders to finance the construction. Many years later the house was sold by the man. And the woman evoked the facto partnership in order to obtain half of the product of sale. She obtained a favorable decision before the court of appeal of FORT-DE-FRANCE in the decision of 16 august 2007. For the court of appeal, co-lending for the financing of the common project,

testifies the presence of affectio societatis, their goal being to have a stable family life. The court of appeal had it that, the concubine assured the upkeep of the house; these elements show the concubine's will to participate in the benefits and loses of the home. Thus, the qualification of de facto partnership.

The vigorous nature of the case law is justified by the existence of other means of resolving patrimonial issues between the concubines. To be in a relationship of concubinage, necessarily implies the acceptance of the risks of breach. At the occurrence, the parties are usually in a situation of patrimonial misunderstanding. At this stage, the parties can make use of so many parameters such as, civil responsibility, unjust enrichment [28] or case management.

1.1.2 The qualification of de facto partnership between couples.

Most frequently, the court qualifies as de facto partnership, the exploitation of an individual business in common by a couple married under separate property [29]. This claim can be evoked either by the spouse or by a third party [30]. It is mainly done by the creditors of one of the spouse, who can demand the payment of his credit from both partners [31].

The condition of separate property regime is because; each party has an exclusive right of ownership on his property, with its risks, debts, and credits. Thus if both parties intervene in the same economic activity, there will be at the need to regulate the patrimonial relations, based on the confusion of patrimony that has occurred between them.

A good example of de facto partnership between couple was given by the decision of the commercial chamber of the court of cassation on the 16th December 1975 [32]. In this case, the woman under the regime of separate property acquired a business with her husband and proceeded with lending operations, to ameliorate the arrangement of the business, commanded products and accepter commercial debts. Both were condemned to pay the bills of the merchandise. In this condition, the couple made contributions in cash and by industry both had the intention to be associates [33]. At divorce, the spouse can claim the existence of de facto partnership.

The situation of business co-exploitation by a couple has brought up this question. Can the spouse that co-exploited a common business, obtain with her husband the quality of merchants? The French law gives a negative response. The article L. 121-3 of the code of commerce disposes that, "the spouse of a merchant can obtain the quality of a merchant only if she exercises an activity different from that of the husband". Even the OHADA law prohibits that, for the sake of the protection of the family property. It is after a while that a good number of the doctrine and the case law decided that in case where the woman plays an important role in the business, there can be the presumption of commerciality. That is where the case law came to decide that, the quality of merchant can be given to both spouses [34]. It is to illustrate this that, in a decision of 17 June 1958, the commercial chamber admitted that two couples could be declared in bankruptcy if the court of appeal pronounces the bankruptcy of the de facto partnership that existed between them. This position is supported by the rule of equality between men and women and also on the disposition of article one of the code of commerce [35]. Thus, if they exercise the same trade under the same condition, with the same authority, in a conventional manner, they obtain the quality of merchants by application of article one above. The English law has added yet another condition through the case of Texas Partnership. The court reviewed the development of Texas Partnership law with respect to determining the existence of de facto partnership. The court stated that, the following five factors test for de facto partnership formation: the intention to form a partnership, the community of interest, an agreement to share profits, an agreement to share loses and mutual right of control and the management of the enterprise [36]. The party claiming de facto partnership has to proof the existence neither of these characteristic elements which is not an easy task neither for the parties involved nor for the judge. Hence, the acquisition of the quality of merchants by both spouses will automatically lead to the qualification of de facto partnership. Consequently, just as associates in a regular company, the creditors can decide to claim their debts on the property of each of the couples [37].

The acknowledgement of de facto partnership within the family has far reaching consequences, especially when the spouses are qualified as merchants. It puts the family property in jeopardy. It opens the possibility for the collective procedure against both of them [38]. There is also the possibility to declare them bankrupt. The existence of the facto partnership leads to the acknowledgement of a collective and a definite responsibility for social liabilities against both partners. What about the acknowledgement of de facto partnership between associates.

1.2 The qualification of de facto partnership between associates

The facto partnership can also be qualified between the members of a company such as a company under formation and others situations.

1.2.1 The qualification of de facto partnership in a company under formation

De facto partnership is a company that is deprived of moral personality just as a company under formation. But in de facto partnership, there have never been the desire to belong to a company, while the company under formation is growing towards legal recognition. How can we then admit that a company under formation marked by this, be degenerated to a de facto partnership [39] Nonetheless, the case law and the doctrine, to a certain measure admit the requalification of a company under formation to de facto partnership.

The case law and the doctrine hold divergent views concerning the conditions of its requalification. If the case law has admitted that a company under formation becomes de facto partnership, it varies on the criteria that permit such transformation. First of all, the union of all the elements of the constitution of a company [40], when once one of these elements are lacking, there will be no company, thus its requalification as de facto partnership. The case law also makes use of the criteria of the nature of act undertaken, and the intention of the author of the act to make the difference between de facto partnership and a company under formation. In the decision of 13th may 1997, the court of appeal of Paris made reference to the character of the act and the intention of the parties [41]. As fact, societe espace corée' under formation represented by its director, concluded a contract of location on the 7th September 1990 but the company was incorporated only on the 23rd October 1991 [42]. Within the interval of time, one of the associated signed a bounced check on its personal account for

money due by the company. Creditors then evoked the facto partnership. Another criteria used by the case law is the quality of the founder of the company. On the 24th September 1991, in a case concerning principally the quality of the founder of the company, the court of appeal concluded the existence of a company under formation because of the divers material acts undertaken by those concerned: signature of an agreement protocol, precise studies comprising notably of supplies, and a commercial plan of action, the accomplishment of various formalities including the demand for the designation of capital contributions appraisal and the complaint towards the partners against the weak nature of preliminary operations to the signing of statues.

The facts were as follows, an enterprise and an individual entered into discussion in order to constitute a common company. Divers expenses were done by the enterprise but the company was not constituted. The enterprise claimed half the expenses under the pretext that both were the founders of the company. Following the decision of 13th may 1997; the court of appeal of 13th June 1997 gave as criteria of transformation of one company to the other, not only the execution of commercial activity but also the realisation of an important turn-over [43].

From these decisions we notice the objective criterion: the beginning of social activity. This element of distinction appears to be preferable to that of the intention of parties [44]. In fact, contrarily to the last a criterion, the beginning of social exploitation is a material fact that is easily verified than the study of wills which is to the advantage of partner. This because, they will know at what moment the company will be transform into de facto partnership. They will know how to protect themselves from eventual surprises concerning the scope of their responsibility towards third parties. Moreover, this materiality facilitates the signing of diver's contracts for they will lessen the risk of seeing the creation of the facto partnership for acts of less important [45].

Concerning the doctrine, three conditions can cause the requalification of a company under formation. First of all, every company has to respect the time limit for the incorporation at the TPPR [46]. After this time limit, if the company has not acquired its moral personality, it is transformed into de facto partnership. This is because in economic affairs, economic actions always precede judicial information through its incorporation.

Another part of the doctrine thinks that, what determines the choice between the facto partnership and the company under formation is the beginning of social activity. Mr. Chaput makes use of another material element: the accomplishment of isolated acts. As soon as these acts are accomplished, if they arrive at a true commercial activity without incorporating the company, it will have to be qualified as de facto partnership [47].

Today, the case law considers that, the criteria of transformation from a company under formation to the facto partnership is found in the "important and durable manner of an activity which is more than the accomplishment of simple acts, necessary to the constitution of the company ".

1.2.2 The qualification of de facto partnership in other situations

De facto partnership can also be qualified in a situation of joint ownership. Though the law of 31 December 1976 relating to the reform of joint ownership, and the law of 4th January 1978 reforming the title of the civil code, relatively renewed the conception of joint ownership and its relationship with the company, the distinctions between the two notions are not less uncertain as before [48]. The doctrine proposes to distinguish joint ownership from a company by considering the subjective criterion of the will power [49]. It is justified by the fact that, the two institutions are fundamentally opposed by the intention that animates the respective parties. While the parties have the intention to continue their activity together in a framework of joint ownership, other parties are forced to exploit together because of the nature of the subject matter. Nonetheless, the dynamic exploitation of the property means, the existence of affectio societatis.

Consequently, the case law and especially in fiscal matters, proceeds through the requalification of the situation of joint ownership into a company either "société en participation" or de facto partnership, each time that the joint owners use their property as a common enterprise, without seeking to know if this situation is compatible or not with the qualification of joint ownership.

Also, the expiration of a convention of joint ownership can lead to its requalification as de facto partnership. It is important to note that, subsidiary character of de facto partnership prohibits its acknowledgement when the company is legal, constituted to realise a particular objective [50]. It also prohibits the qualification as associates, parties to the convention of joint ownership. But when the convention expires, the prohibition ceases. The ex-joint owners can become associates. This solution was given by the court of Appeal of Paris [51].

To this effect, after the time determined for the convention, except in case of renewal, the parties to the convention take a risk of requalification if they continue to manage together the joint property. They might become associates of de facto partnership.

Concerning the group of company, it can be qualified as de facto partnership at the demand of creditors of the insolvent company. A group of company having worked together can eventually become de facto partnership [52]. This does not happen in every situation. But the qualification of de facto partnership in a group of enterprise depends on whether; the company members of the group fulfil all the constitutive elements of a contract of company. That is why the judges can admit or reject the requalification.

A group of company can constitute de facto partnership when the companies grouped together, tendered together in a common goal, to a public work and each of them bringing their knowledge and their competence, that is, bringing together all the potentials of their respective activities, in order to obtain the result. Moreover, it should be through the means of these potential that the group of enterprise realised the work or the objective of their group.

2. The judicial regime of de facto partnership

After the qualification of de facto partnership, it is considered as a legally formed company and thus treated as one. The rules that govern "Société en Noms Collectives" are then applied on it. But before then, its validity has to be verified. When it is proven, it gives rise to diverse consequences.

2.1 The validity and proof of de facto partnership

It belongs to the judge to determine whether there is or not de

facto partnership. Before he does that, the claimant has to proof its existence and the judge verifies if the elements necessary for its qualification present. Thus the validity of de facto partnership lies in the hands of the judge (1) while the proof is in the hands of the claimant (2).

2.1.1 The validity of de facto partnership

For a common activity to be qualified as de facto partnership, the parties involve have to satisfy all the conditions of the validity of the contract [53]. These conditions include consent, capacity, object and cause. That is to say, any company that reposes on an unlawful cause could be null [54]. De facto partnership cannot result from a simple project of company [55]. In a case, it was decided that, an abandoned project of company could not be qualified as the de facto partnership because of the short duration of collaboration between the partners. In order to receive the stamp of validity, de facto partnership has to benefit from at least a beginning of execution [56].

What is particular about de facto partnership is that, it is acknowledged only at the moment of its liquidation. It is just a normal fact, given that; the parties during their activity have no intention to have their activity recognised as a company. De facto partnership is just the result of a simple economic compartment between parties. One party can evoke the its presence only at the end of their relationship in order to obtain a part of the fruits of the economic activity which he cannot obtain if he does not evoke the qualification of de facto partnership. As example, In the case of de facto partnership between couple or concubines, at the existence of the marriage or the relationship of concubines, the economic activity can be the personal property of either of one spouse or of one concubine. It is only at the breach of concubinage or at the divorce that one of them would evoke de facto partnership so that the economic activity belonging to one partner, object of the common exploitation could be liquidated as de facto partnership so that she can benefits from its fruits.

Apart from the partners, third parties can also evoke de facto partnership. In a case the court of cassation decided the liquidation of de facto partnership that existed between couples evoked by a third party. It is aimed at opening a collective procedure against the partners to ode facto partnership. When evoked by a third party, the judge can liquidate the company in other to compensate the creditors (third party). But yet, he has to bring the proof of what he claims.

2.1.2 The proof of de facto partnership

By principle it belongs to the person who alleged the existence of something to bring the proof of its existence [57]. If one of the associate of de facto partnership wants to establish its existence, he has to start by bringing out the different elements that constitute the contract of company. The claimant can either be a third party or a partner.

When the proof is brought by a third party, it is more relaxed. Third parties can evoke de facto partnership without proving the constitutive elements of the contract of society. It can be done through the theory of apparence [58]. It was decided that, a person who created the apparence of a company where he is an associate before third parties is held by the obligations contracted with these third parties.

When the claimant is an associate, the regime of proof becomes stiff. The associate has to start by bringing out the different elements that constitute the contract of company. These elements include contributions, affectio societatis, participation to gains and losses. The proof of these elements has to be done separately and not deduced one from another as analysed earlier. The concubine that wishes to establish the existence of de facto partnership in their common business has to demonstrate the existence of material contributions different from the charges of home upkeep and affectio societatis has to be demonstrated different from the desire to have a common life with the partners [59].

Moreover, the associate has to bring the proof of the fulfillment of the general conditions for the validity of a contract. He has to bring the proof that the associates have the capacity, their consent are clear and the object and causes of de facto partnership are lawful, without which the judge cannot decide on their partnership.

Nonetheless, the court of cassation has a sovereign power of appreciation over the proof of de facto partnership. Every means can be used to bring the proof of de facto partnership. The instant judges have the sovereign power of appreciation of the elements of proof submitted to them [60]. But the court of cassation does not abandon the judicial operation of qualification in the hands of the instance judges. In others word, with the elements of proof sovereignty appreciated, the court of cassation controls to see if the instance judges, had sufficient elements to admit the existence of de facto partnership [61]. According to the administrative high court, de facto partnership has to unite all the elements of the constitution of a company [62]. The absence of one of these conditions is an obstacle to the proof of the existence of de facto partnership. In a case where two brothers exercised together a fishing activity, and participated in an equal measure to the assets and charges of exploitation, the council of states decided that, the only fact that, they fished together on the same place but with their respective boats does not suffice to characterise de facto partnership [63].

On the fiscal domain, the particular fiscal regime applicable on de facto partnership has led the administration to take certain positions: in an instruction of 19th October 1984 the fiscal administration precise his criteria of the existence of de facto partnership. According to this case law the facto partnership supposes the union of three conditions: each member has to effectively participate to their contributions in cash, in kind or by industry; each member has to participate effectively to the management of the enterprise; to the functioning, the direction or the control and have to be able to engage the company towards third parties. Finally, each member has to participate effectively to the benefits or the deficit result of the enterprise. By principle the criteria of participation to the result is established in a written convention that provides a repartition of these results between the associate of facts. Meanwhile in the absence of this convention, it can result from the perception of a variable remuneration that remains sensibly equal to the proportion of benefits. The facto partnership can exist only between associate that fulfill simultaneously all three conditions [64]. This is to distinguish de facto partnership from a simple help between agricultural exploiters.

2.2 The effects of de facto partnership

The most glaring trait of de facto partnership is the lack of moral personality. This result from the fact that de facto partnership is not incorporated in the TPPR. It does not also

have a judicial existence.
De facto partnership has no proper patrimony. The contribution of each party does not constitute the patrimony of the de facto partnership but it belongs to each contributor, such that at his departure or at the dissolution of the company he can collect his property. Concerning goods and property found under joint ownership in the company, before the law of 4th January 1978, it was judge that any acquisition done in the frame work of de facto partnership could lead to a joint ownership. Towards third parties, each associate remain proprietor of the property he puts at the disposition of the company. It can also be agreed between associates that, one of them be towards third party, the proprietor of half or all of the goods acquired, for the realisation of social object.
Another consequence of the absence of morale personality is the inability to act in court not even for the recovery of credits [65]. De facto partnership cannot undergo collective procedure because it has no personal property. The only possibility is to act against each of the associates. It cannot also be represented in court because of it legal inexistence. But the partners of de facto partnership can either individually or collectively undergo collective procedure in case of confusion of property or of joint ownership.
The notion of confusion of patrimony, from first sight has no relationship with unincorporated companies. It is a notion linked to incorporated companies [66]. But the notion does not remain on incorporated companies alone. Though highly contested, the confusion of patrimony has acquired its autonomy. It was admitted by the case law, not only where there is fictively but also in situations where two or more physical or moral persons whose interests and patrimony are in a confused state [67]. The confusion of property renders inapplicable a procedure against one person. The only solution is the application of the procedure against all those whose patrimony is in a confused state.
The conception of confusion of patrimony permits to solve difficulties that come up with unincorporated companies such as de facto partnership between couples. The existence of de facto partnership is the consequence of the confused state of the patrimony of concubines. It is always easy in such cases to establish the confusion of patrimony considering the solution admitted by the case law.

2.2.1 The assimilation of de fact partnership to "Société en Non Collective

As earlier said, the governing rules of SNC are applied on de facto partnership. This is appreciable at the level of the fiscal regime. The fiscal regime of SNC is characterized by a remarkable flexibility, because the participants have the latitude to moderate the regime of imposition to benefit their situation. According to article 8 of the general code of taxation, the associates of SNC are personally submitted to taxation according to the revenue of social benefit corresponding to their right in the company. But this is only possible under two conditions [68]; the associate has to be collectively responsible, and their names and address have to exist in the administration of taxation.
Far from manifesting some sort of autonomy, the fiscal administration has purely and simply adopted the position of private law [69]. Article 6 -1 of finance law of 1979 certified the assimilation of the fiscal regime of de facto partnership to that of SNC.
The paradox in this situation is that, persons that are not aware of their belonging to a company are being imposed with the obligations of accountancy. A ministerial response added that, the assimilation of de facto partnership to the rules of SNC, is extended to the rules relative to the obligation of contribution; "the associate of the facto partnership are held by the obligation to pay the charges of contribution and to deposit the receipt of taxation at the administration territorially competent. Moreover, the transfer of the governing rules of SNC to de facto partnership is not perfect.
The dispositions of article 1873 of the civil code that provides the application of the rules of SNC to de facto partnership has always been approved because of the resemblance that exist between the two form of companies. But certain authors reserve their approval because of the different perspectives that animates the two companies. The facto partnership is an ignored company even by their founders, SNC is a contractual company wanted by the parties. We think, those who choose this regime did not measure the consequences.

2.2.2 The dissolution of de facto partnership

De facto partnership is not a company created willfully by the parties. So they cannot determine the duration of the company; it exists only as long the associates allow the contributions at the disposition of the common enterprise and when their consent to remain in the activity exists. The court of appeal and the court of cassation decided in a case where a couple transferred their contributions to another couple that, such action is a proof that they no more had the intention to remain associates; and wanted to dissolve the partnership [70].
The causes of dissolution of de facto partnership are numerous; the death of an associate can lead to the dissolution of de factor partnership just as in the case of SNC [70]. But the solutions would be different if there's the convention stipulating that, there will be the continuation of the activity in case of the death of one party. In the absence of such convention, the dissolution of de facto partnership leads to the fiscal consequences of the cession of the enterprise toward the associate. When the de facto partnership has a civil object, the death of an associate does not lead to an automatic dissolution of the partnership, in application of the combined disposition of article 1871-1 and 1870 of the civil code. According to article 1870, the civil company cannot be dissolved after the death of an associate, except there is contrary disposition in the convention of its creation.
Another cause of the dissolution of de facto partnership, not too different from the above is the resignation of an associate. This resignation can lead to the dissolution of the partnership if, it contained only two associates an also if the outgoing associate sells his shares to his partner [71]. If the outgoing associates concedes his share to a third parties, his resignation cannot lead to the dissolution of the de facto partnership and thus no fiscal incidence.
The exclusion of an associate from de facto partnership can lead to its dissolution. The associate of fact that brutally dismiss his partner from the partnership can be sanctioned to pay to the later, indemnities. The foundation of this sanction is found in the fault committed by the author of the breach [72].
Misunderstanding between associates can also lead to the dissolution of the partnership. It is an anticipated dissolution that can occur only in the case where, it has as effect to paralyses the functioning of the partnership. Moreover, the

union of the entire shares into one share can cause the dissolution of the partnership for it becomes a "one person enterprise".

Considering the fact that the qualification of de facto partnership is to protect third parties and good faith partners, it is normal that its dissolution be evoked by any of them. Third parties can evoke de facto partnership to profit from the liquidation. Instead of benefiting from an action against one associate, through the qualification of de facto partnership, third parties can benefit from an action against all of the associates indifferently. This is easier when the third party is of good faith.

3. Reference

1. MEUKE B-Y. la société non personnalisée dans l'OHADA « Etude de l'impact de l'absence de personnalité morale dans la société en participation » www.ohadata.com, Ohadata D-066-01, 1.
2. Organisation for the Harmonisation of Business Law in Africa. The instating treaty was signed on the 17th October 1993 and comprises of 16 member states including Cameroon. The uniform Act relative to commercial companies was adopted in Cotonou, Benin on the 17 April 1997 and became effective on the 1st of January 1998 and is affirmed as a work of judicial and economic integrations. The other signatories of this treaty include; Benin, Burkina-Faso, Central African Republic, Comores, Congo-Brazzaville, Ivory Coast, Gabon, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo. See introduction ANOUKAHA (F), *et al*. OHADA Commercial Companies and Economic Interest Groups (GIE), Bruylant, Bruxelles, 2002.
3. The 1st slash of article 4
4. Société a Responsabilité Limitée
5. Société Anonyme
6. Article 6 AUSCGIE
7. Ripert et Roblot, Trait traité élémentaire de droit commercial, LGDJ, t. 1, n° 725.
8. CA Paris, 1st chamber of commerce, 12 march 1992, Parisbas c/ Gentel, JCP ed. E 1992; I:172, 402.
9. Anoukaha F. OHADA, société commercial et groupe d'intérêt économique, coll. droit uniforme OHADA, Bruylant, Bruxelle 2002, 525.
10. Article 3 of the uniform act.
11. The SNC, according to the article 270 of the uniform act is a company where all the partners are traders and have unlimited liability for the company's debt.
12. the SCS according to article293 of the uniform act is a company in which one or more partners with limited liability for the company's debts referred to as "active partners" co-exist with one or more partners liable for the company's debts up to the limit of their shares referred to as "sleeping partners" and whose capital is broken down into partnership shares.
13. Article309 of the uniform act defines a Private Limited Company (SARL), as a company in which the parties are liable to the company's debt up to the limit of their contribution and their rights are represented by company shares.
14. Anoukaha F. op. cit, para. 1179-1180; Pougoué *et al*., le droit de la société commercial et groups d'intérêt économique OHADA, PUA, 1998; 525-526, 264, 615, 616.
15. Anoukaha F. op. cit. 528-531.
16. Cass. Com., 1974, n° 73-12.919, Revue société 1975, 492.
17. Anoukaha F. op. cit. 528, 1188.
18. Le concubinage académie des sciences moral et politique – http://www. asmp. Fr.
19. Lamy, société commercial, éd. 2006
20. Court de cassation, 20 January 2010 n° 58 FS p. 225
21. Articles 41 to 49 of the Uniform Act relating to commercial companies
22. Article 50 of the uniform act related to commercial companies and economic interest groups.
23. Anoukaha F, Nguebou Toukam J. droit des sociétés dans l'Acte uniforme OHADA, PUA, 2008.
24. CA Paris. 29 Mai 1992, RIVP c /Minot, Rev. Société 1993, 797.
25. The commercial chamber of the court of cassation, 13 October 1992 n°90-18.745 and 90-18, 746
26. Commentaire de l'arret de la cout de cassation civ.1er ch.20 janvier 2010 no 08-132000
27. Jerome Bonard, mannuel de droit de societe,Hachette superieur 6eme ed. 2009/2011, 41
28. Terre F. droit civil, les obligations, dalloz, 10ém éd. 2009
29. Dekeuwer Defossez F. Mariage et société, in aspect actuel du droit commercial
30. Ngeubou Toukam J. société créée de fait entre époux en droit camerounais. Revue de droit camerounais de management, Revue trimestrielle de l'Ecole Supérieure des Sciences Economiques et Commerciales, n° 8, 1989, 66
31. Maubru. Les société créée de fait entre époux in mélange DERRUPPE, 1991, 275.
32. The commercial chamber of the court of cassation, 16 November 1981, n° 80- 10780, Rev. Société note Chartier. 1983, 91
33. The commercial chamber of the court of cassation, 6 October 1980, n° 80-90.351.
34. Com, 5 decembre 1967, Bull. Civ.III,no 404,p.381:RTDcom.,1968,389,obs.Houin
35. Are merchants, all who exercise commercial acts and make them their habitual profession.
36. Elizabeth S-M, A survey of recent Texas partnership and Limited Liability Company, An update case law, 2009.
37. Nguebou Toukam J. société créée de fait entre époux en droit camerounais, Revue de droit camerounais de management, Revue trimestrielle de l'Ecole Supérieure des Sciences Economiques et commerciales, n° 8, 1989, 66
38. Ngeubou Toukam J. l'entreprise familial, etude de droit camerounaise, Juridis info, 1995.
39. ibid
40. Massart T contrat de société, 2006
41. Under comparative law, the french law hold it that, the element of requalification is intention of parties, that is mating affectio sociétatis to prevail.
42. Tchotourian I, Société en formation, jurispole de loraine
43. Dereu X. reflexion sur les qualifications données a certaines types de sociétés, Bull. Joly, 1998.
44. Afana B, la société de fait dans L'AUDSCGIE, mémoire de DEA, Université de Yaoundé II, 2001

45. Afana B la société de fait dans L'AUDSCGIE, mémoire de DEA, Université de Yaoundé II, 2001.
46. Issa Sayegh J. présentation des dispositions particulière sur les sociétés commerciales et GIE, Ohadata D-06-11,
47. GIBIRILA D op. cit.
48. Deboissy F, Wicker G. la distinction de l'indivision et la société et ses enjeux fiscaux, RTD civ 2000, 225.
49. Caporale F. société et indivision: Rev. societe, n° 1979; 1:265.
50. CA of Paris, 1st chamber, 26 June 1992 in JCP 1992, éd. G.1, n° 1. 3612
51. CA of Paris. 3rd civil chamber, 16 June 1995, inédit, M. Madore c/M. Pichot
52. Lamy, droit des sociétés commerciales, éd. 2006
53. For the general conditions for the validity of contract, see article 1108 of the civil code.
54. Commercial chamber of the court of chamber, 20 January 1987, n° 85-11-277, bull. Joly 1987 p.94 note Faugerolas
55. CA of Versailles, 13th chamber 25 March 1998, societe Rudolf veldhoven c/ societe ouest, Rev. Society 1998, p. 631.
56. CA of Lyon, 19 June 1973, Bull. Joly 1973, 668.
57. Article 1315 civil code « the proof of a situation comes from the claimant »
58. Ibid
59. Jean François Babierie, note under court of cassation 15th November 1994. Colein C/Mme Lieniez
60. Commercial chamber of the court of cassation, 13 march 1984, n°82-11.866: D, jur. 244, note Reinhard.
61. Lucas (F-X), conditions d'existence des sociètés civiles créées de fait, Rev des sociètés 2005, chr. p. 131
62. Council of state, 24 jully 1987, n° 47. 135, note de Saint Pulgent Dr fisc. 1988, n° 827.
63. Council of state 9th and 10th sub section reunited, 14 January 2002, n° 204.573, Bull.joly 2002 p.721
64. [1] PENNEAU (J), preuve de l'existence d'une société créée de fait et taxe sur véhicule particulière possédée ou utilisée par les associés, Recueil D. 1993;
65. CA Versailles, 2nd chamber 24 septembre 1986, Rev. Sociétés 1987, p. 98, obs. Guyon
66. Beau Brun, la confusion de patrimoine au regard de procédure collective de liquidation du passif; Rév. Jur. Com. 1980 P. 41.
67. Court of cassation, 13 may 1986, Bull. Civ. IV, n° 91
68. Cozian *et al*. op. cit.
69. Defossez, op. cit.
70. Court of cassation 3rd Civil chamber, 15 April 1980, n°78-14. p.557
71. Court of cassation, 15 November 1994, n° 92,18.947,
72. Council of state, 21Decembre 1990, n° 72. 039. Dr société 1991, p.172.
73. Court of cassation 23 January 1990, n° 88-12-12. 071 Dr société 1990, n° 133, RTD. Com. 1991, P. 398.