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Merits and demerits of cashless policy in Nigeria

Kabiru Garba Muhammad

Lecturer, Faculty of Law, Usmanu Danfodiyo University, Sokoto Nigeria

Abstract
Information technology is beyond computers; it encompasses the data that a business creates and uses as well as a wide spectrum of increasing convergent and linked technologies that process such data. Information technology thus relates to the application of technical processes in the communication of data. It is worthy of note that information technology goes a long way in helping to reduce transaction costs for banks, which translates to lower prices for services to customers. The adoption of information technology by banks has given birth to bankers' automated clearing system, automated payment systems and automated delivery channels, amongst others, which has now culminated into the implementation of cashless policy in Nigeria. The paper discusses the merits and demerits of the policy; and proffers recommendations.

Keywords: Cashless, Demerits, Merits, Nigeria, Policy.

Introduction

The focal point of this paper is on the merits and demerits of cashless policy in Nigeria. The paper discusses the scope of e-banking as comprising of – bankers automated clearing system; automated payment systems and automated delivery channels. It further discusses the cashless policy.

Information technology (IT) plays vital role in achieving sustainable development in any nation. Without optimal IT compliance, a country cannot attain speedy socio-economic growth and development. This is buttressed in the words of Kosoko thus:

The future of all business, particularly those in the service industry lies in information technology. In fact, information technology has been changing the way companies compete. Banks are companies engaged in banking business. Their future is, therefore, linked to the pervasive influence of information technology.

Information technology is beyond computers; it encompasses the data that a business creates and uses as well as a wide spectrum of increasing convergent and linked technologies that process such data. IT thus relates to the application of technical processes in the communication of data. It is worthy of note that IT goes a long way in helping to reduce transaction costs for banks, which translates to lower prices for services to customers. The scope of e-banking is not exhaustive; it keeps expanding as IT develops and new electronic devices spring up daily. However, the scope could be said to cover any electronic means used to facilitate automated clearing system; automated payment systems and automated delivery channels in the banking industry.

Bankers Automated Clearing System

Automated clearing of cheques and other financial instruments is facilitated by the Nigeria Automated Clearing System (NACS). NACS is an online service designed to facilitate the clearing of cheques, credit instruments as well as the payment and settlement of inter-bank transactions. It replaced the manual clearing house system described as cumbersome and time consuming. Any bank selected for the purpose is a Participating Bank Clearing Centre (PBCC), and this is done after a rigorous screening by the Nigerian Inter-Bank Settlement System (NIBSS). The information technology requirements for participating include – possession of Magnetic Ink Character Recognition (MICR) which reads/sorts/encodes cheques and documents with character in magnetic ink, as specified by NIBSS technical committee; presentation of cheques and instruments that are only MICR compliant; installation of a secured communication line to the clearing house; signing of service level agreement (SLA) to guarantee high quality service of equipment; and recruitment of qualified staff, who should have a minimum qualification of a system administrator and operator.

Automated Delivery Channels

Automated delivery channels include telephone; internet; personal computer (PC); short message service (SMS); mobile and interactive television. They offer an excellent environment for banks to experiment with the delivery of electronic, home and office banking. This technology provides for exchange of data between computer applications supporting the process of business partners by using agreed-to and standardized data format. This device enables customers to carry out transactions with their bankers through connection between the customer's terminals in their homes and/or offices and the banker's computer system.

Telephone Banking

Telephone banking is a service provided by a financial institution which allows its customers to perform financial transactions over the telephone. Most telephone banking systems use an automated phone answering system with phone keypad response or voice recognition capability. To guarantee security, the customers must first authenticate their identity through a numeric or verbal password or through security questions asked by a live representative. With the obvious exception of cash withdrawals and deposits, telephone banking

offers virtually all the features of an ATM. Usually, there is the possibility to speak to a live representative located in a call centre or a branch, although this feature is not guaranteed. In addition to the self-service transactions, telephone banking representatives are usually trained to do what was traditionally available only at the branch such as loan applications, investment purchases and redemptions, cheque book orders, debit card replacements, change of address, etc.

Internet Banking

Internet banking refers to the use of the internet as a remote delivery channel for banking services. Internet banking is often confused with personal computer banking (PC banking) because most internet transactions are conducted through customer's personal computer that connects to a banking website via the internet. There is however a difference between PC banking and internet banking. With PC banking, the customer needs special software to act as an interface between the banker and his computer. The banker might provide its own proprietary software or require the customer to use a package. Internet banking requires no special dial up or software. All the customer needs is the internet browser. Once he is on the net, his bank's website is only a click away. Internet banking or online banking allows customers to conduct financial transactions on a secure website operated by their retail or virtual bank, credit union or building society. Internet banking offers features such as bank statements; electronic bill payment; funds transfer; loan applications and transactions, and account aggregation which allows user to monitor all of his accounts in one place. It is widely recognised that internet banking provides more revenue per customer and costs less per transaction than any other e-banking channel.

PC Banking

PC banking is a banking service that enables bank customers to access their account information and perform certain bank transactions using a personal computer and a modem. The system is based on the use of internet banking software and it enables the customer to, among other things, download his account information from his bank, upload instructions to his bank, and send and receive secure e-mails to and from his bank respectively. It allows a customer to easily control his finances from his home or office computer with his personal financial management software. Once a customer is online, he can safely and securely access his bank account information, check on balances, pay his bills, transfer funds between accounts electronically, and more.

Short Message Service (SMS) Banking

SMS banking is a technology-enabled service permitting banks to operate selected banking services over the customers' mobile phones using SMS messaging. SMS banking services are operated using both push and pull messages. Push messages are those that the bank chooses to send out to a customer's mobile phone without the customer initiating a request for the information. Typically, push messages could be either mobile marketing messages or messages alerting to an event which happens in the customer's bank account such as a large withdrawal of funds from the ATM or a large payment using the customer's credit card, etc. Another type of push message is a one-time password (OTP). Pull messages are those that are initiated by the customer using a mobile phone for obtaining information or performing a transaction in the bank account. Examples of pull messages for information include an account balance enquiry or requests for current information like currency exchange rates and deposit interest rates. A bank customer is empowered with the capability to select the list of activities (or alerts), that he/she needs to be informed. This functionality to choose activities can be done either by integrating to the internet banking channel or through the bank's customer service call centre.

Mobile Banking

Mobile banking also known as M-Banking or Wireless Application Protocol (WAP) enabled banking, is a term used for performing balance checks, account transactions, payments etc via a mobile device such as a mobile phone. Mobile banking is most often performed via SMS or the internet accessed through the mobile device, but can also use special programmes downloaded to the mobile device. Mobile banking allows customer who is already subscribed to mobile network in Nigeria, access his bank account on his mobile phone through an interactive menu based application installed on the phone. It allows the customer to operate his account anywhere anytime using his mobile phone provided the phone is aligned to the bank's network supports or SMS service.

Interactive Television

Interactive television is an audio/video delivery technique that allows viewers to interact with television content, and equally provides return path as they view it. As long as the customer subscribes to a satellite or cable television service, some banking facilities such as checking balances, moving money between accounts, paying bills and setting up overdrafts are made available through a television set. Interactive television is developed as a means of entering customer's households to sell products and services (financial products inclusive). It requires an intelligent decoder, which acts as a computer attached to the cable of television network. It is also possible to combine satellite television with the telephone network to enable interaction outside the cable network. This helps to provide sales and loan information on the screen.

Automated Payment Systems

Automated payment systems are simply payments using electronic devices and products such as ATM, plastic cards and electronic funds transfer.

Automated Teller Machine

ATM is a computerised telecommunications device that provides the clients of a financial institution with access to financial transactions in a public space without the need for a cashier, human clerk or bank teller. It is a remote cash dispenser that assists customers to have access to withdrawal outside the banking hall. On most modern ATMs, the customer is identified by inserting a plastic ATM card with a magnetic strip or a plastic smart card with a chip that contains a unique card number and some security information such as an expiration date. Authentication is provided by the customer entering a personal identification number (PIN). Using an ATM, customers can access their bank accounts in order to make cash withdrawals and check their account balances as well as purchase phone prepaid credit, etc.

Electronic Cards
Plastic cards are used to identify customers and pass same to machines to initiate paper or electronic payment. It is a mechanism by which customer could interface with electronic banking industry. Electronic cards are microchips that store electronic cash to use for online and offline micro payments. There are a range of electronic cards and they include, among others, credit card, debit card, cheque guarantee card and digital cash card.

Credit Card is used as a means of borrowing or as a convenient method of payment. Financial institutions issue credit cards in order to provide credit facilities to their customers.

Debit Card permits customers to pay for goods and services at the point of sale. Debit Card is a charge card designed as a convenient method of payment in place of cash or cheque.

Cheque Guarantee Card is used in conjunction with a cheque book and guarantees the payment of a cheque up to a specified amount.

Digital Cash Card is used by the customer to pay for small value items and can be used independently of a bank account. Of course, any one card may be multi-functional. Payment cards may also enable the customer to obtain cash from an ATM.

Electronic Wallet
Electronic wallet is a wallet that can be filled with the credit card data or refilled through bank transfers. Once the customer has registered the specific e-wallet (compiling a web form including both the personal and the credit card data), he needs the user identity and the password only to make an online transaction (the credit card data are not necessary anymore when making a purchasing online). Some e-wallets can even generate a temporary credit card number (i.e. a credit card number that can be used just once) that can be used on any website even though the latter does not accept the e-wallet. Electronic wallet looks like a small pocket calculator with a plug which enables electronic connection with another wallet, either directly or through telephone lines. It stores an amount of money that cannot be forged, and enables safe transaction with other wallets. It is safer than cash money since only the legitimate owner who knows the password can operate it. It replaces credit-cards, cheques and travellers' cheques and saves the paper work involved in their use.

Electronic Funds Transfer (EFT)
Electronic fund transfer (EFT) is an electronic oriented payment mechanism. It is an electronic tool that is used to effectively transfer the value of exchange process for goods and services, ideas or information from one bank account to another account in another bank. It allows customers' accounts to be credited electronically within 24 hours. The basic elements of EFT system are classified into three: clearing network characteristics, remote service or point of sale characteristics and pre-authorised debit and/or credit characteristics.

Electronic Funds Transfer at Point of Sale (EFTPOS)
Point of Sale (POS) terminals handle cheque verifications, credit authorisation, cash deposit and withdrawal, and cash payment. This enhances electronic fund transfer at the point of sale (EFTPOS). EFTPOS enables a customer's account to be debited immediately with the cost of purchase in an outlet such as a supermarket or petrol station. It consists of the accumulation of electronic payment messages by the retailer, which are subsequently passed on to appropriate institutions for processing. The purchase price is debited on the buyer's account and credited on the seller's account. The basic components of every EFTPOS system are recognition, authorisation, message-entry and message-processing.

Electronic Letter of Credit
An electronic letter of credit is an undertaking by an issuing bank sent electronically to the beneficiary to make payment within a specified time, against the presentation of documents which comply strictly with the terms of the credit. Therefore, the risk to the seller of non-payment by the buyer is transferred to the issuing bank (and the confirming bank if the electronic letter of credit is confirmed) as long as the exporter presents the documents in strict compliance with the credit. It is important to remember that all parties in the electronic letter of credit transaction deal with electronic documents, not goods. Other than cash in advance, a letter of credit is the most secure method of payment in international trade, with the payment undertaking of the bank, as long as the terms of the credit are met. The letter of credit also provides security for the importer who can ensure all contractual documentary requirements are met by making them conditions of the letter of credit.

Electronic Cheque
An electronic cheque functions in the same way as a paper cheque. It acts as a message to a bank to transfer funds to a third party. However, it has a number of security advantages over conventional cheques since the account number can be encrypted, a digital signature can be employed, and digital certificate can be used to validate the payer, the payer's bank, and the account.

Electronic Cash
Electronic cash, also known as e-currency, e-money, e-cash, digital money, digital cash or digital currency refers to money or scrip which is exchanged only electronically. Typically, this involves the use of computer networks, the internet and digital stored value systems. Electronic fund transfer and direct deposit are all examples of electronic money. Also, it is a collective term for financial cryptography and technologies enabling it. Electronic or digital cash allows consumers to pay for goods and services by transmitting a number from one computer to another. These numbers function much like the serial numbers on real money. They are unique, and represent a specific amount of actual cash. Unlike credit-card transactions, e-cash transactions are anonymous. E-cash works just like paper cash. Once it is withdrawn from an account it does not leave a trail of digital crumbs. E-cash by its nature is portable and therefore more convenient for mobile commerce.

Electronic Billing
Electronic billing is the electronic delivery of invoices (bills) and related information by a company to its customers. Electronic billing is referred to by a variety of terms, including: electronic bill presentment and payment (EBPP) typically focused on business-to-consumer billing and payment; electronic invoice presentment and payment (EIPP) typically focused on business-

to-business billing and payment. While there are current efforts to standardise systems for electronic billing and invoicing, there is currently a wide variety of options for businesses and consumers. Most fall into one of two categories: customer service providers (CSPs) which allow a business to invoice clients electronically; bank aggregators, which allow consumers to pay multiple bills, typically through their bank.

The bankers automated clearing system, automated delivery channels and automated payment systems discussed above culminated into a policy introduced by Central Bank of Nigeria (CBN) known as 'Cash-less Nigeria'. Hence, the paper proceeds to discuss the Cash-less Nigeria.

Cashless Society

A cashless society is a culture where no one uses cash; all purchases being made are by credit cards, charge cards, cheques, or direct transfer from one account to another through mobile banking. It is an environment in which money is spent without being physically carried from one person to the other. It involves the widespread application of computer technology in the financial system.

Cash-less Nigeria

The CBN has introduced a new policy on cash-based transactions which stipulates a 'cash handling charge' on daily cash withdrawals or cash deposits that exceed five hundred thousand Naira (N500,000) for individuals and three million Naira (N3,000,000) for corporate bodies. The new policy on cash-based transactions (withdrawals and deposits) in banks aims at reducing, but not eliminating the amount of physical cash (coins and notes) circulating in the economy; and encouraging more electronic-based transactions (payments for goods, services, transfers, etc.)

Reasons for the Cash-less Policy

The new cash-less policy was introduced by CBN for a number of reasons amongst which are:

- To drive development and modernisation of the payment systems in line with Nigeria's vision 2020 goal of being amongst the top twenty (20) economies by the year 2020. An efficient and modern payment system is positively correlated with economic development; and is a key factor for economic growth.
- To reduce the cost of banking services (including cost of credit); and drive financial inclusion by providing more efficient transaction options and greater reach.
- To improve the effectiveness of monetary policy in managing inflation and driving economic growth.

In addition to the above reasons, the cash policy aims to curb some of the negative consequences associated with the high usage of physical cash in the economy which include:

- High cost of cash – There is a high cost of cash along the value chain from the CBN and the banks, to corporations and traders; everyone bears the high costs associated with volume cash handling.
- High risk of using cash – Cash encourages robberies and other cash-related crimes. It can also lead to financial loss in the case of fire and flooding incidents.
- High subsidy – CBN analysis showed that only ten percent (10%) of daily banking transactions are above 150k, but the ten percent (10%) account for majority of the high value transactions. This suggests that the entire banking population subsidises the costs that the tiny minority ten percent (10%) incurs in terms of high cash usage.
- Informal economy – High cash usage results in a lot of money outside the formal economy, thus militating against the effectiveness of monetary policy in managing inflation and encouraging economic growth.
- Inefficiency and Corruption – High cash usage enables corruption; leakages and money laundering, amongst other cash-related fraudulent activities.

Contents of the Cash-less Policy

The following aspects of the policy were applied in Lagos State from 1st January, 2012 tagged 'Cash-less Lagos':

- Only cash in transit (CIT) licensed companies are allowed to provide cash pick-up services. Banks ceased CIT lodgement services rendered to merchant – customers in Lagos State from 31st December, 2011. Any bank that continues to offer CIT lodgement services to merchants shall be sanctioned.
- Third party cheques above one hundred and fifty thousand Naira (N150,000) shall not be eligible for encashment over the counter. Value for such cheques shall be received through the clearing house.

The service charge took effect from 30th March, 2012**.** This gave people time to migrate to electronic channels and experience the infrastructure that has been put in place. Banks were to use this period as grace to encourage their customers to migrate to available electronic channels; and where possible, demonstrate the costs that will accrue to those that continue to transact high volumes of cash from 30th March, 2012 in Lagos State.

The pilot was run in Lagos State from January 2012; while the policy took effect in Rivers, Anambra, Abia, Kano, Ogun and the Federal Capital Territory (FCT) on the 1st July, 2013. The policy was implemented nationwide on 1st July, 2014.

The cash-less policy applies to all accounts with exception to government revenue generation account, primary mortgage institutions, microfinance banks and embassies. Banks were directed to therefore work with their corporate customers to arrange for suitable e-collection options.

The limits are cumulative daily limits for withdrawal and for deposits respectively (for individuals – the daily free withdrawal limit is five hundred thousand Naira (N500,000); while the daily free deposit limit is equally five hundred thousand Naira (N500,000). The limits apply to the account so far as it involves cash, irrespective of channel (such as over the counter, ATM, third party cheques encashed over the counter, etc) in which cash is withdrawn or deposited. For instance, if an individual withdraws four hundred and fifty thousand Naira (N450,000) over the counter, and one hundred and fifty (N150,000) from the ATM on the same day, the total amount withdrawn by such customer is six hundred thousand Naira (N600,000); and the service charge will apply on one hundred thousand Naira (N100,000) which is the amount above the daily free limit. The limit also applies to cash brought through CIT companies, as the CIT companies only serve as means of transportation.

The charges became applicable from 30th March, 2012 in Lagos; and 1st October, 2012 in Rivers, Abia, Anambra, Ogun, Kano and the FCT respectively. The service charge for daily cumulative deposits/withdrawals above the limit shall be borne by the account holder. The policy does not however prohibit withdrawals or deposits above the stipulated amounts, but that such transactions will be subject to cash handling charges.

Demerits of the Cash-less Policy

There are a number of constraints on the cash-less policy in the Nigerian economy. They include:

- Network unreliability**:** Instability of POS networks which is prevalent across all operators poses a challenge which may serve as a barrier to usage especially when money sent is not received when needed, which is crucial.
- Fraud**:** Prevalent fraudulent acts among ATM scammers are likely to occur on the POS channels.
- Security**:** There are great concerns about trust in the agents providing cash-in and cash-out services. This could be risky for customers and the agents if there is no form of adequate security.
- Charges determinants: The question of how will charges be determined is a factor. Will the charges be determined by location/proximity; amount involved; periodic monthly charges or occasional access fees?
- System instability: The instability in the economy in general and banking in particular (both deposit money banks and microfinance banks) has created and is continuously creating fears in the public.
- Literacy issue: Both consumers and business enterprises have limited knowledge of what services exist, how they operate and what benefits to be derived from cash-less economy. This is a situation where many of the targeted populace are illiterate of the e-banking applications. For instance, a dubious businessman may capitalise on a customer ignorance of the e-banking applications to the disadvantage of the customer.
- Inadequate infrastructural development: Lack of infrastructural development particularly energy puts a lot of constraints to the operations of e-payment machines. There are also great concerns on the policy operations in the rural areas, especially where there is currently no network coverage.
- Operational disruptions: These may greatly affect the cash-less policy. Examples abound, even in developed economies of the world. The computer problem that caused the Bank of New York a whooping $22 billion overdraft in 1985; a roof collapse after a heavy snow resulting in a shutdown of an electronic data system facility for processing ATM transactions affecting more than 5000 ATMs in the US in 1993; the disruption of the operations of the internet as a result of the worm virus in 1987; and a host of other disruptions.

Merits of the Cash-less Policy

A variety of benefits are expected to be derived by various stakeholders from an increased utilisation of the cash-less policy. These include but not limited to:

- Increased convenience for consumers.
- Additional service options for consumers.
- Reduced risk of cash-related crimes.
- Cheaper consumer access to (out-of-branch) banking services.
- Consumer access to credit and financial inclusion.
- Faster access to capital for corporations.
- Reduced corporation revenue leakage.
- Reduced corporation cash handling costs.
- Increased tax collections for governments.
- Greater financial inclusion for government.
- Increased governmental economic development.
- Faster transactions for both banker and customer.
- Improved hygiene on site. This is so because handling of coins and notes provide an easy way for bacteria to spread quickly from one individual to another.
- Managing staff entitlements which can be programmed on to the card and be refreshed, daily, weekly or monthly.
- Increased sales as vending and catering purchases are often dictated by the amount of loose change in the pockets. But in cash-less system, the value on the card is available 24/7.
- Cash collection is made simple as time spent collecting, counting and sorting cash costs money.
- Reduced cash circulation.
- Job creation is facilitated as the licensing and establishment of payment agencies will create jobs and new business opportunities.

On the issue of awareness, the CBN ran targeted stakeholder engagement sessions for key groups that will be most impacted by the cash-less policy as a first stage of its planned communication campaign, with the objective of creating awareness and providing an opportunity for stakeholders to raise issues and get on the spot clarifications. These stakeholders include markets, associations, professional bodies, religious bodies etc. These stakeholder sessions have run nationwide while the media campaign continues.

Recommendations

In line with the preceding discussions, it is recommended that:

- The CBN should intensify in its awareness campaign by harnessing other opportunities such as the use of religious leaders in the awareness campaign since the lack of banking culture especially in the Northern part of the Country has been largely due to religious belief.
- The CBN should reconsider its punitive based system of punishing non-adherents of the cashless policy; and adopt a reward based system which rewards adherents to the policy no matters how negligible. This will serve as attraction to non-adherents and will make users be friendly to the policy that they will be eager to learn more about the policy.
- Governments at every level should collaborate in providing essential social and physical infrastructures that drive the cashless economic policy.
- The speed adopted in the implementation of the policy in the Country should be reduced that the pace of the implementation should now be gradual.

Conclusion

The paper discussed the scope of e-banking as consisting of bankers' automated clearing system; automated payment systems and automated delivery channels. It further discussed the constraints and benefits of cashless policy; and proffered recommendations for the effective and efficient implementation of the policy.

Information and communication technology (ICT) has no doubt brought about innovations in the economic life of the Country. However, there is dearth of legal instruments to meet up with the developments occasioned by the influence of ICT. Law maker therefore need to be up and doing as well as proactive in enacting laws in this regard. Nevertheless, the constraints associated with the effective implementation of the cashless economic policy are clearly surmountable; and regardless of the constraints, the policy is a welcome development that should be sustained.

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Application of economic analysis of Law to Nigerian legal system

Kabiru Garba Muhammad

Lecturer, Faculty of Law, Usmanu Danfodiyo University, Sokoto Nigeria

Abstract
Economic interpretation of law is rooted to Marxist theory of law. It is well known that Marxism is both part of the ideology of the Soviet Union and many other countries in Eastern Europe, Latin America and Africa; and a critical standard employed by many intellectuals throughout the world by which to measure existing institutions as well as a lodestar of revolutionary change. The recent economic analysis of law which has grown up principally in the United States is an attempt to offer a sophisticated scientific alternative to utilitarianism. One of the problems with utilitarianism is the lack of a method for calculating the effect of a decision or policy on the total happiness of the relevant population. It offers no reliable technique for measuring change in the level of satisfaction of one individual relative to a change in the level of satisfaction of another. This paper appraises the application of this theory of interpretation of law to Nigerian legal system.

Keywords: Application, Economic Analysis, Law, Legal System, Nigeria.

Introduction

The focus of this paper is the recent jurisprudential economic analysis of law and its application to Nigerian legal system. Jurisprudence, legal theory or philosophy of law as interchangeably used by different writers, has undergone several stages of development depending on the ideologies of the jurists who are the proponents of the various theories.

It is not an exaggeration to say that the economic interpretation of law is rooted to Marxist theory of law. Marxism is both part of the ideology of the Soviet Union and many other countries in Eastern Europe, Latin America and Africa; and a critical standard employed by many intellectuals throughout the world by which to measure existing institutions as well as a lodestar of revolutionary change. Marx attached primacy to the economic system. His theory of law and state might be described crudely as an economic theory of law and state.

The recent economic analysis of law which has grown up principally in the United States is an attempt to offer a sophisticated scientific alternative to utilitarianism. One of the problems with utilitarianism is the lack of a method for calculating the effect of a decision or policy on the total happiness of the relevant population. It offers no reliable technique for measuring change in the level of satisfaction of one individual relative to a change in the level of satisfaction of another.

The concept of value employed by economists is a truism. A thing has value (utility) for a person when that person values it. How much value a thing has for a given person is said to be measured by the maximum that person would be willing to pay for it or the minimum the person would be willing to take to give it up. Economists support this by two arguments. They argue that there are costs (disutilities) when there is non-ownership of a scarce good. So they argue, when total cost of these external disutilities is greater than the cost involved in creating a system of ownership rights, then that system of property rights is justified by consideration of economic utility. The soundness of this argument depends on the dominant guiding principle being that of minimising costs. Their second argument concerns "alternative transactions" (that is the ways in which people deal with resources used for the production of goods). Ownership rights, it is argued, stabilise these transactions. The economic arguments turn on concepts like efficiency, superiority, optimality, allocation and distribution.

Economists have approached the decision of an individual to engage in crime as a type of occupational choice which is influenced by factors like the expected economic rewards, the risk of punishment, the life style entailed by a crime career and so on. Economists have postulated that the decision to engage in crime is a rational decision and accordingly, that any factor which reduces the expected returns of criminal occupations will reduce crime.

Proponents of Economic Analysis of Law

a. Wilfredo Pareto (1848 - 1923)

The thought of Pareto has been particularly influential. The most basic notion in the economic analysis of law is 'efficiency' or 'Pareto optimality'. A situation is said to be 'Pareto-optimal' if it is impossible to change it without making at least one person believe he is worse off than before the change. A change is however 'Pareto-superior' to another when at least one person believes he is better off by it while no one believes he is worse off.

The definitions of 'optimality' and 'superiority' do not depend on objective assessments of good, but on subjective ones. Whether persons believe that they will be better off or the same under a proposed change, and how much, is measured by their willingness to pay for the change, and how much; or to agree to it only if they are paid for it, and how much. All participants would, by definition, consent to a transaction which left them either better off, or as well off as before. Therefore, a moral analysis based on autonomy and consent would approve of transactions that were 'Pareto-superior'.

It should be noted that if a transaction involved one person getting more of something, and everyone else having the same

amount, those whose possessions had not increased might object to the transaction on the basis of equality (or its negative correlate envy). Thus, in real world terms, it is difficult to find situations where at least one person is better off and everyone else is (in every sense of the word) no worse off than they were before.

Even in a looser construction of 'Pareto superiority', most governmental (legislative and judicial) actions would not qualify. In most government actions such as awarding contracts, assessing legal liability, setting taxes and benefits and so on, there are winners and losers. There are groups who by any measure are worse off than they were before the government action or decision. If government could only act when no one was made worse off, there would be little that could be done.

b. Nicholas Kaldor (1907 - 1986) and J. R. Hicks (1904 – 1989)

The 'Kaldor-Hicks' test, named after the theorists who developed the analysis, which is based on the possibility of compensation, is an attempt to extend the usefulness of Pareto rankings. It requires not that no one be made worse off by a change in allocation of resources, but only that the increase in value be sufficiently large that the losers can be fully compensated. The 'Kaldor-Hicks' test enables us to evaluate social policies and legal rules that produce winners and losers. The difference between 'Pareto superiority' and 'Kaldor-Hicks' efficiency is just the difference between actual and hypothetical compensation. If compensation were paid to losers, the 'Kaldor-Hicks' efficient move would become a 'Pareto-superior' one. That is why the 'Kaldor-Hicks' criterion is often called the 'Potential Pareto superiority test'.

'Kaldor-Hicks' or 'Potential Pareto superiority' is sometimes offered by economists that purport to justify government actions even when some parties are left worse off. This analysis is a kind of wealth-maximisation claim, but with a Pareto twist.

To 'Kaldor-Hicks', the question is whether the parties made better off could if they chose, compensate the parties who were made worse off and still be better off. The point here is not that the winning parties actually compensate the losing parties. If they did, then the combination of the government decision and the compensation would be a fully 'Pareto-superior' move. The point is that this compensation could be paid; and thus, there is a basis for concluding without any apparent need for controversial comparisons of value that the post-transaction situation would be superior to the pre-transaction situation; and therefore, that the government's action was justified.

The question must be asked as to why compensation is not paid, if it could be? The reasons given are two-fold: first, some losers deserve to lose. J. L. Coleman gives the examples of policies implemented to break up inefficient monopolies. "There is no reason to render monopolists no worse off after breaking up their monopolies than they were while engaged in monopolistic behaviour". Secondly, it may be very costly to compensate losers. The 'Kaldor-Hicks' criterion assumes that compensation is to be rendered costless. But there will be transaction costs so that the payment of compensation will not be costless.

c. Richard Posner (1939)

Richard Posner is the most influential figure in the law and economic movement. In many of his earlier writings, Posner argued that a theory of wealth-maximisation served well both as an explanation of the post actions of the common law courts and as a theory of justice, justifying how judges and other officials should act.

Posner is one of the representatives of pragmatic materialistic thinking which is fairly widespread in the English speaking world. As such, he is not an 'anarcho-capitalist', he is 'statist'. Starting from unrealistic neo-classical assumptions that economic actors are rational profit maximisers operating under conditions of perfect information. Posner argues that the common law is developed based on its ability to maximise social wealth. According to Posner, law seeks to maximise economic wellbeing of citizens. Posner goes on to argue further that the law mirrors, and should mirror economic processes.

The idea is that though until recently, common law judges rarely used economic formulations; and few had economic training, the doctrines they created approximate what an economist who was trying to maximise social wealth would have created.

In American tort law in nuisance, a court will sometimes hold a polluter liable, but allow only monetary damages and refuse injunction. In the American case of *Boomer* V. *Atlantic Cement Co*, the court refused an injunction on the basis that the cost of enjoining the nuisance (by shutting down the factory creating the pollution) was disproportionate to the amount of harm being done to the plaintiff.

Under wealth maximisation, judges are to decide cases according to the principles which will maximise society's total wealth. Posner argues that wealth maximisation is the best compromise between utility and autonomy, or that it successfully exemplifies both utility and autonomy. Wealth maximisation is better than utilitarianism, according to Posner, because money is easier to measure than utility. It is better than autonomy-based approach because it allows government action even where actual consent by all those affected would not be forthcoming or would be impractical to obtain. However, because the only actions allowed would be those that maximised social wealth, everyone would have consented to this principle if asked, because it is a principle that leaves everyone better off in the long run.

Posner tries to show that most rules of the law of contract are economically efficient in the sense that the party injured by a breach of contract is entitled to recover as damages, such sum of money as will (so far as many can do so), put him in the same financial position as if the breach had not occurred; and that contracts for the sale of goods generally available are not subject to specific performance.

The Nigerian Experience

In Nigerian Constitutional Law, government decisions on payment of compensation for compulsory acquisition of property for public interest seem to adopt 'Pareto-superior' theory of economic analysis of law. This is so because people compensated are expected to be made better off than they were before the government decision. The Law provides thus:

No moveable property or any interest in an immoveable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things –

a) Requires the prompt payment of compensation therefor; and

b) Gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.

In Law of Contract, Nigerian judges use Posner's wealth maximisation theory in deciding cases of breach of contract. In the case of *Ijebu-Ode L.G.* V. *Adedeji Balogun & Co*, Karibi-Whyte JSC observed that in cases of breach of contract, assessment of damages is calculated on the loss sustained by the injured party which loss was either in contemplation of the contract or is an unavoidable consequence of the breach.

In tortuous cases of nuisance, judges in Nigeria take into consideration, economic factor in the society, while deciding cases before them. In the English case of *St Helen's Smelting Co* V. *Tipping*, a case cited by Nigerian judges, Lord Westbury stated that where there is an interference with enjoyment of land, the nature of the locality is a factor to be taken into account in deciding whether the acts complained of are actionable, so that a person who chooses to live in the heart of an industrial town or in a densely populated part of a large city is not entitled to expect such a high degree of peace and quiet as one who lives in a residential area.

In the criminal justice system, there have been calls by Nigerian lawyers on the fact that court decisions on theft cases should concentrate on recovery of stolen goods by the victims of theft rather than punishing the offenders.

Criticisms against the Economic Analysis of Law

Economic analysis of law can be criticised in many ways. One of such ways is that it is a reductive system in that it is an approach to law and life that attempts to analyse everything in terms of a single parameter (money, wealth and willingness to pay).

A question may also be asked here in a way of criticism that 'is wealth a value'? Obviously, the answer is negative because wealth is not a value in the strict sense of it.

Economic analysis of law has inherent biases towards the rich over the poor; producers over customers; and the status quo over reform.

The legal perspective of language and the world is different from the economic perspective; and the law would be worse off to the extent that the economic outlook is allowed to take over law.

The objectives of efficiency or wealth maximisation are irrelevant to, and often incompatible with correlative justice.

Lastly, the theory confounds and confuses justice and wealth, and overemphasises economic factors in legal decision making.

Conclusion

There is no doubt that the application of techniques of economic analysis to the study of legal rules can provide very valuable new insights. In the United States, no approaches to law in recent decades have been more influential than the economic analysis of law. Its influence is also growing every year in legal academic circles in Britain and other countries. Part of the power of economic analysis is that it presents a largely instrumental approach, which fits well with the analysis and evaluation of law. It forces the question of – what objectives these legal rules stand to achieve or would alternative rules do any better?

But if we concentrate on the specific direction within the economic analysis of law which is represented by its proponents especially Posner, the assessment cannot be so unreservedly positive. Specifically, both the normative thesis that judges should endeavour to decide hard cases by applying those rules which are most economically efficient; and the descriptive thesis that the main rules of the common law are in fact economically optimal, need to be reassessed.

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Analysis and assessment of the right to peace in light of the latest developments at the Human Rights Council

[1] Christian Guillermet Fernández, [2] David Fernández Puyana

[1] Vice-Director General for Foreign Policy at the Ministry of Foreign Affairs of Costa Rica

[2] BA, LLM, PhD, legal assistant of the Chairperson-Rapporteur

Abstract
In the 2015 June session of the Human Rights Council, important regional groups, such as ASEAN and EU, reaffirmed their commitment to work on the basis of consensus regarding to the Declaration on the right to peace. Despite that an agreement among States and regional groups seemed within reach in the 2015 September session, it could not finally be achieved, exclusively because of lack of agreement on the title and article 1 of the text as presented by the Chairperson-Rapporteur on 21 September 2015. The mobilization and strong voice of some civil society organizations was not properly heard by the international community. In particular, in the September session large networks of civil society organizations openly called on Member States to take a step forward in the promotion of peace by adopting a declaration that can be both consensual and meaningful for generations to come. Consequently, in the line of the voice raised by them, today much more than ever the Chairperson-Rapporteur recommends that it is necessary that a serious assessment be conducted by all as to whether the international community is in a position to further develop the right to peace in a consensual manner.

Keywords: Application, Economic Analysis, Law, Legal System

Introduction

Context

On 2 October 2015, the Human Rights Council (HRC) adopted the resolution A/HCR/30/L.30 on the promotion on the right to peace for 33 votes in favour, 12 against and 2 abstentions, by which the HRC "decides that the working group shall hold its fourth session for five working days with the objective of finalizing the declaration" and "requests the working group to prepare a report and to submit it to the HRC, to be made available in all official languages of the United Nations, for consideration at its thirty-third session » -September 2016-

In the presentation of the resolution, **Cuba** requested to have another session in order to conclude the pending issues of the draft declaration on the right to peace and addtionally, they acknowledged the participation of numerous delegations involved in the negotiations, particularly efforts to close the gap and find solutions in a subject that far from dividing should be a source of unity and consensus.

In the explanation of vote before the vote, the **United Kingdom of Great Britain and Northern Ireland** recognised that although there were times when it seemed, both during the Working Group's sessions and subsequent informal discussions hosted by Costa Rica, that consensus might just be possible, this was not achieved because of two difficult key issues contained in the text. Additionally, the **United States of America** thanked the delegation of Costa Rica for its constructive, consensus seeking approach while leading the HRC's working group for three years on this difficult issue. Despite the best efforts of many participants over the years, they have not been able to reach agreement on a shared outcome. Finally, the **European Union** stated that after the 3rd session of the Working Group and subsequent informal consultations by the Chair, consensus seemed within reach. The EU was ready to display flexibility to build on that momentum and to accept a draft Declaration, despite several difficulties, provided their 2 main concerns in the draft were addressed – namely the title and Article 1 -. They regretted that a consensus outcome was not possible. Also they expressed their thanks to Ambassador Christian Guillermet from Costa Rica for his very open and transparent Chairmanship of the Working Group, and to his team for all the work done on this issue.

This paper will analyse the important advancements on the right to peace performed since the presentation of the report of the third session of the Open-Ended Working Group (OEWG) on the right to peace by the Chairperson-Rapporteur before the HRC in its September session. In particular, the informal consultation held in Geneva on 21 September and the process of releasing provisions of the Declaration carried out by the Chairperson-Rapporteur will carefully be analysed.

Additionally, a global assessment about the subtantive improvements included in the last version of the text will also studied, such as the recognition by some regional groups of the resolution 20/15, the existence of the right to peace or the general agreement to accept the text elaborated by many stakeholders in collaboration with the Chairperson-Rapporteur in the latest months, with the exception of title and Article 1.

Finally, a reflection about the future challenges will be provided, concluding with an emphasis on the need for agreement in order to advance in the promotion and protection of human rights for all, including the right to peace, and to strengthen the culture of peace worldwide.

Analysis

Informal consultations

On 18 September 2015, the Secretariat of the HRC presented its compliments to the Permanent Missions of the United Nations Office at Geneva and had the honour to transmit a new text of a Draft United Nations Declaration on the Right to Peace prepared by the Chair-Rapporteur of the third session of the Open-ended intergovernmental working group on a draft United Nations declaration on the right to peace.

On 21 September, the Permanent Mission of Cuba convened an informal consultation open to all permanent missions, civil society and other stakeholders, in which the Chairperson-Rapporteur was invited to participate. He began his statement thanking deeply the mission of Cuba for convening this informal consultation on the right to peace. Also he recalled that today, 21th September, the world is conmemorating the International Day of Peace.

He said that after being honoured with the task of guiding the work of this Group in the first session in 2013, we have jointly made progress through an open and transparent dialogue. We have built an atmosphere of trust and mutual respect, which are characteristic of a true culture of multilateral diplomacy. He remembered in the first session of the Working Group that many delegations refused to participate in negotiations because of the polarization that existed at that time. We have jointly achieved to involve all parties with a clear common goal: to agree, from a human rights perspective about the concept of the right to peace.

He recalled that on the afternoon of 24 April he had presented a new revised text, which was based on some agreeable points and ideas raised by some States and civil society organizations during the third session of the Working group. In his report he acknowledged the respectful atmosphere and spirit of dialogue and cooperation that reigned during the session while moving towards a consensual outcome. However, we could not achieve this desirable agreement because 16 preambular paragraphs and the operative section appeared in square brackets, revealing the objections of the States.

He stated that after the third session, a large group of States approached him to invite him to make a last joint effort to reach an agreement on this important topic. Throughout the latest months, they have been in close contact with him, and the message received from them has been very clear: in the present session we should try to finalize this process through the adoption of a text by consensus. In particular, he has worked very closely with those delegations, to release the provisions of the text.

Therefore, he noted that the text presented is the clear result of these bilateral meetings. This consultation process has not involved any interpretation coming from his side. He has only included their suggestions and comments and additionally he has proposed some additional language to overcome differences. In addition, in the text there are not new preambular paragraphs or provisions, which have not previously been discussed within the group. Those delegations which objected to some provisions of the text have released by proposing new language.

He indicated that now that we have walked a long way, his role of mediator is almost over presenting this new version of the text, which responds to work in these months.The ball is now in the hands of States: you can accept this text as a consensual text or you have the option to reject it entirely, he said. The negotiation process ended in the third session. Now it is the time to advance and to take action on this topic.

After the Chair's presentation, the **Russian Federation** welcomed the new draft declaration and remembered the long way walked by everyone since the first session of the OEWG on the right to peace, taking into account that all delegations now are really engaged in the process. They confirmed their disposal to accept the text presented by the Chair. Additionally, they suggested that those delegations which had some problem with the text should use the existing mechanism to express their concerns, such as explanation of vote, reservations, … and therefore, they requested them not to break the consensus.

The **United States of America, European Union, Australia, United Kingdom** and **South Korea** stressed that all the work should be based on consensus. They also added that working on the consensual basis is difficult because they do not recognize the right to peace. However, they could be in a position to join consensus and accept the text as a whole, with the exception of two issues: the title and the notion of «entitlement» in article 1. The new PP1 could be acceptable for them and they could also propose several titles for the text.

Uruguay and **India** said that the momentum should not be lost. The consensus was important and the text presented was the minimum denominator to reach an agreement. Although they would have preferred a stronger text, they are aware about the difficulties on this matter.

Egypt stated that consensus was possible. They commented on the Chair's text on the basis of three parameters: firstly, the definition of the right to peace through elements has been increasingly progressed and therefore, they could accept the text as a package; secondly, the notions of disarmament and peacekeeping are difficult to be included at this stage ; and thirdly, the right to peace should be recognised in the text and they would be in a position to accept the ASEAN approach to this notion, which recognises the «right to enjoy peace». They have some problem with the current PP1, because this new paragraph breaks the principle of universality of human rights.

Indonesia shared the same opinion about PP1 and also expressed its willingness to follow Cuba. They also stated that could accept the text presented by the Chair, because in their view, this text is the best compromise to be reached.

Iran expressed its concerns because of the current preambular paragraph 13, which makes reference to some instruments regarding the terrorism, such as the International Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism, the International Convention for the Suppression of Acts of Nuclear Terrorism and the Amendment to the Convention on the Physical Protection of Nuclear Material. They said that they cannot join consensus with this paragraph, because according to them, we don't need to be exhausitive by naming several instruments on terrorism.

Associazione Comunità Papa Giovanni XXIII (APG23) said that they would have preferred to have a stronger text and insisted on the need to adopt a text by consensus and not to lose the momentum. According to them, the title and article 1 are closely linked to the mandate of the Working Group.

International Fellowship of Reconciliation recommended to include a reference of the right to life in article 1.

Finally, **Cuba** said that they would have preferred to include in the text topics, such as nuclear disarmament, international solidarity or the promotion of democratic and equitable order. Although they can show significant flexibility, we need to solve the issue of title and article 1. According to them, we have two

different options at the level of procedure: firstly, we can reach a consensus, then Cuba will present a resolution annexing the text of the Declaration; secondly, we do not find an agreement, then Cuba will present a resolution in which the HRC will request to have a fourth session of the Working Group.

2.2 Process of releasing provisions of the Declaration

Below it is the result of the bilateral meetings held with those missions which had objected some of the preambular paragraphs on 24 April 2014, last day of the OEWG on the right to peace. Those delegations which objected to some of the 16 provisions of the text finally released these paragraphs by proposing new language or deleting some notions, which is a demonstration of real engagement of many missions from South and North in the process.

Firstly, "*Recalling also* that the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations solemnly proclaimed the following principles (PP7) »:
that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations, the principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered, the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter, the duty of States to co-operate with one another in accordance with the Charter, the principle of equal rights and self-determination of peoples, the principle of sovereign equality of States, the principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter
Egypt, Iran and Algeria objected to this preambular paragraph, because they wanted to amend it for expansion. During the bilaterals, the Chairperson-Rapporteur proposed to expand this paragraph, by including the main principles enshrined in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation of 1970, which was accepted by them. It permitted to release this preambular paragraph.

Secondly, "*Acknowledging* that the fuller development of a culture of peace is integrally linked to the realization of the right of all peoples, including those living under colonial or other forms of alien domination or foreign occupation, to self-determination enshrined in the Charter of the United Nations and embodied in the International Covenants on Human Rights, as well as in the Declaration on the Granting of Independence to Colonial Countries and Peoples contained in General Assembly resolution 1514 (XV) of 14 December 1960 » (PP9)
Originally, this preambular paragraph was proposed by the State of Palestine at the third session of the Working Group as follows :
"Reaffirming that the full realization of the right of all peoples, including those living under colonial or other forms of alien domination or foreign occupation, to self-determination, as enshrined in the Charter and embodied in the International Covenants on Human Rights, as well as in the Declaration on the Granting of Independence to Colonial Countries and Peoples, is integrally linked to the fuller development of a culture of peace"
Canada, Australia and the United States of America objected to this paragraph and proposed to keep it in square brackets. The Chairperson-Rapporteur approached them to show that the legal sources of this paragraph can be found in Article 3.n of the Declaration on Culture of Peace and also proposed to them to start the paragraph with a clear reference to culture of peace. It was accepted and therefore, the paragraph was released. The USA proposed to end the paragraph, making a reference to the General Assembly resolution 1514 (XV) of 14 December 1960, such as is indicated in Article 3.n of the Declaration on Culture of Peace.

Thirdly, « *Deeply deploring* all acts of terrorism, recalling that the Declaration on Measures to Eliminate International Terrorism recognizes that acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations and may pose a threat to international peace and security, jeopardize friendly relations among States, threaten the territorial integrity and security of States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society, and reaffirming that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed » (PP11),
This preambular paragraph on terrorism was released by the United States of America and Algeria with the condition that it should be expanded in the line of the PP13 and PP14, which happened.

Fourthly, « *Stressing* that all measures taken in the fight against terrorism must be in compliance with the obligations of States under international law, including international human rights, refugee and humanitarian law, as well as those enshrined in the Charter » (PP12),
During the bilaterals Algeria decided to release this preambular paragraph, taking into account that the legal sources proposed by the Chairperson-Rapporteur, in particular UNGA Resolution A/RES/60/288 of 2006 and SC resolution 2178 of 2014 were meaningful and correct.

Fithly, « *Urging* all States that have not yet done so to consider, as a matter of priority and in accordance with Security Council resolution 1373 (2001) and Council resolution 1566 (2004) of 8 October 2004, becoming parties to the relevant conventions and protocols as referred to in paragraph 6 of General Assembly resolution 51/210, as well as the International Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism, the International Convention for the Suppression of Acts of Nuclear Terrorism and the Amendment to the Convention on the Physical Protection of Nuclear Material » (PP13),
Both Algeria and the United States of America objected to preambular paragraph 11 by indicating that this provision should be expanded. During bilaterals both of them agreed to make a reference to the general call that States become parties to the relevant instruments on terrorism. Additionally, United States of America proposed in the bilaterals to name some of these international instruments in line of paragraph 10 of the UNGA

resolution 60/43 on measures to eliminate international terrorism of 6 January 2006.
On 21 September 2015, Iran objected to this preambular paragraph, in particular the reference to nuclear terrorism, in the informal consultation organised by Cuba and also said that they could not join consensus with the present language.

Sixthly, « *Reaffirming* that the promotion and protection of human rights for all and the rule of law are essential to the fight against terrorism, and recognizing that effective counterterrorism measures and the protection of human rights are not conflicting goals but are complementary and mutually reinforcing » (PP14),
The United States of America objected to preambular paragraph 11 by indicating that this provision should be expanded. During bilaterals the United States of America proposed to include a new preambular paragraph, which is directly selected from the «United Nations action to counter terrorism: Implementing the Global Counter-Terrorism Strategy».
The UN Global Counter-Terrorism Strategy was adopted by Member States on 8 September 2006. The strategy, in form of a resolution and an annexed Plan of Action (A/RES/60/288), is a unique global instrument that will enhance national, regional and international efforts to counter terrorism.

Seventhly, « *Recognizing* that peace is not only the absence of conflict, but also requires a positive, dynamic participatory process where dialogue is encouraged and conflicts are solved in a spirit of mutual understanding and cooperation, as well as socio-economic development is ensured » (PP17)
Indonesia objected to preambular paragraph 17 by indicating that this provision should be expanded. During bilaterals Indonesia proposed to include a new sentence at the end of this provision, as follows: «as well as socio-economic development is ensured». It was accepted and therefore, the paragraph was released.

Eigthly, "*Recalling* that the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, and recognizing that peace is promoted through the full enjoyment of all inalienable rights derived from the inherent dignity of all human beings » (PP18),
The United States of America objected to the notion of "is critically enhanced for" as was originally included in this paragraph and proposed to keep this notion in square brackets. The Chairperson-Rapporteur approached them to propose the deletion from the text of this notion. It was accepted and therefore, the paragraph was released.

Ninth, «*Recognizing* the importance of the prevention of armed conflict, in which multilateralism and diplomacy plays a critical role, in accordance with the purposes and principles of the Charter, and of the commitment to promote a culture of prevention of armed conflict as a means of effectively addressing the interconnected security and development challenges faced by peoples throughout the world, bearing in mind the human and material costs of armed conflicts » (PP21),
The United States of America objected to the definition used for the multilateralism and diplomacy and notion of "culture of prevention of armed conflict" as were originally included in this paragraph and proposed to keep both notions in square brackets. The Chairperson-Rapporteur approached them to propose the alternative language of «multilateralism and diplomacy plays a critical role» and «culture of peace». It was accepted and therefore, the paragraph was released.

Tenth, « *Reaffirming* that since wars begin in the minds of human beings, it is in the minds of human beings that the defences of peace must be constructed and recalling the importance of the settlement of disputes or conflicts through peaceful means" (PP23)
Indonesia released preambular paragraph 17 by indicating that this provision should be expanded. During bilaterals Indonesia wanted to make a reference to the settlement of disputes or conflicts through peaceful means, such as included in this paragraph.

Eleventh, « *Recalling also* the importance of promoting actions aimed at eliminating the contributing factors of conflict, while taking into consideration, inter alia, political, social and economic factors » (PP25),
The United States of America objected to the notion of "eliminating the root causes" as was originally included in this paragraph and proposed to keep this notion in square brackets. The Chairperson-Rapporteur approached them to propose the deletion of this notion from the text. It was accepted and therefore, the paragraph was released.

Twelfth, « *Recalling further* that development assistance and capacity-building based on the principle of national ownership in post-conflict situations should restore peace through rehabilitation, reintegration and reconciliation processes involving all those engaged, and recognizing the importance of peacemaking, peacekeeping and peacebuilding activities of the United Nations for the global pursuit of peace and security » (PP26),
Australia and the United States objected to this paragraph and proposed to keep it in square brackets. The Chairperson-Rapporteur approached them to show that the legal sources of the alternative paragraph can be found in SC Resolution 2086 (2013) on UN peacekeeping operations. It was accepted and therefore, the paragraph was released.

Thirteenth, « *Recalling* that the culture of peace and the education of humanity for justice and liberty and peace are indispensable to the dignity of human beings and constitute a duty that all nations must fulfil in a spirit of mutual assistance and concern » (PP27)
Brazil objected to the notion of "culture" and "sacred" as was originally included in this paragraph and proposed to keep both notions in square brackets. The Chairperson-Rapporteur approached them to propose the notion of "culture of peace" and to delete from the text the notion of "sacred". It was accepted and therefore, the paragraph was released.

Fourteenth, «*Stressing* the need for States, the United Nations system and other relevant international organizations to allocate resources to programmes aimed at strengthening the culture of peace and upholding human rights awareness through training, teaching and education » (PP31),
The United States of America objected to the notion of "substantial" as was originally included in this paragraph and proposed to keep this notion in square brackets. The

Chairperson-Rapporteur approached them to propose the deletion from the text of this notion. It was accepted and therefore, the paragraph was released.

Fifteenth, « *Recalling* the need to design, promote and implement at the national, regional and international levels strategies, programmes and policies, and adequate legislation, which may include special and positive measures, for furthering equal social development and the realization of the civil and political, economic, social and cultural rights of all victims of racism, racial discrimination, xenophobia and related intolerance » (PP36),
Originally, this preambular paragraph was proposed by South Africa at the third session of the Working Group as follows :
« *Recalling* the primary responsibility of States to promote measures to eliminate all forms of racism, racial discrimination, xenophobia and related intolerance, as well as all forms of intolerance and discrimination based on religion or belief"
Australia objected to this paragraph and proposed to keep it in square brackets. The Chairperson-Rapporteur approached them to show that the legal sources of the alternative paragraph can be found in Art. 107 of the Declaration on the World Conference against racism, racial discrimination, xenophobia and related intolerance (2001). It was accepted and therefore, the paragraph was released.

Sixteenth, "*Recognizing* that racism, racial discrimination, xenophobia and related intolerance, where they amount to racism and racial discrimination are an obstacle to friendly and peaceful relations among peoples and nations, and are among the root causes of many internal and international conflicts, including armed conflicts » (PP37)
Originally, this preambular paragraph was proposed by South Africa at the third session of the Working Group as follows :
"Recognizing that racism, racial discrimination, xenophobia and related intolerance are among the root causes of armed conflict and very often one of its consequences, and recalling that non-discrimination is a fundamental principle of international law"
Australia objected to this paragraph and proposed to keep it in square brackets. The Chairperson-Rapporteur approached them to show that the legal sources of the alternative paragraph can be found in Preamble of the Declaration on the World Conference against racism, racial discrimination, xenophobia and related intolerance (2001). It was accepted and therefore, the paragraph was released.

Seventeenth, "*Inviting* solemnly all stakeholders to guide themselves in their activities by recognizing the high importance of practicing tolerance, dialogue, cooperation and solidarity among all human beings, peoples and nations of the world as a means to promote peace; to that end, present generations should ensure that both they and future generations learn to live together in peace with the highest aspiration of sparing future generations the scourge of war" (PP38),
Costa Rica objected to the sentence "to that end, present generations should ensure that both they and future generations learn to live together in peace" and proposed to keep it in square brackets. The Chairperson-Rapporteur approached them to show that the legal sources of the alternative paragraph can be found in Art. 9.1 and 9.2 of the Declaration on the Responsibilities of the Present Generations Towards Future Generations of UNESCO. It was accepted and therefore, the paragraph was released.

Article 1
Everyone is entitled to enjoy peace such that all human rights are promoted and protected and development is fully realized.
The Chairperson-Rapporteur changed the notion "right" for "entitlement".

Article 2
States should respect, implement and promote equality, non-discrimination, justice and the rule of law and should respect and support moderation, tolerance, and guarantee freedom from fear and want as a means to build peace as well as enhance friendship and cooperation within and between societies.
Indonesia released preambular paragraph 17 by indicating that this provision should be expanded. During bilaterals Indonesia wanted to make a reference to the notions of moderation and tolerance and to include the sentence of **«as well as enhance friendship and cooperation»,** such as appeared in this paragraph.

3. Advancements throughout the process
Since the end of the third session of the Open-Ended Working Group on 24 April 2014, there has been important and positives advancements in the process, such as :

Firstly, the Western and European countries accepted with «reservations» the resolution 20/15, which creates the Working Group on the right to peace. It does not mean that they support the right to peace, only that they are engaged in the process. It should be recalled that this regional group had always been opposed to the existence of this Working Group since the beginning.
On 2 July 2015, the United States of America and European Union drafted a proposal of presidential decision, which was absolutely supported by the Russian Federation, which "requests the Chairperson-Rapporteur to continue consultations on the text contained in the report on its third session of the Working Group created in accordance with *Human Rights Council resolution 20/15* and authorizes the Working Group to hold a final meeting for two days before the 30th session of the Human Rights Council in order to complete its work by determining the title and content of its draft declaration, on a consensus basis".
Although it was neither presented nor eventually adopted by the HRC because of lack of time, the relevance of this draft decision was the reference herein to the resolution 20/15. Also this text showed the real engagement of some Western countries in the pursuit of a solution which can satisfy everyone.

Secondly, States and some civil society organizations have always demanded that the Chairperson-Rapporteur should present a short and concise text. The revision of the last version of the text presented on 21 September 2015 by the Chairperson-Rapporteur was accepted by all missions, with the exception of title and the notion of «entitlement» in article 1.
All States and some civil society organizations have recognised that this text was the best compromise to reach an agreement on this topic. It means that the process of releasing square brackets in the text, carried out by the Chairperson-Rapporteur in the latest months, was a useful and successful experience.

Even the European Union affirmed at the HRC on 1 October 2015 that they were ready to display flexibility to accept a draft Declaration, despite several difficulties. It should be recalled that most of the controversial provisions proposed by some missions were finally accepted by the Western and European countries, such as terrorism, the list of principles contained in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, the reference to the colonial or other forms of alien domination or foreign occupation or the fight against racism and xenophobia or intolerance.

Additionally, we should take into consideration that the Western and European countries have actively participated in a process, in which they do not believe, which demonstrate the good faith of everyone in the negotiation process. Therefore, despite their long-term position about the lack of legal basis for the 'right to peace' in international law, they have consistently expressed their willingness to be engaged in the discussion.

In its resolution 27/17 of 2014 and L.13 of 2015, the HRC decided the OEWG would hold its third and fourth session. These previous resolutions are not explicitly referring to the draft declaration on the right to peace elaborated by the Advisory Committee, because this text was categorically rejected by Member States in the first session of the OEWG. These resolutions are a clear example of the decision taken by the HRC by not accepting the Advisory Committee's text as a basis for future negotiations. The community of States and an increasing number of civil society organizations had realized about the close linkage, even sometimes the repetition, between the elements proposed by the Advisory Committee and the Programmes of Action on Vienna and a Culture of Peace. For this reason, none State claimed in the 27th and 30th sessions of the HRC to go back to the Advisory Committee's text in order to avoid duplications.

Thirdly, many regional groups and all civil society organizations have rightly and consistently demanded that the right to peace should be expressely recognised in the text. It is important to recall that all Western and European countries accepted to include a reference in PP5 of the Declaration on the Right of Peoples to Peace, a reference which has been always object to by all of them since the beginning of the process.

Additionally, they were ready to accept for the first time the existence of the right to peace in the line of the proposal formulated by Costa Rica in the third session of the Open-Ended Working Group, which was included in PP1, as follows:

«*Acknowledging* that the elements contained herein are characterized as a right to peace in some legal systems or by some countries»

On 21 September 2015, some missions objected to this first preambular paragraph, because in accordance with them it negatively affects the principle of universality of human rights. This matter is strongly linked to the old debate on universalism vs. cultural relativism, which has existed in legal scholarship for decades, and is increasingly entering public discourse on international law and human rights, including the United Nations. The supporters of the universalism on this matter advocates that the right to peace is universal and consequently, it should apply to every human being. On the other hand, those whose support the other theory argue that the right to peace is culturally dependent, and that the right to peace can not apply in all legal systems.

At this point of the debate, it should be recalled that as of today the right to peace has been only elaborated in the *African Charter on Peoples and Human Rights* (Art. 23) and the *ASEAN Human Rights Declaration* (Art. 38). In 1984 the General Assembly adopted the *Declaration of the Right of Peoples to Peace* by 92 to none and 34 abstentions. Twenty-nine States were absent from the vote and two countries did not participate, because both of them disagreed with the initiative. Consequently, the right to peace does not exist in all legal systems of the world. This does not mean that the parliaments or governments of the Western countries cannot pass some decree or law recognizing the right to peace one day in the future, only that today there is not a common agreement at the universal level to recognize this enabling right.

Article 38.1 of the Statute of the International Court of Justice (ICJ) describes the law to be applied by the ICJ when deciding cases within its jurisdiction. It is generally considered to be the most authoritative enumeration of the sources of International Law. The Court recognizes three main legal sources: firstly, *international conventions*, whether general or particular, establishing rules expressly recognized by the contesting States; secondly, *international custom*, as evidence of a general practice accepted as law and thirdly, the *general principles of law* recognized by civilized nations.

Since 1984, the Western and European countries have strongly opposed the right to peace in both the General Assembly and the UN human rights bodies – Commission on Human Rights and HRC-, which has impeded to create a positive *opinio iuris* about the existence of this right at the universal level. Therefore, we can affirm that there is not a universal custom among all States exhibited both by widespread conduct and a discernible sense of obligation which recognises the right to peace by all. In these cases, all that is needed to have an international custom is that the State, group of States or regional groups have not objected to the law, which is not the case with the right to peace.

Since the creation of the League of Nations and the subsequent United Nations, all States without exception have tried to use the international organizations to extend their sovereignity through the prevalence of their ideas and conceptions on human rights or international law. This general phenomenon is common within the community of States and consequently, to reach this aim they join with other States and regional groups so that their conceptions can prevail over the others. However, this principle is always limited to other principles developed by the Charter of the United Nations, such as the principle of international cooperation and friendly relations among nations.

In accordance with the resolution 1815 (XVII) on the *Consideration of principles of international law* adopted by the Sixth Committee of the UNGA on 18 December 1962, the progressive development and codification of the principles of international law concerning friendly relations and co-operation among States should be elaborated through the promotion of international cooperation in economic, social and related fields and the realization of human rights and fundamental freedoms.

On several occasions, the UNGA has stated that the codification of the rules of international law and their progressive development would assist in promoting the "purposes and principles" of the Charter of the United Nations. In particular, the UNGA resolution 1505 (XV) on the *Future work in the field of the codification and progressive development of international law* stated that: "the conditions prevailing in the world today give increased importance to the role of international law … in

strengthening international peace, developing friendly and co-operative relations among the nations, settling disputes by peaceful means and advancing economic and social progress throughout the world".
Consequently, the progressive elaboration of the right to peace should be done on the basis of the principle of international cooperation and friendly relations among nations. The progressive elaboration of international law, including the right to peace, constitute one of the foundation stones of the rule of law and a clear means to also establish a just and lasting peace all over the world. To reach this aim and without diminishing the real objective of this process, the community of States should find common ways in which all ideas can peacefully coexist.

4. Implementation of the TICO approach

After Ambassador Christian Guillerment was honoured with the task of guiding the work of the Working Group since 2013, all stakeholders have jointly made a progress through an open and transparent dialogue, which would be based on the so-called TICO approach: transparency, inclusive, consensual and objective. He also added to this approach the "R" from realism.
Thanks to this approach all stakeholders built an atmosphere of trust and mutual respect, which are a characteristic of a true culture of multilateral diplomacy. They created the basis to really begin a negotiation process in good faith and with a clear demonstration of political will in order to reach an agreement.
The diverse civil society, which has strongly promoted this process from the beginning has seen a progress, even if the expectations of some were higher.
A brief analysis of the process in light of this TICO approach shows the following:

Transparency and inclusiveness

Since the transparency and inclusiveness are the pillars of the global governance, the Chairperson invited all possible international players to take part in the discussions in order to have their professional opinion. In particular, he met two times with the UN Secretariat (OHCHR), funds and programmes (UNHCR, UNEP, UNDP, UNICEF, UNFPA), specialized agencies (FAO, ILO, UNESCO, WHO), research and training institutes (UNRISD, UNIDIR), inter-governmental organizations (IOM), human rights treaty bodies and special procedures of the Human Rights Council.
On 25 February 2015, in the context of an informal meeting, the Chair assured NGOs that he was listening very carefully to the proposals made by them and that he had identified some interesting points to be taken into consideration, such as the mention of the three Declarations (Right of Peoples to Peace, Preparation of Societies for Life in Peace and Principles on International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations). Other interesting elements proposed by them, which were finally included in his text, were the Preamble of the UNESCO constitution; the issue of the eradication of poverty; the concept of eradication of inequality; the respect for life and practice of non-violence linked to education, the new concept of peace structures; violence, and the inherent right to life in peace.
In the opening statement of the third session of the Working Group hold on 20 April 2015, the Chairperson remembered how in the first session many governmental delegations refused to participate in negotiations because of the polarization that existed at that time. He recognised that we have jointly achieved to involve all parties with a clear common goal: to agree, from a human rights perspective about the concept of the right to peace. His job was to listen the different positions, to be inclusive and transparent, to understand the difficulties and obstacles, but especially to clarify concepts and encapsulate the debates within the mandate of the Human Rights Council.

Consensus

On 21 September 2015, when the Chairperson-Rapporteur presented his new revised text, all delegations stressed that consensus was important and the text presented was the minimum denominator to reach an agreement. Although they would have preferred a stronger text, they were aware about the difficulties on this matter.
Thanks to this consensual approach some delegations made an important effort to release those provisions objected at the third session of the Working Group and also agreed, with the exception of title and article 1, with the whole text.

Objective

Like in previous occassions, on 21 September 2015, the Chairperson-Rapporteur stressed that he knew that some points are not accepted by everyone, in particular the title and some notions contained in article 1. He clearly said that the mandate which he received from the Council Resolution 20/15 is to " …. progressively negotiating a draft United Nations declaration on the right to peace … without prejudging relevant past, present and future views and proposals".
Consequently, he is oblied in compliance with this resolution to present a text which responds to the mandate received by the HRC.

Realism

The OEWG witnessed in its first session that the text presented by the Advisory Committee was not supported by Member States, even by those countries that actively support the process within the HRC. Cuba, Iran and Egypt pointed out that using undefined, ambiguous and un-grounded concepts that lack any consensus in international law is counter-productive and complicates the work entrusted with the working group. Controversial issues should be excluded from the text, such as human security, conscientious objection to military service, peacekeeping, refugees and migrants, among others. Some proposed sections should be discussed in other specialized fora (i.e. disarmament). Sri Lanka added that the draft Declaration has attempted to "re-invent the wheel" by formulating new concepts and definitions, whereas it should be guided by international law, basing itself on the UN Charter. Singapore also indicated that the thematic areas proposed seem to have been arbitrarily picked, as well as that the draft Declaration is philosophically and substantively problematic and is not conducive to a coherent and meaningful text. They added that a declaration should also be realistic, which contains common denominators that are acceptable to all.
One of the issues that the OEWG needed to consider in its second session was that during the drafting process within the Advisory Committee all the main elements identified by this UN body had previously been elaborated by Member States, international organizations and Non Governmental Organizations (NGOs) in the Programmes of Action on Vienna and Culture of Peace. There were nothing new in the Advisory

Committee's text apart from making a useful compilation of those elements of international law linked to peace.

5. Future challenges

On 1 October 2015, the distinguished representative of Cuba stated before the Council that the draft resolution L.13 requests to the Working Group to have another session in order to conclude the pending issues of the draft declaration on the right to peace. On the other hand, the EU also indicated that the two main concerns of the draft – namely the title and Article 1- could not be solved.

Although there existed some proposals of language on title and article 1 on the negotiation table which were done by some missions in consultation with their respective capitals during the informal discussions, the desirable consensus was not finally achieved.

For this reason, today much more than ever it is neccessary that a serious assessment be conducted by all as to whether the international community is in a position to further develop the right to peace in a consensual manner at this point in time, such as the Chairperson recommended in his report of the third session of the Working Group.

In regards to the title of the Declaration, we should be aware that it is closely linked to the current mandate of the Working Group. On 17 July 2012, the HRC adopted Resolution 20/15 on the promotion of the right to peace by which the HRC "decides to establish an open-ended intergovernmental working group with the mandate of progressively negotiating a draft United Nations declaration on the right to peace, on the basis of the draft submitted by the Advisory Committee, and *without prejudging relevant past, present and future views and proposals*".

In the first session of the OEWG held in 2013, some delegations stated that the last phrase of the resolution 20/15, which indicates "and without prejudging relevant past, present and future views and proposals" opens the possibility to include new ideas and formulations. It follows that the future title should contain not only the right to peace in the line of the current mandate of the Working Group, but also those other demands coming from other regional groups, such as the relationship between peace and human rights, which is not incompatable with the right to peace.

As to article 1, the draft Declaration should declare the right or entitlement of everyone to enjoy peace, in the line of Article 38 of the ASEAN Human Rights Declaration, which recognises that «Every person and the peoples of ASEAN have the right to enjoy peace… ».

It is interesting to highlight that in this provision the notion of peace should be read in conjuction with the expression of «right to enjoy». In accordance with the Black Law Dictionary, the expression of «enjoyment» should be understood as the «possession and fruition of a right, privilege or incorporeal hereditament. Comfort, consolation, contentment, ease, happiness and satisfaction ». It follows that in this case peace could be understood either as a right of every person and the peoples or as an aspiration or privilege to be reached by all humankind.

The right to enjoy peace is intended to ensure that the authorities take measures to guarantee that peace may be enjoyed in a natural and dignified manner and that the individual has every possible means for this purpose. Peace is a holistic concept which goes beyond the strict absence of armed conflicts. It is also positive, since it is linked to the eradication of structural violence as a result of the economic and social inequalities in the world and to the effective respect for all human rights without discrimination.

Additionally, Article 1 should not only recall again the linkage between the right to life and peace, but also to elaborate the right to life in connection to the enjoyment of peace, including also human rights and development, which has not been elaborated in international law. The United Nations does not need to re-invent the wheel, but only to strengthen the right to life linked to the enjoyment of peace, human rights and development.

6. Recommendations

Despite the current lack of dialogue between those delegations, which support the right to peace, and those others, which deny the existence of this right, a minimum agreement on the title and article 1 would be desirable. Nevertheless, the position of the European Union was pretty clear on 2 October 2015, when they said that "their approach to this issue in the past had also been guided by the clear agreement that the 3rd session was to be the last session of the IGWG, as reflected in its mandate conferred by HRC resolution 27/17 to "finalize" the Declaration".

Overcoming the current situation will be a very difficult exercise, taking into account that Western and European countries regretted and did not support the extension of the mandate of the Working Group. It should also take into account that if in 2012 all European member States of the HRC abstained in resolution 20/15, on 2 October 2015 all European States did not support the extension of the Working Group. Therefore, at this stage the political environment to approach positions could be much more difficult.

In case of that an agreement can not be achieved within the HRC, the consequences on a future Declaration on the right to peace would be twofold:

Firstly, the reception of the future Declaration on the right to peace by many States at the General Assembly will possibly not be very warmly.

To know the current situation of the right to peace within the General Assembly, we should study the resolution 69/176 entitled "Promotion of peace as a vital requirement for the full enjoyment of all human rights by all" adopted on 23 January 2015 by which the Assembly elaborates the right of peoples to peace and consequently, "welcomes the decision of the Human Rights Council, in its resolution 20/15, to establish an open-ended intergovernmental working group with the mandate of progressively negotiating a draft United Nations declaration on the right to peace" (art. 9).

This resolution was adopted with the opposition of 53 Western, European and a majority of Eastern countries and clearly responds to four other resolutions adopted by the General Assembly since 2003 entitled "Promotion of peace as a vital requirement for the full enjoyment of all human rights by all". All of them were adopted by around 120 votes to 53 – principally, from developed countries-, and recognized the importance of respect of the right of peoples to peace, the elimination of nuclear war and the promotion of the right to development.

It follows that, in the current Council context, a future Declaration on the right to peace could be adopted by the General Assembly with the opposition of important regional groups. This situation would be a step backwards compared to

the three other main peace instruments adopted by the same body.

In particular, neither the Declaration on Preparation on Societies to Life in Peace of 1978, the Declaration on the Right of Peoples to Peace of 1984 nor the Declaration and Programme of Action on Culture of Peace of 1999 were never adopted by the General Assembly with the opposition of regional groups. In fact, both the Declaration on Preparation on Societies to Life in Peace and the Declaration and Programme of Action on Culture of Peace were adopted by consensus, with the exception of the first instrument, which was adopted with only one abstention. On the other hand, the Declaration on the Right of Peoples to Peace obtained the abstention from all Western and European States, but never the vote against.

The adoption by consensus of peace instruments in the General Assembly has been a clear tendency since the creation of the United Nations. In particular, it should also be recalled that the Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples of 1965, the Declaration on the Protection of Women and Children in Emergency and Armed Conflict of 1974, Declaration on the Participation of Women in Promoting International Peace and Co-operation of 1982 and the Political Declaration on the peaceful resolution of conflicts in Africa of 2013, were adopted by consensus.

In conclusion, in the current environment within the Council, a Declaration on the right to peace would possibly obtain the opposition of important regional groups at the General Assembly, which means that for the first time in the history of the United Nations, a Declaration on peace issues would be adopted with a large number of States opposing a peace initiative. Consequently, if the main promoters of the other peace instruments passed to the world UN history for having promoted a successful peace Declarations, it would not be the case for the current one, which would negatively affect to peace in general. The political, cultural and social price to be paid by humankind as a whole is too much high.

Secondly, the adoption of a Declaration on the right to peace by the General Assembly in the current context, without reaching a minimum agreement, would also negatively affect to the promotion of all human rights for all, including the right to peace, because of the high number of States opposing the future text.

Therefore, this situation not only could be contrary to the objective and spirit of the title of the resolution "promotion of peace as a vital requirement for the full enjoyment of all human rights by all", but also it would be seen as another step backwards in the promotion and protection of human rights and fundamental freedoms.

It should be noted that most of Declarations, Rules and Guidelines on human rights adopted by the General Assembly since 1945 were adopted by consensus. In particular, the General Assembly has adopted around thirty Declarations in different fields of human rights, such as children rights, racial discrimination, persons with disabilities, women, enforced disappearance, development, among others, after all different regional groups reached relevant agreements. Only three important Declarations on human rights were adopted with some oppositions, such as Declaration on the Right to Development or Indigenous Peoples, or abstentions, such as the Universal Declaration of Human Rights. But the rest of Declarations have been adopted by consensus.

In the United Nations only the Declaration on the International Right of Correction (A/RES/630, 1952) and the United Nations Declaration on Human Cloning (A/RES/59/280, 2005) were respectively adopted with a huge number of States opposing the instrument. Like both instruments, the impact in real life of the future Declaration on the Right to Peace would be absolutively minimum, by taking into account that more than one third of the world population could not enjoy this right by not becoming an universal right.

7. Conclusions

The pursuit of agreements among all different regional groups is the tendency not only in international relations, but the United Nations, and in particular in the field of human rights and peace. In general terms, the United Nations does not work like a national or regional parliament in which some political parties impose their will by using the majority of votes. For important matters affecting the lives of millions of people, such as the adoption of a Declaration on the right to peace, the United Nations, including its multiple entities and bodies, should work on the basis of multilateralism with the purpose of reaching important consensual decisions.

The general practice of the United Nations since 1945 has been the adoption of Declarations in both human rights and peace matters by consensus. Reaching agreements among all countries has been the general rule of the General Assembly. Therefore, the use of vote has been the clear exception. Nevertheless, when this system has been used, only few number of States have showed their opposition, the rest has voted in favour or exceptionally, they have abstained.

In the current context a Declaration on the right to peace could pass to the UN history for being the first Declaration in which States could not reach a large agreement, taking into account the current increasing opposition in both the Human Rights Council and the General Assembly. This situation would be a clear step backwards in the promotion of human rights and peace.

The OEWG on the right to peace has walked a long way, thanks to the leadership of many actors, including some civil society organizations, the Chairperson-Rapporteur, his team and the Secretariat. The ball is now in hands of States. Hopefully world leaders and diplomats will take wise decisions by thinking more about the well-being of human beings and humankind than in their own interests as States.

In case that a minimum agreement can be achieved by all regional groups on the title and the notion of "entitlement" in article 1, the future Declaration will surely contribute to the strengthening of international cooperation and multilateralism and will also influence the current objectives of the United Nations as a fundamental step towards the promotion of peace, tolerance, friendship and brotherhood among all peoples.

The obligation of the international community is to hear the voice raised by some civil society organizations, whose strongly demand the need of achieving an agreement on this matter based on transparency, inclusiveness and consensus in order to empower victims of armed conflicts as a means to allow them to live in a world free of wars.

"Peace can not be kept by force, it can be only be achieved by understanding"

(Albert Einstein)

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9. Annex

[**United Nations Declaration on the Right to Peace**]

Preamble

The General Assembly,

PP1 *Acknowledging* that the elements contained herein are characterized as a right to peace in some legal systems or by some countries

PP2 *Guided by* the purposes and principles of the Charter of the United Nations,

PP3 *Recalling* the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Vienna Declaration and Programme of Action,

PP4 *Recalling also* the Declaration on the Right to Development, the United Nations Millennium Declaration, including the Millennium Development Goals, and the 2005 World Summit Outcome,

PP5 *Recalling further* the Declaration on the Preparation of Societies for Life in Peace, the Declaration on the Right of Peoples to Peace and the Declaration and Programme of Action on a Culture of Peace, and other international instruments relevant to the subject of the present declaration,

PP6 *Recalling* the Declaration on the Granting of Independence to Colonial Countries and Peoples,

PP7 *Recalling also* that the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations solemnly proclaimed the following principles: that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations, the principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered, the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter, the duty of States to co-operate with one another in accordance with the Charter, the principle of equal rights and self-determination of peoples, the principle of sovereign equality of States, the principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter

PP8 *Reaffirming* the obligations of all Member States, as enshrined in the Charter of the United Nations, to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations, and to settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered,

PP9 *Acknowledging* that the fuller development of a culture of peace is integrally linked to the realization of the right of all peoples, including those living under colonial or other forms of alien domination or foreign occupation, to self-determination enshrined in the Charter of the United Nations and embodied in the International Covenants on Human Rights, as well as in the Declaration on the Granting of Independence to Colonial Countries and Peoples contained in General Assembly resolution 1514 (XV) of 14 December 1960

PP10 *Recognizing* the importance of the settlement of disputes or conflicts through peaceful means,

PP11 *Deeply deploring* all acts of terrorism, recalling that the Declaration on Measures to Eliminate International Terrorism recognizes that acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations and may pose a threat to international peace and security, jeopardize friendly relations among States, threaten the territorial integrity and security of States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society, and reaffirming that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed,

PP12 *Stressing* that all measures taken in the fight against terrorism must be in compliance with the obligations of States under international law, including international human rights, refugee and humanitarian law, as well as those enshrined in the Charter,

PP13 [*Urging* all States that have not yet done so to consider, as a matter of priority and in accordance with Security Council resolution 1373 (2001) and Council resolution 1566 (2004) of 8 October 2004, becoming parties to the relevant conventions and protocols as referred to in paragraph 6 of General Assembly resolution 51/210, as well as the International Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism, the International Convention for the Suppression of Acts of Nuclear Terrorism and the Amendment to the Convention on the Physical Protection of Nuclear Material],

PP14 *Reaffirming* that the promotion and protection of human rights for all and the rule of law are essential to the fight against terrorism, and recognizing that effective counterterrorism measures and the protection of human rights are not conflicting goals but are complementary and mutually reinforcing,

PP15 *Reaffirming also* the determination of the peoples of the United Nations as expressed in the Preamble to the Charter to save succeeding generations from the scourge of war, to reaffirm faith in fundamental human rights, to promote social progress and better standards of life in larger freedom, and to practice tolerance and live together in peace with one another as good neighbours,

PP16 *Recalling* that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being, and recognizing that development, peace and security and human rights are interlinked and mutually reinforcing,

PP17 *Recognizing* that peace is not only the absence of conflict, but also requires a positive, dynamic participatory process where dialogue is encouraged and conflicts are solved in a spirit of mutual understanding and cooperation, as well as socio-economic development is ensured

PP18 *Recalling* that the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, and recognizing that peace is promoted through the full enjoyment of all inalienable rights derived from the inherent dignity of all human beings,

PP19 *Recalling also* that everyone is entitled to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights can be fully realized,

PP20 *Recalling further* the commitment of the international community to eradicate poverty and to promote sustained economic growth, sustainable development and global prosperity for all and the need to address inequalities within and among States,

PP21 *Recognizing* the importance of the prevention of armed conflict, in which multilateralism and diplomacy plays a critical role, in accordance with the purposes and principles of the

Charter, and of the commitment to promote a culture of prevention of armed conflict as a means of effectively addressing the interconnected security and development challenges faced by peoples throughout the world, bearing in mind the human and material costs of armed conflicts,

PP22 *Recalling* that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

PP23 *Reaffirming* that since wars begin in the minds of human beings, it is in the minds of human beings that the defences of peace must be constructed and recalling the importance of the settlement of disputes or conflicts through peaceful means

PP24 *Recalling* the need for strengthened international efforts to foster a global dialogue for the promotion of a culture of tolerance and peace at all levels, based on respect for human rights and diversity of religions and beliefs.

PP26 *Recalling further* that development assistance and capacity-building based on the principle of national ownership in post-conflict situations should restore peace through rehabilitation, reintegration and reconciliation processes involving all those engaged, and recognizing the importance of peacemaking, peacekeeping and peacebuilding activities of the United Nations for the global pursuit of peace and security,

PP27 *Recalling* that the culture of peace and the education of humanity for justice and liberty and peace are indispensable to the dignity of human beings and constitute a duty that all nations must fulfil in a spirit of mutual assistance and concern,

PP28 *Reaffirming* that the culture of peace is a set of values, attitudes, traditions and modes of behaviour and ways of life, as identified in the Declaration on a Culture of Peace, and that all this should be fostered by an enabling national and international environment conducive to peace,

PP29 *Recognizing* the importance of moderation and tolerance as values contributing to the promotion of peace and security,

PP30 *Recognizing* also the important contribution that civil society organizations can make in building and preserving peace, as well as in strengthening a culture of peace,

PP31 *Stressing* the need for States, the United Nations system and other relevant international organizations to allocate resources to programmes aimed at strengthening the culture of peace and upholding human rights awareness through training, teaching and education,

PP32 *Stressing also* the importance of the contribution of the United Nations Declaration on Human Rights Education and Training to the promotion of a culture of peace,

PP33 *Recalling* that respect for the diversity of cultures, tolerance, dialogue and cooperation, in a climate of mutual trust and understanding, are among the best guarantees of international peace and security,

PP34 *Recalling also* that tolerance is respect, acceptance and appreciation of the rich diversity of our world's cultures, our forms of expression and ways of being human, as well as the virtue that makes peace possible and contributes to the promotion of a culture of peace,

PP35 *Recalling further* that the constant promotion and realization of the rights of persons belonging to national or ethnic, religious and linguistic minorities as an integral part of the development of a society as a whole and within a democratic framework based on the rule of law would contribute to the strengthening of friendship, cooperation and peace among peoples and States,

PP36 *Recalling* the need to design, promote and implement at the national, regional and international levels strategies, programmes and policies, and adequate legislation, which may include special and positive measures, for furthering equal social development and the realization of the civil and political, economic, social and cultural rights of all victims of racism, racial discrimination, xenophobia and related intolerance,

PP37 *Recognizing* that racism, racial discrimination, xenophobia and related intolerance, where they amount to racism and racial discrimination are an obstacle to friendly and peaceful relations among peoples and nations, and are among the root causes of many internal and international conflicts, including armed conflicts,

PP38 *Inviting* solemnly all stakeholders to guide themselves in their activities by recognizing the high importance of practicing tolerance, dialogue, cooperation and solidarity among all human beings, peoples and nations of the world as a means to promote peace; to that end, present generations should ensure that both they and future generations learn to live together in peace with the highest aspiration of sparing future generations the scourge of war,

Article 1

Everyone is [entitled] to enjoy peace such that all human rights are promoted and protected and development is fully realized.

Article 2

States should respect, implement and promote equality, non-discrimination, justice and the rule of law and should respect and support moderation, tolerance, and guarantee freedom from fear and want as a means to build peace as well as enhance friendship and cooperation within and between societies.

Article 3

States, the United Nations and specialized agencies should take appropriate sustainable measures to implement the present Declaration. International, regional, national and local organizations and civil society are encouraged to support and assist in the implementation of the present Declaration.

Article 4

Nothing in the present Declaration shall be construed as being contrary to the purposes and principles of the United Nations. The provisions included in this Declaration are to be interpreted in accordance with the Charter of the United Nations, the Universal Declaration of Human Rights and international law.

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Judicial initiatives in tackling custodial torture

Dr. Seema Garg
Assistant Professor in Law, M.M. University, Mullana, Ambala, India.

Abstract
Torture is generally defined as an instrument to impose the will of strong over the week by suffering. Police atrocities are common feature of Indian scenario. Common features of violation of human rights are the torture of arrested persons, the disappearances of suspects who ought to have been in regular police custody, deaths in police encounters and at police stations and undertrials detained in jails for years without trials. A study of various decisions of the Supreme Court and various High Courts revealed that Indian Judiciary has made a tremendous achievement in protecting custodial human rights.

Keywords: Custody, Torture, Human Rights, Police, Prisoner

Introduction

The essence of a modern Criminal Justice Administration is enshrined in three great principles. First in order is the principle of 'legality' which implies that the person subjected to the criminal process shall be treated equally without regard to rank or wealth. The second principle is concerned with 'due respect to the person involved in the criminal process' which implies that regard must be paid to the dignity of the accused, the victim as well as witness etc. both at the substantive as well as procedural levels. The third is the 'principle of quality of criminal justice', which implies compliance with certain minimum standards that would be followed in various criminal processes such as independent and impartial judiciary, trial in an open court, access to legal counsel and free legal aid in case of poor, information about ground of arrest and charge and access to evidence, right to be released on bail and speedy trial [1].

The *Mathura Rape Case* [2] (where Mathura, a kidnapped minor was raped by three policemen in the lock-up), the *Bhagalpur Blinding Case* [3] (where in the course of investigation the police had poured acid in the eyes of the hardened criminals with a view to discipline them), *the Indefinite Prisonization of under-trials Case* [4] (where a large number of under-trial prisoners were identified in various prisons in Bihar State pending trials and even pending investigations and the *forgotten life-termers in Uttar-Pradesh Prison Episode* [5] (where under the order of High Court 249 Life-Termers who had served more than 26 years in various prisons were located) and many other such cases expose the seamy side of our Criminal Justice Administration, which most of the lawmen would wish to be described nothing more than mere aberration.

In all these cases, there is failure on the part of one or the other agency of Criminal Justice Administration and involved abuse of custodial power or relate to perpetrating custodial injustice. Such custodial injustice is occasioned whenever there is a killing, a rape or torture of a person in condition of custody, whether in police lock-up, prison, juvenile custodial institution, nari niketan and mental asylum, orphanage etc. Every instance of State sponsored denial of freedom to a person under detention of any kind can be related to custodial justice [6]. There has been a growing tendency on the part of the State functionaries, particularly the police and para-military forces to sacrifice custodial justice values in the light of the social and political realities [7].

The Supreme Court of India has come ahead to expand the constitutional prospect of providing certain rights and remedies to the prisoners. It heralded a new era of prisoners' rights and blazed the trail of widespread recognition of these rights. The Court, in several cases, recognised the right of prisoner to be treated with dignity and humanity and laid down the holistic principle that human rights belong to inmates also and no one including the State has right to trample upon their human rights.

Judicial Initiatives on a Persons' Rights from the Pre-Detention Period till his Release

Fair and Speedy Investigation

Article 21 of the Constitution of India ensures a 'fair, just and reasonable' procedure in all facets of Criminal Justice Administration. The worst violation of human rights and custodial justice guarantee takes place in the course of investigation, when the police act under the pressure to secure most clinching evidence often resort to third degree methods and torture. The Courts have not only exposed the seamy side of police investigation process but in several cases also dished out exemplary punishments to ensure human conditions of investigations.

In *Gauri Shanker Sharma v State*, [8] three members of police force were charged for custodial death in the course of investigation. It was revealed that the deceased was taken into custody without recording arrest in the general diary on the actual day of arrest. This way the injuries given in the course of investigation were shown to have been incurred in the pre-arrest period. Ahmedi, J. observed that the offence was of a serious nature aggravated by the fact that it was committed by a person, who was supposed to protect the citizens and not to misuse his uniform and authority to brutally assault them or else this would be a stride in the direction of Police Raj. It must be curbed with a heavy hand, the punishment be such that it would deter others from indulging in such behaviour.

Though investigation and prosecution are the functions of two distinct wings of Criminal Justice Administration, but often the investigating agency develops a commonality of interest with the prosecution and at times, resorts to foul and underhand

means to forge evidence to somehow secure conviction. In *Dilawar Hussain v State* [9] R.M. Sahai, J. observed, "Still sadden was the manner in which the machinery of the law moved from accusation in the charge sheet that accused were part of unlawful assembly of 1500-2000. The number came down to 150 to 200 in evidence and the charge was framed against 63 under Terrorist and Disruptive Activities (Prevention) Act, 1985 and various offences including Section 302 of Indian Penal Code. Even out of 63, 56 were acquitted either because there was no evidence or if there was evidence against some, it was not sufficient to warrant their conviction. What an affront to fundamental rights and human dignity. Liberty and freedom of these persons were in chains for more than a year, for no reason – one even died in confinement".

In *Kishore Chand v State of Himachal Pradesh* [10] K. Ramaswamy, J. highlighted the over zeal of investigation agencies and its dangers for the liberty of the individual and observed that, "undoubtedly, heinous crimes are committed under great secrecy and investigation of the crime is difficult and tedious task. At the same time the liberty of a citizen is precious one guaranteed by Article 3 of Universal Declaration of Human Rights and also Article 21 of the Constitution of India and its deprivation shall be only in accordance with law".

In *Shivappa v State* [11] Dr. A.S. Anand, J. declined to admit in evidence a confession under Section 164, as the facts in the case displayed a real possibility of police influence over the accused and absence of any assurance about the voluntariness of the confession.

The Supreme Court held in case of *State of Andhra Pradesh v P.V. Pavithran* [12] that there is no denying the fact that a lethargic and lackadaisical manner of investigation over a prolonged period makes an accused in a criminal proceeding to die every moment and he remains always under extreme emotional and mental stress and strain and the remains always under a fear psychosis. Therefore, it is imperative that if the investigation of a criminal proceeding staggers on with a tardy pace due to the indolence or inefficiency of the investigating agency causing unreasonable and substantial delay results in grave prejudice. Personal liberty will step in and resort to the drastic remedy of quashing further proceedings in such investigation.

In case of *Noor Mohamed v Jethanand,* Court held that access to speedy justice is regarded as human right which is deeply rooted in fundamental concept of democracy nad such right is not only creation of law but also natural rights [13].

Arrest and Detention

The Code of Criminal Procedure confers fairly extensive powers of arrest mainly on the police. No arrest should be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest.

The Supreme Court in *Joginder Kumar v State of U.P.* [14] strongly opposing the practice of carrying out indiscriminate arrests said that "an arrest cannot be made simply because it is lawful for the police officer to do so".

Harassment and Ill Treatment

Holding that protection of prisoner within his rights is a part of the office of Article 32, in case of *Sunil Batra* [15], Krishna Iyer, J. observed that 'even prisoners under death sentence have human rights which are not negotiable and even the dangerous prisoner has basic liberties that cannot be bartered away', while ruling down the practice of putting bar fetters for under trials and provisions regarding solitary confinement.

The act of police officers in giving third degree treatment to an accused person while in their custody and thus killing him is not referable to and based on the delegation of the sovereign powers of the State to such police officers to enable them to claim any sovereign immunity [16].

In *Raghubir Singh v State of Haryana* [17] the Apex Court observed that, the diabolical recurrence of police torture resulting in a terrible scars in the minds of common citizens that their lives and liberty are under a new peril and unwarranted because the guardians of law destroy the human rights by torture. The vulnerability of human rights assumes a traumatic torture when functionaries of the State whose paramount duty is to protect the citizens and not to commit gruesome of offences against them in reality perpetrate them. In this case the Supreme Court quoted *Abrahim Lincoln that – if you once forfeit the confidence of our fellow citizens you can never regain their respect and esteem. It is true that you can fool all people some of the time and some of the people all the time but you cannot fool all the people all the time.*

Prisoners' rights have been recognised not only to protect them from physical discomfort or torture in the prison but also to save them from mental torture [18]. In *State of U.P. v Ramasagar Yadav* [19] the Supreme Court said, "It wished to impress upon the Government the need to amend the law so that the burden of proof in cases of custodial deaths will be shifted to the police". In case of *Saheli* [20] the Court confirmed that the plea of immunity of State is no longer available and State will have to answer action for damages for bodily harm, which includes battery, assault, false imprisonment, physical injuries and death. The high headedness of the police authorities was brought to the light in *Delhi Judicial Service Asson, Tis Hazari Court v State of Gujarat* [21]. This case exhibited the berserk behaviour of police undermining the dignity and independence of judiciary.

The Supreme Court in *D.K. Basu v State of W.B* [22]. handed down thirteen directions that not only prohibit certain practices but also require the police to fulfil certain positive obligations such as preparation of memo of arrest, allow the arrestee to meet his lawyer during interrogation, notification of time, place of arrest and custody, telegraphically, getting arrestee medically examined after arrest and every 48 hours, information about arrest to police control room etc.

In *Smt Selvi and Others v State of Karnataka* [23], while dealing with the involuntary administration of certain scientific techniques, namely, narcoanalysis, polygraph examination and the brain electrical activation profile test for the purpose of improving investigation efforts in criminal cases, a three-Judge Bench opined that the compulsory administration of the impugned techniques constitute 'cruel, inhuman or degrading treatment' in the context of Article 21. In *Haricharan and Another v State of Madhya Pardesh and Others* [24], the Court held that the expression 'Life and Personal Liberty' in Article 21 includes right to live with human dignity. Therefore, it includes within itself guarantee against the torture and assault

by the State or its functionaries. In *Vishwanath S/o Sitaram Agrawal v Sau. Sarla Vishwanath Agrawal* [25], the Court observed, "Reputation which is not only the salt of life, but also the purest treasure and the most precious perfume of life. It is extremely delicate and a cherished value this side of the grave. It is a revenue generator for the present as well as for the posterity."

The Supreme Court in case of *Dr. Mehmood Nayyar Azam v State of Chhattisgarh and Others* [26] observed that when an accused is in custody, his Fundamental Rights are not abrogated in toto. His dignity cannot be allowed to be comatosed. The right to life is enshrined in Article 21 of the Constitution and a fortiorari, it includes the right to live with human dignity and all that goes along with it. The restrictions imposed have the sanction of law by which his enjoyment of fundamental right is curtailed but his basic human rights are not crippled so that the police officers can treat him in an inhuman manner. On the contrary, they are under obligation to protect his human rights and prevent all forms of atrocities.

Unhygienic Conditions in Lock-up

Right to healthy and clean environment is included in right to life under Article 21 of the Constitution. In the case of *Indu Jain v State of M.P. and Others* [27] the Supreme Court ruled that death of a detained person due to unhygienic conditions in Jail would amount to custodial death and could make officials liable for prosecution.

In *Court on Its Own Motion v Union of India and Others* [28], the Apex Court held that, "The appropriate balance between different activities of the State is the very foundation of the socio-economic security and proper enjoyment of the right to life".

Privilege against Self-Incrimination

The Supreme Court decision in *Nandini Satpathy v P.L. Dani* [29] gave an interpretation to the constitutional guarantee against self-incrimination. The Apex Court speaking through Krishna Iyer, J. accorded a new expanse to the privilege by making it available right from the early stages of interrogation, thereby giving a meaningful protection to an accused person in police custody. The Court ruled that if the police obtained information is strongly suggestive of guilt from an accused by applying any kind of pressure, subtle or crude, mental or physical, direct or indirect, it becomes a compelled testimony violative of privilege against self-incrimination.

Bail and Remand

Bail is an important factor in preserving the personal liberty of an individual. When bail is refused a man is deprived of his personal liberty, which is of too precious value under our constitutional system. It vindicates the traditional right to freedom before conviction; it permits unhampered preparation of a defence and prevents infliction of punishment prior to conviction [30].

In *Moti Ram's* case the Court held that there is a need for liberal interpretation of social justice, individual freedom and indigent's rights and while awarding bail covers release on one's own bond, with or without sureties. When sureties should be demanded and what sum should be insisted on are dependent on variables [31].

In the context of continuance of police remand the court ruled that 'bail not jail' should be the principle to be followed by Courts. [32] In *Kashmira Singh v State of Punjab,* Bhagwati, J. observed that it would be indeed a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the court ever compensate him for his incarceration which is found to be unjustified? [33].

In *Common Cause's* Case the Supreme Court treated the long pendency of cases and consequent incarceration itself an engine of oppression and issued several directions for release on bail the diverse categories of under- trials [34]. On the rights of bail Bhagwati, J. said that, "This system of bail operates very harshly against the poor and it is only the non poor who are able to take advantage of it by getting themselves released on bail" [35].

Treatment of Women in Custody

Women in custody are particularly vulnerable to physical and sexual abuse. Courts took a very serious view of complaints regarding rape in custody or harassment. Expressing serious concern about the safety and security of women in police lock up, the Supreme Court directed that a woman judge should be appointed to carry out surprise visit to police stations to see that all legal safeguards are being enforced. The Supreme Court directed [36] that

1. Female suspects must be kept in separate lock-up under the supervision of female constable.
2. Interrogation of females must be carried out in the presence of female policepersons.

However, these directions have not been implemented. The Court issued detailed procedures to ensure enforcement of human rights of women and girls in police and prison custody in *Dr Upinder Baxi and Others v State of U.P.* [37] and *Christian Community Welfare Council of India and Others v Government of Maharashtra and Others* [38] when the Court's attention was drawn to horrible conditions in custodial institution's for women and girls. In *Mehboob Batcha and Others v State Rep. by Superintendent of Police* [39], the Court observed, "Crimes against women are not ordinary crimes committed in a fit of anger or for property. They are social crimes. They disrupt the entire social fabric, and hence they call for harsh punishment". The Court further held that the horrendous manner in which victim was treated by policemen was shocking and atrocious, and calls for no mercy.

Prohibition against detention of Juvenile in Adult Custodial Institutions

Practice of locking up children in adult custodial institutions not only exposes the minors to the ways of hardened criminals, but also makes them the victims of sexual and other forms of exploitation. Keeping this in view the Supreme Court ruled against detention of children in adult prisons in *Munna v State* [40].

In *Sheela Barse v Union of India and Others* [41] the Supreme Court held that, the State must ensure strict adherence to the safeguards of the jails so that children are not abused.

- Take precautions that children below 16 years of age are not kept in Jail.
- Ensure that trial of children should take place only in juvenile courts and not in criminal courts.
- Ensure that if a First Information Report is lodged against a child below 16 yrs of age for an offence punishable with

imprisonment of not more than seven years, then the case must be disposed off in three months.

The Supreme Court further pointed out that by ignoring the non-custodial alternatives prescribed by law and exposing the delinquent child to the trauma of custodial cruelty, the State and the society run the risk of sending the child to the criminal clan [42]. In *Sunjay Suri v Delhi Adminstration* [43], the Supreme Court gave specific directions to magistrates and the detention authorities. Ranganath, J. said, "We call upon every magistrate or trial judge authorised to issue warrants for detention of prisoners to ensure that every warrant authorising detention specifies the age of the person to be detained".

Compensation to Victims of Abuse of Power

There is no wrong without a remedy. The law wills that in every case where a man is wronged, he must have remedy. A mere declaration of invalidity of an action or finding of custodial violence or death in lock-up not by itself provide any meaningful remedy to a person whose Fundamental Right to life has been infringed, more needs to be done.

Khatri (IV) v State of Bihar [44] was the first case where the question of granting monetary compensation was considered by the Supreme Court. Bhagwati, J. observed, "Why should the court not be prepared to forge new tools and device new remedies for the purpose of vindicating the most precious of the precious, fundamental rights to life and personal liberty". Article 21 would be reduced to nullity, 'a mere rope of sand' if State is not held liable to pay compensation for infringing Article 21.

The Supreme Court brought about revolutionary break – through in the 'Human Rights Jurisprudence' in *Rudal Shah v State of Bihar* [45] when it granted monetary compensation to the petitioner against the lawless acts of the Bihar Government, which kept him in illegal detention for over fourteen years after acquittal. The Supreme Court observed, "The refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to *jus* Fundamental Right to liberty which the State Government has so grossly violated" [46].

In *Nilabeti Bahera v State of Orissa and Others* [47] the Supreme Court observed, "The Court is not helpless and the wide powers given to the Supreme Court by Article 32, which itself a Fundamental Right, imposes a constitutional obligation on the Court to forge such new tools, which may be necessary for doing complete justice and enforcing the Fundamental Rights guaranteed in the Constitution which enable the award of monetary compensation in appropriate cases". The Court further said that, "the purpose of law is not only to civilise public power but also to assure people that they live under a legal system which protects their interests and preserve their rights. Therefore, the High Courts and the Supreme Court as protectors of civil liberties not only have the power and jurisdiction but also the obligation to repair the damages caused by the officers of the State to Fundamental Rights of citizens" [48].

In *Sakshi Sharma and Others v State of Himachal Pradesh and Others*, the High Court has granted compensation of Rupees 15,60,000 to the victim and directed the suspension of the erring police officials. The High Court also directed the Chief Judicial Magistrates's and the Sub Divisonal Magistrates's to visit police stations and submit reports to the Sessions Judge, who would take action against the persons who violated the constitutional provisions and legal mandate [49].

In *Dr. Mehmood Nayyar Azam v State Of Chattisgarh And Others* [50], the Court observed that, the purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights.

The Supreme Court of India has come ahead to expand the constitutional prospect of providing certain rights and remedies to the prisoners. It heralded a new era of prisoners' rights and blazed the trial of widespread recognition of these rights. The Court, recognised the right of a prisoner to be treated with dignity and humanity and laid down the holistic principle that human rights belong to inmates also and no one including the State has right to trample upon their human rights. The Fundamental Rights, which also include basic human rights, continue to be available to a prisoner and these rights cannot be defeated by pleading old and archaic defence of immunity in respect of sovereign acts.

The Prime Minister of the country has shown such a serious concern about the arbitrary exercise of executive power and appreciated the positive role of the judiciary. The Prime Minister Dr. Manmohan Singh said, "Our Courts have protected out citizens from the exercise of arbitrary power and inequities of a poor country trying to modernise itself" [51].

The judiciary has to function as a watch dog to ensure that not only the legislature enacts custodial laws as per the constitutional and statutory rights, but also to ensure that if an executive exercises powers of interrogation, arrest, pre and post trial custody are exercised as per the rules too. The broad range of custodial rules and wide variation in the situations of their applicability make the task of the judiciary complex and almost daunting. That is one of the reasons why despite creditable performance of the judiciary, particularly the Supreme Court and High Courts in several spheres of custodial justice, there remain many 'areas of darkness' still [52].

In *Lakshmi v Sub-Inspector of Police, Nagamalai Pudukotti Police Station, Madurai* [53] Murugan, a boy of 15 years of age, was picked up by the police for interrogation in a theft case and detained in police lock-up and tortured in every possible way. The mother's *habeas corpus* petition before the High Court revealed the plight of the little Murugan and also the sordid tale of abuse of custodial power not only on the part of the police but also the magistracy. The most serious violations, however, the respondent committed was the manipulation of the so-called surrender of Murugan before the Judicial Magistrate IV, Dindigul and a remand of judicial custody in Dindigul sub-jail and again, a remand to judicial custody under the orders of Judicial Magistrate No.7, Madurai. Murugan had charged the respondent by alleging that he and other policemen at his command interrogated him (Murugan) and in the course of interrogation tortured him by removing his nails, applying chilli powder over his eyes and forcing him to consume ganja, arrack and human waste diluted in water. The Court said, "There was good material on the record to show that Murugan was produced before the Judicial Magistrate IV, Dindigul by the police. It is enough to conclude that Murugan was taken in custody by the respondent on 8 Febureary1991 and kept in custody without any authority of law until he was produced before the Judicial Magistrate IV on 1March1991. His judicial custody after 1March1991 in jail prison was also illegal and invalid as per provisions of Section 18 of the Juvenile Justice

Act, 1986. How and why the Judicial Magistrate IV fell to the scheme of the respondent or any other police personnel is a matter of concern. It appears that it was on the basis of the said interpolation in the surrender petition that the Judicial Magistrate IV ordered remand of Murugan in judicial custody. That order formed the basis of the order of remand to judicial custody by the Judicial Magistrate 7, Madurai. That both the Magistrates failed to notice the obvious that, Murugan was a juvenile is yet another matter of concern. Was it a case of the accused not brought bodily before the Court? Was it a case of remand order passed blindly without seeing the accused? Magistrate who makes orders of remand blindly will not only fail in one case but would cause the failure of the justice system itself" [54].

In *Shakila Gaffar Khan v Vasant Raghunath Dhoble and Others* [55] a private complaint was filed by the appellant (wife) alleging torture in custody of her husband who died in hospital within two days of his release on bail. The Court, particularly the Apex Court in this case, was inclined to agree that the appellant's husband had been tortured in custody but was not prepared to make the accused legally responsible for it, though the fact of torture was considered enough for granting compensation to the widow.

In the aforesaid case would it not be an effective measure against torture if the Magistrate before grant of bail had got the victim examined medically for his injuries? Should the Magistrates not inspect the conditions and the physical state of persons remanded in police custody?

Reacting sharply to gross abuse of custodial powers leading to all-round torture, invasion of modesty and even death the Nagpur Bench of the Bombay High Court speaking through R.M. Lodha, J. (M.B. Ghodeshwar, J. concurring) in *Christian Community Welfare Council of India and Others v State of Maharashtra and Others* [56] had issued eight far-reaching directions to the State Government, Law Secretary, Director General of Police with a view to strengthening custodial justice network. Directions (VII) and (VIII) relate to detaining or arrest of females and their custody in lock-ups. It is said that instead of improving the custodial conditions and according a special consideration to female detainee, the State Government moved the Supreme Court against the High Court judgement. It is sadder still that the Supreme Court saw some merit in their appeal. The Supreme Court speaking through Hegde, J. (B.P. Singh, J. concurring) thought it was appropriate to water-down the High Court directions. It was observed in the context of special safeguard in a case of detention and arrest of women, "We think a strict compliance with the said direction, in a given circumstance, would cause practical difficulties to the investigation agency and might even give room for evading the process of law by unscrupulous accused. It may not always be possible and practical to have the presence of a lady constable when the necessity for such arrest arises" [57].

Conclusion

It may be submitted that the cause of custodial justice to vulnerable sections like women, children and many other under-privileged sections is much more urgent and vital than the 'practical difficulties' to investigation agencies. The judiciary must remember that in most of the situations of custody a person's liberty is deprived because of some kind of exercise of judicial power. Therefore, the judiciary has to accept its primary obligation for securing to every citizen custodial justice.

The Indian judiciary, especially the Supreme Court of India, has played a significant role in evolving prison jurisprudence in India. The Indian Courts have become the Courts of the poor and the downtrodden. Various decisions reflect that Indian Courts are deeply sensitised to the need of doing justice to large masses of the people to whom justice had been denied by the heartless society for generations [58]. However, while appreciating the judicial approach towards the prisoners, the fact that has to be borne in mind is that the country's criminal justice system still suffers from substantive and procedural deficiencies. Once a citizen is arrested, even if on a relatively minor charge, he could be held in custody for years before his case comes up for trial. Those who are affluent are still able to negotiate their way around the numerous obstacles that lie on the road of justice. For an ordinary citizen, an encounter with the law is very much the stuff of nightmares [59]. There is a long course before the Indian judiciary to be followed in order to achieve the goal of social justice.

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An appraisal of the new trend of child trafficking in Nigeria: A need for an effective law

[1] Garba Umaru Kwagyang, [2] Nik Ahmad Kamal Nik Mahmood

[1] Ph.D Research candidate, Ahmad Ibrahim Kulliyyah of Laws IIUM, and Lecturer, Department of Public Law, University of Maiduguri, Nigeria.

[2] Ahmad Ibrahim Kulliyyah of Law, IIUM

Abstract
Child trafficking has become a global problem which requires a global collaboration in order to bring it to an end. In Nigeria just like any other countries of the world, the menace has reached an alarming level which requires every effort to stamp it out. Nigeria is a transit, source, and destination country for child trafficking, and the menace have deviated from the conventional form of child trafficking, where children are being trafficked for forced labour, prostitution, and other form of exploitation to a more complicated and dangerous form of trafficking called "baby harvesting." The paper adopted doctrinal methodology where relevant literature in the area both primary and secondary were analysed. The paper, also examine this phenomenon with a view to point out its consequences and to clarify its objective with a view to expand the scope of the provision of the Anti- trafficking law to cover the menace. The paper finds that there is a need to make the Anti-trafficking law adequate to cover emerging form of trafficking such as baby harvesting, and recommends full implementation of the law so that Nigeria child could be save and protected from this dangerous modern form of child trafficking.

Keywords: child trafficking, Nigeria, a trend, Anti-trafficking Law

1. Introduction

In the recent past, Nigeria is famous not because of her exceptional advancement in the field of science and technology but for child trafficking. An International Labour Organisation (ILO) estimate shows that over twelve million Nigerian children are engaged in child labour, and a large percentage of the children in labour are victims of trafficking. [1] The history of child trafficking in Nigeria could be traced to the severe economic hardship caused by structural adjustment programmed imposed by the Nigerian government [2]. The structural adjustment programmed led to the loss of employment by many Nigerians, broken homes and poverty. Young women became breadwinners for some families. [3] The threats posted by acute poverty, disease, mass unemployment, corruption, retrenchment of workers, harsh environmental and high cost of living consequently caused the mass exodus of Nigerian citizens toward a more economically viable countries or any other country where they can survive irrespective of the risks involved. Wealthy Nigerians who made their money through illegal international business seized the opportunity and commenced massive recruitment of young boys and girls to be sent abroad for prostitution and other forms of exploitation. This situation continued unchanged until a very wide gap was created. Consequently, human trafficking has taken a centre stage in the nature of child trafficking in Nigeria with traffickers deploying many strategies that is not contemplated by the law to remain in the business of child trafficking. Baby harvesting is one of the new dimension of child trafficking in Nigeria that will be examined in this article with a view to proffer a solution toward addressing the menace.

2. Definition of the key Terms; Child, Child Trafficking, and Trend.

2.1 Definition of A Child

The word "Child" has been defined specifically in both the local and international instruments dealing with the rights and welfare of the child. In Nigeria, there are different types of definition given to a child depending on which law and for what purpose. A child is statutorily defined as a person under the age of 14 years, while a young person is a child under the age of 17 years but who has attained the age of 14. [4] This age ceiling in Nigerian law is lower than the age standard in the relevant international instruments. A child under International Instrument is every human being below the age of 18 years. [5]
The problem with age-based definitions is that they are always arbitrary and indeed risk the possibility of being rendered obsolete by modern perceptions, and findings on children in a very recent study has shown where traffickers lie about the age of trafficked victims to beat security agencies [6] Other definitions include:

a) A child under seven (7) years is not criminally responsible for an act or omission; however, there is a rebuttable presumption that under twelve (12) years cannot commit a crime. [7]
b) Juvenile Justice: The Children and Young person's Law differentiates between the child and young person. It is below 14 years for the former, while the latter is not to exceed 17 years. [8]
c) Voting Rights: The age is fixed at 18 years. [9]
d) Marriageable age: This depends on the type of marriage being contracted e.g. under the Matrimonial Cause Act

1970; [10] As at common law is 16 years; under the Customary and Islamic law, it varies from place to place. [11]

e) Right to acquire land: the minimum age is 18 years. [12]
f) Contractual age: The Infant Reliefs Act 1874 [13] and Infant Reliefs law defines infant as any person below the age of 21 years.
g) Right to be member of Limited Liability Company: If the members are not more than two it is fixed at 18 years. [14]

Be that as it may, the Child Right Act defines a child as a person under the age of eighteen (18) years. And age of majority means the age at which a person attains the age of eighteen. [15] For all intents and purposes therefore, a child as envisaged in this article is simply refers to a person who is below the age of 18 years.

2.2 Child Trafficking

Trafficking encompasses the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. [16] At a minimum, exploitation implies the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. [17] This means that for an act to constitute trafficking, the following three elements must cohabit. [18] Viz;

1. The Act (What is done)Recruitment, transportation, transfer, harbouring or receipt of persons
2. The Means (How it is done) Threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim
3. The Purpose (Why it is done) For the purpose of exploitation, which includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs.

2.3 Trend

Is defined as a general development or change in a situation or in the way that people are behaving, [19] and it could also be defined as pattern of gradual change in a condition, output, or process or an average or general tendency of a series of data points to move in a certain direction over time, represented by a line. [20]

2.4 Background of child trafficking in Nigeria

Child trafficking has became an international problem with women and children been trafficked and sold as sex slaves to rich owners, who invariably used them and then relegated them as bonded slaves to work for them. Nigeria just like other countries of the world is not an exception to the menace. In Nigeria, the history of child trafficking dated back in 1980s following the severe economic hardship caused by structural adjustment programmed imposed at the time by the Nigerian government [21]. The structural adjustment programmed led to the loss of employment by many Nigerians, broken homes and poverty. Young women became breadwinners for some families. [22] The Nigerian former Vice President, Atiku Abubakar also aligns himself with this view. [23] They vehemently argue that the introduction of structural Adjustment Programme (SAP) in Nigeria created a huge down turn in the economy of the country. The threats posted by acute poverty, disease, mass unemployment, corruption, retrenchment of workers, harsh environmental and high cost of living consequently caused the mass exodus of Nigerian citizens toward a more economically viable countries or any other country where they can survive irrespective of the risks involved. Furthermore, the non-challant attitude of Nigerian government to the yearnings and aspirations of her citizenry denied the situation any concrete effort to arrest the drift. This situation continued unchanged until a very wide gap was created. Consequently, human trafficking has taken a centre stage in the nature of child trafficking in Nigeria and it continues to spread like wild fire throughout Nigeria. Naturally, people started exploring ways of dealing with the frightening hunger. In no time, social ills such as greed, materialism, love for money, moral decadence and all sort of economic crimes emerged. [24]

Wealthy Nigerians who made their money through illegal international business seized the opportunity and commenced massive recruitment of young boys and girls to be sent abroad for prostitution and other forms of exploitation. For example in 2001, in Turin, Northern Italy, the Italian Police in a crackdown arrested a hardened ring of three middle-aged woman from Edo state of Nigeria who are successful prostitutes and responsible for trafficking hundreds of young girls to Italy. [25] In the case of *Attorney General of the Federation V. Sarah Okoya* [26] the accused was charged for transporting some girls from Edo state Nigeria to Spain for exploitative prostitution, and the court found the accused person guilty and sentenced her to six months imprisonment without the option of fine. In most of this situations, the victim parents or guardian are either deceived or cajole into it by believing that there exist a juicy job abroad. [27] Hence they hand over their sons and daughters to these traders in human mystery; believing that sooner or later their hard conditions would turn around. Traffickers who noticed the desperation of parents many a times cajole them to sale off valuable family property such as lands, houses to finance their daughter‘s trip overseas. [28]

The situation looks attractive especially where people who embark on such trips come home reeking rich, owning expensive cars, buying lands, etc. Throwing money around and erecting mansions at choice places in town. [29] Thus, most people fall prey not knowing the true nature of their working conditions. In *AGF V Sarah Okoya* [30] the victim was promised employment in the saloon of the accused in Spain instead they were introduced to prostitution to their own surprise.

As the market booms the style of recruitment changes. Traffickers prefer operating in proxy rather than negotiating directly with their victims. Consequently, agents are employed and deployed to villages and cities to hunt for their victims. This is achieved by convincing parents, friends and relatives through adverts, job websites, phone calls, kidnapping, persuasion, gift, enticement and charms. In the case of *AGF V Ebun* Sunday [31] the accused was charged and convicted for five years imprisonment for kidnapping a 14 years girl who was deceived by a fake job advertisement paste by the accused person. Although there are no exact figures and data on the number of trafficked victims; there are indicators to show that the trend is assuming an alarming rate in Nigeria. One of such

indicators is the growing population of women and children particularly children in the city centres. [32] The issue of child trafficking is as important (if not more) than the problems bedevilling the Nigerian nation like the Boko Haram insurgency, corruption, fuel scarcity and kidnapping. This is so because the children and youths represent the future and hope for the nation. Parents and guardians should therefore, not be allowed to borrow from the future by allowing their children to be trafficked thereby exposing them to all sorts of dangers and at the end become problem to themselves, family and the society at large.

In the recent past, Nigeria is famous not because of her exceptional advancement in the field of science and technology but for child trafficking. An International Labour Organisation (ILO) estimate shows that over twelve million Nigerian children are engaged in child labour. So also, women's consortium of Nigeria (WOCON) experience in executing projects for the elimination of child labour, has found that a large percentage of the children in labour are victims of trafficking. [33] Similarly, with regards to women and girls, a survey indicates that over 10,000 Nigerians engaged in prostitution in Italy which constitutes about 80% of all prostitutes in the sex trade in Italy: [34] Most of these Nigerian women and girls are initially trafficked victims. Nigeria is the second largest source of child trafficking victim to the U.S. with Akwa Ibom State having the highest rate of trafficking in Nigeria [35]. The victims of this terrible trade are mostly young girls and boys who are recruited from mostly rural areas and towns and transported to unfamiliar environment. In the case of *Attorney General of the Federation V Effiong Effiong*, [36] the accused person was charged for subjecting a 15 years old girl from wudil local government Area of Kano State Nigeria to exploitative prostitution in Lagos. The accused was convicted for two years imprisonment. Also in the case of *Attorney General of the Federation V David Adepegba*, [37] the accused person was charged for prostituting some girls he brought from a village in Enugu state in a brothel in Abuja Nigeria. The case is still pending at Abuja High court in the Federal Capital Territory.

4:0 Factors that Precipitate Child Trafficking.

The present legal responses to the problem of child trafficking often reflect a deep reluctance to address the socio-economic root causes of the problem. Since child trafficking is perceived as an act of violence, most responses focus predominantly on prosecuting traffickers and protecting trafficked children, [38] neglecting the root causes of child trafficking. Child trafficking is a multi-dimensional social problem caused by socio-economic challenges as well as demand for the exploitative use of children. The logic behind the emphasis on poverty as one of the fundamental causes of child trafficking is because most victims are trafficked from poor countries to rich countries. Furthermore, for child trafficking to continue, there should exist some socio-legal environment which encourages the menace. [39] It is for this reason that all aspects contributing to the vulnerability of children to trafficking recruitment must be looked at. To this end, the factors that facilitate child trafficking are extremely complex and inter-connected but can be divided into two, namely: the push and the pull factors. [40]

The push factors are those conditions conducive for trafficking of children which fall in the broader context. It usually drives people to leave a region in search for better life somewhere else. [41] The factors include but not limited to bad economic condition such as poverty; unemployment; broken homes; family size; greed; peer pressure; mental disorder or imbalance; weak legal frame work; insecurity; restrictive immigration policies and law enforcement mechanisms are also contributors. [42] While, the pull factors are those once that attracts one to leave his/her place of abode to another country.

4.1 Poverty

Poverty is a major factor responsible for child trafficking in Nigeria. It cannot be denied that abject poverty, unpleasant economic environment, unemployment, massive retrenchments, under employment and poor quality of life has made parents who would otherwise, have been most caring and loving, to neglect and even some times, abuse their children. Some families are living from hand to mouth as a result of insufficient income to cater for their families. They are out of job or business either as a result of retirement or insufficiency of the income to settle the children school fees, rents and feeding. That is a perfect situation of parents and children to fall victim of bogus promises of a good time abroad with the prospect of earning foreign exchange that will convert into tons of naira (Nigerian currency) back home in Nigeria. [43] Although Nigeria has enormous natural and human resources as well as the largest oil producer in Africa and the eleventh largest in the world, [44] it is rated as one of the poorest countries in the world with a GDP per capita of about US $1,000 for a population of over 160 Million. [45] With about two-third of its population living in rural areas without basic social amenities such as electricity, road, hospital, schools, good drinking water etc, and earning less than $1 per day [46]. There is massive youth unemployment and a general lack of opportunities for economic ventures, low standards of living and devalued local currencies; these results in the failure to meet the health, food, housing and security needs of the people. It has been observed that population living in political and economic instability often seek to migrate elsewhere in search of better opportunities. The destination of that migration is usually into bigger cities. [47] The rural areas of Nigeria, where the bulk of the population resides, are not industrialized and characterized with lack of electricity, access road, hospitals and insecurity caused by Boko haram Islamic sect among others. There are few job opportunities or institutions of higher learning. Consequently, even when the children do receive some education up to secondary school, there are no jobs at the end of their schooling nor additional institutions for them to attend. The economic situation is such that most parents are unable to care and properly feed their families. Parents subject their children to various forms of labour, including trafficking for economic gains. [48] It is also submitted that, poverty has a hand in child prostitution and sexual abuse.

In Nigeria, it can't be denied that some female children that are engaged in child labour such as hawking, domestic servant are sexually abused. [49] The women unit of the Federal Ministry of Education portrayed the situation, thus, a report in the magazine 'Ladies Home Journal' estimates that sexual abuse of young girls is four times commoner than rape of adult women. The abuser is likely to persuade and pressurize the child, using all built-in authority of an older person. Children who hawk wares for their parents fall easy victims. They are coerced or bought with gifts. They are thereby prevented from telling their parents or even close friends about the incident. When parents

are financially incapacitated to provide the basic necessities of life such as a comfortable house, food, clothes and sound education for their children, the children are sent into the labour market. [50]

4.2 Illiteracy

Illiteracy generally tend to increase individual vulnerability to child trafficking as it makes one not to benefit from any practical step taken to address the menace. Nearly a billion people entered the 21st century unable to read and write. [51] In Nigeria, there are about eight (8,000,000) Million children who are vulnerable to trafficking and have no access to education. [52] If one is educated he is enlighten and this will make him to understand the nature of any event or occurrence. In most countries including Nigeria where child trafficking is rife, illiteracy is a common cause of child trafficking. Statistics have also shown that fewer school age children are enrolled into school, and most of them will drop out of school before the completion of the primary grade. [53] Furthermore, due to high level of illiteracy among the rural dwellers in Nigeria, family planning is not adopted hence people reproduce children recklessly without planning for their education and general welfare, the end result being having more children than they can support hence the willingness to give out their children to agents of trafficking. [54] This practice is mostly found in Northern part of Nigeria where many parents allow their children to attend fourth rate schools, where they learn next to nothing. As a result, both group are easily deceived by fairly tales of milk and honey flowing bountifully in Europe and Saudi Arabia where people simply pick hard currency off the street. [55]

4.3 Unemployment

Lack of employment is one of the greatest factors which force many people in Nigeria to pursue insecure and unreliable employment in other places. Somebody who has no economic resources can easily be lured by the dream of better livelihood and may easily be trapped by traffickers. Unaware of the possible consequences such people will often consent to travel through undocumented migration routes to affluent cities and countries and are in the process caught up either domestic or International child trafficking. Unemployment in Nigeria has always been on high. Every year many young people graduate from secondary and high school institutions with no employment. After years of working the street in search of non-existent jobs they are ready to go anywhere to do anything, just as long as they can be gainfully employed. The negative impact of unemployment is far worse for those young Nigerians who have or no academic qualification. [56]

4.4 Corruption

The high level of corruption in Nigeria makes it possible for unscrupulous persons to use official channels to secure bogus travel documents for new recruit into prostitution abroad. Sometimes there is corruption even within the foreign missions themselves making it possible for criminal minded persons to procure visa for a fee. [57] Nigeria has attained a global status in corruption. [58] This submission founds its support from a recent report which tagged Nigeria as the 38th most corrupt nation in the global rating. [59]

4.5 Greed

This is an excessive desire to acquire or possess more than what one need or desires, especially with respect to material wealth. [60] It can also be described as being controlled by material things such as power, food, cloth, money etc. [61] Due to greed and the quest for better lifestyles, young people easily fall prey to traffickers who promise them better jobs away from home. [62] Poverty precedes other causes of child trafficking because it relate and inter connected with all other causes of child trafficking which make parents to go as far as selling their children. But a close look at a situation where parents sale his/her child cannot be said to be due to poverty alone. Because there are parents who are steamily poor but will not sale his/her child. Merchandised of children is not synonymous with poverty. Some people are by their nature so greed and so found sale of babies and children profitable. To them once there is profit, it does not matter what article of trade is involve.

There are reported cases in Nigeria where parents or guardians sell their children for money. One good example of this is the case of Jennifer Ogbonna from Aba area of Abia state of Nigeria. The report has shown that Jennifer was sold by her sister to one Ismail Yusuf, a man from Abeokuta, Ogun state of Nigeria, for the sum of one hundred thousand Nigerian naira (N100, 000). [63] This incidence was confirmed by the victim, where she stated "I was sold by my sister in Aba for the sum of N100, 000 naira and brought to Abeokuta by the trafficker. I don't know that they had already paid money on my head. I only got to know in Abeokuta when I overheard the trafficker and her husband talking about me." [64] In as much as poverty causes child trafficking in Nigeria, greed also play very important role in child trafficking. This may get its roots from the olden days when African leaders (Chief and elders) sacrifice African traditional value for life on the altar of the new god i.e money, power and prestige and since then Africa has never been the same and this spread across most African countries which Nigeria is not an exception. [65]

4.6 Peer group pressures

Peer group pressure is also one of the factors that influences child trafficking in Nigeria. Children fall victim to child trafficking because of peer pressure and lack of alternative opportunities within their impoverished home communities. They often seek out traffickers on their own initiative and are thus recruited.

4.7 Prostitution

One of the factors that strives child trafficking is the readily available market for customers of a trade in humans for sexual purposes. It is obvious that child trafficking would not have been on the raise if there exist no increase demand for it. Traffickers are kept in the business of child trafficking because there is high demand for it, and demand in supply of every product is associated with profit. When there is demand, the supply increases. + This is usually associated with a situation where there is abundant male demand for sex but insufficient supply has resulted in aggrevatiating commercial sex industry. [67] A good example of this type of situation is the influx of American soldiers in South-east Asia in the 1960s which led to a sudden and rapid increase in the demand for commercial sexual services. [68]

4.8 Broken Home

A broken home is a serious and recurrent issue emanating from the home environment and as well, facilitates the trafficking of children in the contemporary societies like Nigeria. Thus, the issue nowadays requires much attention and further investigation in order to tackle the escalation of child trafficking and the vulnerability of children to trafficking in the society. Profiles of trafficked children interviewed revealed that most of the trafficked children were products of broken homes and/or orphaned children. [69] An estimate reveals that from Northern part of Nigeria alone, about 9.5 million children; who are between the ages of 6 to 15, and who are mostly orphans and are not exposed to western education, are said to have been trafficked from one place to another. [70] Broken homes and lack of fix place of abode always make children vulnerable to traffickers. In the past, parents cared for their children regardless of marital status. However, today, many parents abandon their children when the marriage ends in separation. The divorce of the child's parents and the broken home environment are contributory factors to child trafficking. In some polygamous family, where a husband takes another wife, some step wives are cruel to children of the estranged or former wife and would not hesitate to abuse such children. [71]

4.9 Family size

Child trafficking is more likely to occur in a crowded home with a large family. The size of the family may therefore, be a potential source of child trafficking especially where the family is large and poor. [72] Demographically, the growth rates and the densities are of such magnitude that available social amenities cannot go round or are too expensive for the average families. When the family cannot afford the basic necessities of life, either as a result of income insecurity due to unemployment or retirement, the children will asked to engage in some form of work such as hawking, begging, domestic servant. Although the purpose of this is to make up for this shortage, the child is likely to fall victims of trafficking. [73]

4.10 High Profits

High Profits accrued in human trafficking, especially trafficking of children and women also pulls them into it. That is to say, child trafficking thrives because of its profitability. The UN estimates it to generate US $7-$10 billion annually, the third largest profits behind arms dealing and narcotics. It is also easier to move human cargo across borders than drugs or weapons which are seized when found. Human beings can be constantly re-used and re-trafficked – not so for drugs. Child trafficking is, by definition, a complex, clandestine, underground business, constantly changing and evolving both in response to demand and to remain sufficiently flexible to elude arrest and prosecution.

4.1 Low risk

Another pull factor to the child trafficking is the low risk that is involved in the process, especially when compared with other cross-border crimes which contain high level of risk. However, by its very nature, child trafficking is secret and dangerous, which helps explain the inadequacy of reliable information. Victims of trafficking are normally lured by the traffickers right within their families and villages (which often provided the funds for the journeys they anticipated and take the child to a job that could help support the family), and because of the stigma of prostitution, fear and mistrust of police, the lack of documentation and fear of complicity also play a part in maintaining the victim's silence. [74] Most victims are poor, illiterate, from marginalized populations and are ignorant of their rights. Traffickers exploit not only bodies but the deepest anxieties and disadvantageous life conditions of the victims. This and many other factors made child trafficking with low risk as the whole business is conducted in secrecy and victims of child trafficking compound the issue by being unwilling to provide useful information about their traffickers, this may not be unconnected with the oath of secrecy victims are subjected to at the point of trafficking. [75]

5. Consequences of Child Trafficking In Nigeria

According to Webster Pocket Dictionary of the English language, the term "consequences" means something that logically follows an action, in other words, its effect. [76] The effects of child trafficking in Nigeria, transcends personal injury to the victim of child trafficking alone, as it also affects the family and society at large. Whatever the level it partakes, child trafficking has the following consequences:

5.1 Disease and death

Disease and death are twin evils that may result from child trafficking. This is likely to be a product of malnutrition, poverty, ignorance, child abandonment, therapeutic abuse and ritual killing. According to Adedoyin, of the 39 diseases surveyed in Lagos in 1985, malnutrition and starvation were found to be the main cause of death among children. [77] In addition, studies that are particularly focused on child agricultural workers in Nigeria have recognized a high incidence of injury, inferior living conditions resulting from substandard housing, poor access to clean water and food, poor sanitation, and low wages. And the end result is sickness and death. [78]

5.2 Unwarranted pregnancies

One of the effects of trafficking on the child is unwanted pregnancy. This comes from unprotected sexual intercourse. One of the dangers of child trafficking is that they are subjected to all forms of exploitation, which include but not limited to rape, prostitution, etc. Young girls are impregnated in the course of forced prostitution. Naturally where this pregnancy is not wanted the person may want to abort it at all course even to her detriment. In the case of *Attorney General of the Federation V. Ganiyu Ishola* [79] a 13 years old pupil was impregnated by an herbalist who detained her for 40 days. The accused was tried and sentenced to two years imprisonment. [80] Victims who are mostly young girls may be ashamed of carrying the pregnancy or the newly born baby before the general public. This is because; these children so given birth to are called with different names like bastards or illegitimate children. This in most cases brings very serious problem in families as it leads to stigmatization in some cases. Most victim of unwanted pregnancy run away to distant places for fear of being killed by their parents or community as the case may be.

Some victims who summon courage to come home to their parents are rejected and consequently disliked. This lead to untold hardship on the victim, as the cost of rearing the new born become challenging. This may further lead the victim to other anti-social behaviors. The new born baby also stands the risk of being killed or abandoned in hazardous places by the

mother. Many children in motherless homes in Nigeria are product of this type of pregnancy. [81] In some instances, young girls sold their babies for a token fee of between 150 to 200 thousand naira. This is as a result of unwanted pregnancy. [82]

5.3 Mental instability

Psychological trauma is a mental condition or conditions of the mind caused by unpleasant experience that make one upset or unhappy. [83] This is one of the identified effects of child trafficking. The process trafficked children undergo before they arrive their destination countries coupled with their terrible sexual experience is unimaginable. Most victims are forced into oath taking in deadly shrines across Nigeria. [84] The oath involves a blood covenant capable of eliminating the victim and his entire family if not observed.

The potency of this oath on victims who are mostly between the ages of 16 to 25 years is undoubtedly serves as an inevitable source of physical, psychological and spiritual trauma. A bondage that imperatively makes one feel doomed especially when the victims who are mostly young are confronted with the horrors of sex and other forms of exploitations. The shock of job description also sends harmful signal of impending calamity. These girls are sometimes made to sleep with house pets like dogs and monkeys and this will psychologically make them to feel devalued and worthless, a condition that condemns one's conscience and renders one hopeless. [85] Child trafficking is so characterized by endless human right abuses, exploitation, and dehumanization till the victim dies, rescued or deported. [86]

5.4 High school drop outs

A child victim of trafficking are subjected to all form of labour exploitation and this causes a decline in the acquisition of human capital. In Nigeria, children have been exploited and forced to work in highly hazardous conditions around pesticides, chemicals, heavy machinery and in dangerous mines. [87] They work for about nine (9) to sixteen (16) hours per day, having no time or day for rest. [88] This will therefore, no doubt make the child to remain uneducated and have low productivity as an adult. child labour diminishes adult productivity. [89]

Illiteracy and school drop-outs are the products of child trafficking resulting from poverty and parental ignorance. Some children drop out of school because of financial difficulties. Others are unable to attend, largely because of the abject poverty of their parents and are therefore constraint to work in order to support their family. due to ignorance, some parent do not believe in sending their female children to school, while others withdraw them from school for early marriage. [90]

Most children in rural area in Nigeria are trafficked through the assistance of their parents or guardian and this has resulted in low school enrollment and in turn perpetuates the institution of child trafficking. [91] Child trafficking involves the movement of school age children from a familiar environment to an unfamiliar environment. The movement of these children either for sexual exploitation or other exploitative purposes, have multiple effects on the children, as their movement are curtailed and a times made to work for between 9 to 18 hours a day. Child trafficking contributes to low enrollment in school and increases high school dropout rates. In Nigeria children of school age between the ages of 6 to 16 years are mostly target of trafficking, and when trafficked they will be deprived of so many of their rights including right to acquire education. Child trafficking also amount to reduction in population of children as most of these trafficked children either died in transit or due to diseases like HIV/AIDS in the destination country.

5.5 Nigeria's Image

Bad international image ranks one of the most palpable effects of child trafficking. Owing to the high degree and alarming rate of child trafficking engaged by Nigerians within and across the globe, there have been unprintable reports that portray Nigerian reputation in very bad light. In the case of *Attorney General of the Federation V. Sylvester Idubor* [92] the accused person was sentenced to two years imprisonment for organizing foreign travel which promotes prostitution contrary to section 16(a) and 17 of the NAPTIP Act. Such reports tend to lower our good image before the international community and portray us in a very bad light. This makes every Nigerian a suspect wherever he or she goes. Consequently, we are faced with harsh immigration laws and in some cases, the most sophisticated security gadgets are used in screening us at different international borders and embassies. So many times visa is denied to Nigerians. It has been stated that about 50,000 Nigerian women and children are trafficked to Italy. [93] This indeed portrays Nigeria in a very bad light internationally. Hence, we are branded promiscuous and people of low morals that can do anything to earn a living, even sleeping with dogs and monkeys and as a result, our people are held in disdain and treated with no respect. In Nigeria, children have been exploited and forced to work in highly dangerous environment which is hazardous to their well-being as children and human being.

6. New Trend of Child Trafficking in Nigeria

Child trafficking in Nigeria is traditionally known for exploitative purposes such as prostitution, begging, domestic servant etc. However, It is worthy of mention that child trafficking have now undergo some sort of sophistication that children are no longer trafficked for sex and labour, [94] Traffickers in Nigeria are increasingly trafficking young girls who are carrying pregnancy through extra marital affairs for their newborns, and those who are not pregnant. [95] In recent past human trafficking in Nigeria have metamorphosed into a more dangerous, sophisticated and complicated form of trafficking called "Baby harvesting" [96] Under this type of modernized form of human trafficking, teenage girl and young women are deceived by traffickers to the so called baby factory with empty assurances for job, while those who got pregnant through extra marital means come voluntarily to the factory for either safe abortions or delivery. Likewise, young girls who either because of their state of poverty or vulnerability submit themselves to the factory voluntarily and later impregnated by men who are specially employed for that purpose. The newly born babies are then either sold out to interesting public or sometimes disappeared through mysterious means or even dash out to childless couples or religion orphanages.

The first case of "baby harvesting" or "baby factory" as they are called in Nigeria was reported in 2006 and since then it has been increasing by the day like a wild fire. In May 2008 alone, about 25 teenage girls were intercepted in Enugu. Between June and October 2011, about 49 teenage girls were rescued from a baby factory in Abia and Lagos state of Nigeria. While

between May and July 2013 over 53 teenage girls and 11 babies were arrested by the police in Enugu and Abia state of Nigeria. This demonstrates how rapid the menace is spreading.

Nigeria has been demonstrating efforts to fight child trafficking by putting laws in place to fight the menace right from the pre-colonial era with laws such as Criminal Code, Penal Code, Labour Law, Children and Young Persons Law, to post colonial law such as the Child Right Act, and to more specific law on child trafficking, Trafficking in Person Prohibition Law Enforcement and Administration Act, 2015. (NAPTIP) The aim of these laws have always been the same, to bring human trafficking including children to an end. Although, tremendous progress have been made toward controlling the menace of child trafficking in Nigeria, this cannot be said to cover baby harvesting which is viewed strange to the law and implementers of the law. It is therefore questionable whether NAPTIP can effectively combat the "baby factories. Section 21 of NAPTIP provides;

"Any person who buys, sells, hires, lets or otherwise obtains the possession or disposal of any person with intent, knowing it to be likely or having reasons to know that such a person will be subjected to exploitation, commit an offence and is liable on conviction to imprisonment for a term of not less than 5 years and a fine of not less than N2, 000,000.00"

Looking carefully at the law will reveal that it is only concern with selling or buying of another person for exploitative means. The question therefore is, can the phenomenon of baby harvesting fall under this category? Particularly situation where such children are giving out free to a childless couple or to a religion orphanages as the situation sometimes in baby factory? Will such a situation fall under the provision of the above section? It is our humble opinion that this type of situation have not being envisage by the framer of the law which makes it to fall outside the realms of the Act. Furthermore, mere mentioning of the word "sale or buy" of a person in the Act alone is not enough. This is because the word "sale or buy" are generic in nature which cannot be construed to cover phenomenon like "baby harvesting" which we consider more complicated than the word "sale or buy" of a person simpliciter as envisaged by the NAPTIP Act. The above assertion was further supported by the NAPTIP Head of Public Relations Unit, Arinse Orakwue, is quoted to have said:

"the issue of baby harvesting… it is a corruption of the legal adoption process and the police has overriding coverage on that matter."

Furthermore, in June 2011, NAPTIP refused to investigate the case of Dr. Orikara for operating a "baby factory" claiming it lacked jurisdiction and returned the case to the police. [97] These and many other reasons therefore called for the amendment of the NAPTIP law so as to effectively combat the menace of baby factory in Nigeria.

We therefore submit that although, the Act prohibit the act of buying and selling of human being which is part of baby harvesting syndrome, but cannot be said to address the crime of baby harvesting as an act of child trafficking. This is because baby harvesting involves so many crimes that goes beyond ordinary buying and selling of person. In order to control the menace therefore, the whole act of baby harvesting and other related matters most be totally prohibited. This is done through the amendment of section 21 of the NAPTIP Act by the Nigeria National Assembly to cover the crime of baby harvesting including situations where children from baby factory are given out to childless couple or religion orphanages and related matters.

It is therefore the finding of this paper that baby harvesting is a new trend of child trafficking which is not covered by the NAPTIP Act, and have being on the raised. Hence, we recommend for the amendment of the NAPTIP Act to cover the crime of baby harvesting and other related matters thereto.

7. Conclusion

Child trafficking has been identified as a serious crime that violates the human right of Nigeria children, and has evaded all efforts put in place by the Nigeria Government to put it to an end. Nigeria have been described as a source, transit and destination country for child trafficking with serious consequences on the child, his family and the society as a whole. This is not because Government is lacking in its responsibility to put measures in place to fight the menace, but because traffickers have always device means of trafficking children different from the traditional ways known such as for sex and other forms of forced labour. Children are now trafficked through what is called "baby harvesting" which is viewed strange to the law and implementers of the law. In order to save guard the human right of every Nigeria child, this new form of child trafficking must be controlled by putting the appropriate law in place to fight the menace. The article therefore conclude by recommending for the amendment of the NAPTIP Act to cover all form of baby harvesting and related matters.

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Legal perspectives on right to strike: An appraisal

[1] Tanya Singh, [2] Pramod Kumar Singh, [3] Sanju Singh

[1] 4th year, BBA, LL.B. (Hons.) Amity Law School, NOIDA (UP)

[2] University Professor and author of several books on English literature and law

[3] M.A., Ph.D., Assistt. Professor, A.B.R. College, Sasaram (Bihar)

The question of legality of strike has always been a matter of debate among people and the public forums. The framers of Constitution, however, have ensured the fundamental freedom of citizens including the rights to dissent and protest at work place. So the right to freedom of speech and expression, right to form association and union, and right to assemble etc. are guaranteed as fundamental rights under Article 19 of Constitution. Strike has always been an effective weapon in the hands of employees during the industrial revolution by mass labour particularly in factories and mines. In most of the countries, the strikes were quickly made illegal. The strike is typically a devise reserved as a threat or last resort during negotiations between the Company and the Union, which may either before or after the contract between union and management expires. The objective of strike, therefore, is to obtain a contract or agreement between the union and the company.

The claim of right to strike to ensure negotiation between the Union and the Company has been. However, rejected by the Supreme Court in '*All India Bank Employees Association-Vs-National Industrial Tribunal*' Case. [1] The Supreme Court has gone a step further in *Rungarajan -Vs- State of Tamil Nadu*' [2] and declared that the government servants have not even the equitable right to strikes. This extreme view taken by the Supreme Court has given rise to strong protest from the trade Union activists and as the right to form an association or union to them is a fundamental right under Article 19 (1)(c) and the right to strike flows from it:—

Article 19(1)- All citizen shall have the right (c) to form an association or unions.

It is often contended on behalf of Union activities that the right of workmen to form unions or associations by sub-clause (c) of clause (1) or Article 19 guarantees and confer upon union so formed, a right to collectively function as an instrument for agitating and negotiating and by collective bargaining to secure and ensure the demand of workman in respect of their wages prospects and conditions of works. The claims raised by them are as follows:-

i. Articles (19) (1) (c) of Constitution guarantees to the citizens in general and to workmen in particular the right to form unions. The expression 'Union' in addition to the word 'association' found in the Article refers to associations formed by workmen for trade union purposes.
ii. The right to form association or union in the sense of forming a body and it as a concomitant right, a guarantee that such union shall achieve the object for which it was formed. If this concomitant right were not conceded, the right guaranteed to form union, would be an idle right and an empty formality lacking all substance.
iii. The object for which labour unions are brought into being and exist is to ensure collective bargaining by labour with the employers.

The provisions of the Industrial Disputes Act, 1947 empowers the government in the event of an industrial dispute which may ultimately lead to a strike or lock-out or when such strike or lock-out occurs, to refer the disputes to an impartial tribunal for adjudication with a provision banning and making illegal, strikes or lock-ups during the pendency of the adjudication proceedings. The provision of an alternative to a strike for the sake of industrial adjudication is a restriction on the fundamental right to strike and it would be reasonable and valid only if the same were an effective substitutes. However, the Hon'ble Supreme Court in *Rangarajan -Vs- Tamil Nadu*, [3] has rejected this contention poining out that the right to form union or association guaranteed by labour legislation is not confined to employers. The court held

"Both under the Trade Union Act as well us under the Industrial Disputes Act the expressions union signifies not merely an union of workers but includes also unions of employers. If the fulfillment of every object for which on union of workmen was formed were held to be a guaranteed right, it would logically follow that a similar content ought to be given to the same freedom when applied to an union of employers which would result in an absurdity. We are pointing this out not as any conclusive answer, but to indicate that the theory of learned counsel that a right to, form unions guaranteed by Sub-clause (c) of C(I) of Art. (c) carries with it a fundamental right in the union so formed to achieve every objects for which it was formed with the legal consequences, that any legislation not falling within Cl. (4) of Art. 19 which might it any way hamper the fulfillment of those objects, should be declared unconstitutional andvoid under Art. 13 of the constitution. Is not a preposition which could be accepted as correct."

The Court further pointed out that the provision conferring right to form association is not absolute but subject to reasonable restriction under Article 19 (4) and held

"Merely by way of illuslatration we might point out that learned counsel admitted that through the freedom guaranteed to workmen to form labour union carried with it the concomitant right to collective bargaining together with right to strike, still the provision in the industrial Dispute Act forbidding strikes in

the protected industries as well as in the event of reference of the dispute to adjudication under C'. 10 of the industrial Disputes Act was conceded to be a reasonable restriction on the right guaranteed by Sub- Cl. (c) of Cl. (1) of Article 19. It would be seen that if the right to strike were by implication a right guaranteed by Sub-Cl.(c) of Cl. (l) of Art. 19 then the restriction on that right in the interests of the general public, viz. national economy while perfectly legitimate if lasted by the criteria in Cl. (6) of Art. 19, might not be capable of being sustained as a reasonable restriction imposed for reason of morality or public order."

The Supreme Court categorically stated that the right to strike is not a fundamental right, when the issue came before the Court in '*Karneshwar Prasad -Vs- State of Bihar*',[4] in which the constitutional validity of rule 4-A, 371 introduced into *Bihar Government Servants' conduct Rules, 1956*, was challenged. The proviso contained in a notification of the Governor of Bihar. dated: 16.03.1957, reads as follows:

"4 - A, Demonstration and Strikes:- No Government Servant shall participate in any demonstration or resort to any form of strike in connection with any mutter pertaining to his condition of Service.

The provisions of Industrial Disputes Act, 1947 indicate that strike could not be treated as an illegal action. Section 2(2) of the said Act defines the term strike'. It says, "strike" means a "cessation of work by a body of persons employed in any industry acting in combination, or a concerted refused, or a refusal, under a common understanding of any number of persons who are or have been so employed to continue to work or accept employment." Whenever the employees want to go on strike, they have to follow the procedure provided by the Act otherwise their strike would be deemed to be an illegal strike. Section 22(1) of the Industrial Disputes Act, 1947 put certain prohibitions on the right to strike. It provides that no person employed in public utility service shall go on strike in breach of contract:

a. without giving to employer notice of strike within six weeks before strike; or
b. within fourteen days of giving such notice: or
c. before the expiry of dates of strike specified in any such notice as aforesaid; or
d. During the pendency of any conciliation proceeding before a conciliation officer and seven days after the conclusion of such proceeding.

It is, thus, obvious from above provisions that these provisions do not prohibit the workmen going on strikes but require them to fulfill certain conditions before going on strike. So the strikes which comply with the said provisions of the Act could not be treated as illegal strike and it in fact recognizes the well accepted principles of human rights. Article 8 (1) (d) of the International Covenant of Economic, Social and Cultural Rights (ICESCR) provides that the States parties to the covenant shall undertake to ensure:

"The right to strike, provided that it is exercised in conformity with the laws of the particular country."

Further, Justice V.R. Krishna lyre has opinioned in *Gujarat Steel Tubes -Vs- Its Mazadoor, Sabha'* [5] that a strike could be legal or illegal and even an illegal strikes could be a justified one and held:

"The right to unionize, the right to strike us part of collective bargain and, subject to the legality und humanity of the situation, the right of the weaker group, viz, labour, to pressure the stronger party, viz., capital, to negotiate and render justice are processes recognized by the industrial jurisprudence and supported by social justices. While society itself in its basic needs of existence, may not be held to ransom in the name of the right of bargain and strikers must obey civilized norms in the battle and not be vulgar or violent handlooms, industry, represented by intransigent managements, may well be made to reel into reason by strike weapon and cannot then sequel or wail and complain of loss of profit or other ill-effects but most negotiate or got a reference made."

Justice Ahmadi also considered in '*B.R. Singh -Vs- Union of India*" [6] strike and held:

"*The right to form association or unions is a fundamental right under Article 19 (1) (c) of the Constitution. Section B of the Trade Union Act provides for registration of a trade union if all the requirements of the said enactments are fulfilled. The right to form associations or unions and provide for their registration was recognized obviously for conferring certain rights on trade unions. The necessity to form unions is obviously for voicing the demands and grievances of labour. Trade Unionists act mouth piece of laobour."*

Since there is a larger bench decision in "*All India Bank Employees 'Association*", to the effect that strike could not be treated as fundamental right, so if this view expressed by Justice Ahmadi can be treated as the ratio of the decision one can arrive at a conclusion the right to strike is a statutory right or common law right.

Justice Swant considered the reasonability and extent of right to strike in "*Syndicate Bank – Vs- K. Unwsh Nuyak'* [7] and took view that though strike is a right but its misuse should be controlled as far as possible and observed:

"The strike or lockout is not to he resorted to because the party concerned has superior bargaining power or the requisite economic muscle to compel the other party to accept its demand. Such indiscriminate use of power is nothing but assertion of rule of might is right". Its consequences are lawlessness, anarchy and chaos in the economic activities which are most vital and fundamental to the survival of the society. Such action, when the legal machinery is available to resolve the dispute, may be hard to justify…….. The Strike or lockout as a weapon has to be used sparingly for redressed of urgent and pressing grievances when no means are available or when available means have failed, to resolve it. It has to be resorted to compel the other party to the dispute to see the justness of the demand. It is not to be utilized to work hardship to the society at large so as to strengthen the bargaining power. It is for this reason that industries legislation such as the Act places additional restriction on strikes and lockouts in public utility services."

Again, in 'B.L. Wadhera –V- State' [8], the Delhi High Court held that lawyers have no strike to go on strike or give a call for boycott and they cannot even go on a token strike and observed

specifically that the strike cannot be justified in the present day situations whether for just or unjust cause.

In another significant judgment in *Rangarajan –Vs- States of Tamil Nadu*', [9] the Supreme Court hearing the unprecedented action of Tamil Nadu Government and terminating the service of all employees who have resesorted to strikes for their demands, has taken a negative attitude towards right to strike and rules that right to strike is not a fundamental right. Kerala High Court has thus rightly concluded that there cannot be any right to call or enforce a "Bandh" which interface with the fundamental freedoms of other citizens in addition to causing national loss in many ways. Kerala High Court [10] has ruled:"

17. No, political party or organization can claim that it is entitled to paralyze the industry or commerce in the entire state or nation and is entitled to present the citizens not in sympathy with its view point, from exercising their fundamental rights or from performing their duties from their own benefit or for the benefit of the state or the nation. Such a claim would be unreasonable and could not be accepted as a legitimate exercise of fundamental right by a political party or those comprising it."

The Court, therefore, arrived at a conclusion that there is no moral or equitable justification to go on strikes and apart from statutory rights, government employees cannot claim that they can take the whole society at ranson by going on strike even if there is injustice to some extent as presumed by such employees. The Courts are of opinion that "Strike as a weapon is mostly misused which results in chaos and total maladministration."

Notes

1. All India Bank Employees Association —Vs—National Industrial Tribunal '[AIR 1962 SC 1962 (5 Judges Bench)
2. Ramgarajan -Vs- State of Tamil Nadu; AIR 2003 SC 3030 (2 Judges Bench)
3. I bid at page 180
4. Kameshwar Prasad -Vs- State of Bihar; AIR 1962 SC 1166;
5. Gujrat Steel Tubes-Vs-Its Mazdoor Sabha= AIR 1980 SCHOOL 1896 (3 Judges Bench)
6. B.R. Singh -Vs- Union of India; (1989) 4 SCC 7109
7. Syndicate Bank -Vs- Umesh Nayak = (1994)5 SCC 573 (5-Judge Bench);
8. B.L. Wadhara –V- State; [AIR 2000, Delhi 266]
9. Rangarajan -Vs- State of Tamil Nadu; AIR 2003 SC 3030;
10. Communist Party of India (M)-Vs.- Bharat Kumar and others; AIR 1998 SC 184: (1998) ISCC 201; The Registrar General, High Court of Meghalaya –V- The State of Meghalaya; AIR 2015 Meghalaya 23 (Full Bench).

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The role and importance of civil servants in India-A socio legal study

Dr. Niranjan Parida

M.A, L.LM, Ph.D, Guest-faculty, P.G. Dept. of Law Utkal University, Vani Vihar, Bhubaneswar, Odisha

Abstract
The primary concern of the citizens in a good civil society is that their government must be fair and good. For a Government to be good it is essential that their systems and sub-systems of Governance are efficient, economic, ethical and equitable. In addition the governing process must also be just reasonable fair and citizen-friendly. The administrative system must also be accountable and responsive besides promoting transparency and people's participation. The test of good governance lies in the effective implementation of it's policies and programmes for the attainment of set goals. Good governance implies accountability to the citizens of a democratic polity and their involvement in decision making, implementation and evaluation of projects programmes and public policies. In this perspective transparency and accountability become invaluable components of good governance as well as of good administration. Transparency makes sure that people know exactly what is going on and what is the rationale of the decisions taken by the Government or its functionaries at different levels. The Minister of a department has to depend on the advice of the civil servants who are a sort of permanent brains trust. They advise and assist the minister concerning the work of the department and find solutions of various administrative problems arising outside the normal routine of the department. Although policy making is the responsibility of the minister even in this field he is dependent upon the permanent undersecretary whose knowledge and experience provide the necessary foundation for policy determination. Warren Fisher has described the role of civil servants in the following words "Determination of policy is the function of ministers and once a policy is determined it is the unquestioned and unquestionable business of the civil servant to strive to carry out that policy with precisely the same goodwill whether he agrees with it or not. That is axiomatic and will never be in dispute. At the same time it is the traditional duty of civil servants while decisions are being formulated to make available to their political chiefs all the information and experience at their disposal and to do this without fear or favour irrespective of whether the advice thus tendered may accord or not with the minister's initial view. Further it is the civil servants of the department who prepare answers which the minister has to give in Parliament. Again it is often they who prepare the speeches to be delivered by the ministers. Thus all work requiring knowledge and experience is performed by civil servants but the responsibility rests with minister.

Keywords: Civil service, Accountability, Good Governance, Civil Service Reform, Role of Civil Servant, Civil Service Law

Introduction

A civil service which delivers policies and services to make us more healthy, more secure, and better equipped to tackle the challenges we face. A civil service which responds directly to our needs such as education and healthcare and which acts for the society as a whole. A civil service which is available when we need it and which provides services to improve the quality of our lives. A civil service that is focused on results rather than on its own internal processes. The deficit that we have today is not entirely the fault of civil servants. The causes are systemic. The present civil service in India carries the cultural baggage of the past. We have to build capacity in the civil service to shed that baggage and change itself and ensure that it has the leadership to bring it about We need to create an environment in which the civil service is the preferred destination of the best and brightest of each generation. There is yet another compelling reason why India needs to modernize its civil service. Globalization is here to stay. Today, countries are competing with each other not only in the global market place but also on the quality of their governance structures. Several countries in the world have already built flexible decentralized and user-friendly civil services. It is with these countries that India has to compete. That is why the idea of continuing with the kind of outdated civil service that we have is untenable. We need to reshape and compatible with today's strategic economic and technological requirements. In other words a civil service for the resurgent India of the twenty-first century. So we deserve a better civil service. our rigid hierarchical centralized process-driven nineteenth century bureaucracy into a modern and responsive organisation. The idea is to build a civil service that is truly world-class

Role of Civil service in present day context

Civil Service is the name of an important government institution comprising the staffs of Central administration of the State. It is more for it stands for a spirit essential to the success of modern democracy and ideal of vacation in Public officials who devote their lives to the Services of the Community. The civil service carries on the important branch of the governmental system"the administration. It has been well observed that "however adequately organised the 'political' side of the government, however wise our political philosophy and high leadership and command, these would be of no effect without a body of officials expert in applying the accumulated supply of power and the general wisdom to particular cases, and permanently and specially employed to do so. The civil service constitutes the permanent executive in the modern state. While the Parliament, the Cabinet and the President may resign it is the Civil Service,

which really governs. This body of officials we call by the name civil servants, and all periods of human history have seen such public employees; perhaps their disposition, character and attainments have varied widely with time and place. A civil servant belongs to a body of persons who are directly employed in the administration of the integral affairs of the State and whose role and status are nonpolitical, ministerial or constabulary. The civil service in its official capacity is a permanent brain trust of administration having both a tradition and a technique in its national setting. If an expanding system of welfare legislation, befitting the new powerful role assumed by the state is to be effectively developed an efficient civil service is a necessity. These relative advantages tend to make the civil service the efficient civil service is a necessity. These relative advantages tend to make the civil service the repository of the flow of all the substance and power. With weak political structures they actually become the masters. But all the same it is good that the cabinet works out the policy with the sanction of the legislature; and the civil service is conceived only as the instrument to execute this policy faithfully. The civil servant should know this limitation of his role. Nevertheless, the civil servant has a right to put forward the point of view of the department: to express his individual opinion on the soundness of a course of action or policy proposed to be formulated. It is also found that after the finalization of the policy, the civil servant straining his utmost to implement the policy forgetting his earlier reservations. Thus it is the minister who is constitutionally responsible for the policies to be pursued by the department since the civil servant has nothing to do with the collective policies of the government of the day. To put it in a nutshell the primary task of the civil service is to act legally within the limits of powers conceded to it by organising the means of administration with a view to achieving the objects laid down by the executive.

Review of the Literature

A brief review of the literature relating to the present study been detailed as follows :- Harold J. Laski's valuable treaties entitled "Parliamentary Govt. in England" & "The Growth of Administrative Discretion" gives a wonderful account of the Home Civil Service of England tracing down its history its relevance. Similarly Herman Finer's "The British Civil Service" (London 1937 P. – 14 & 15) is also a classic source of "The Role of the Civil Service in the Modern World". We also find good research in Herman Finer's classic treatise on "The Theory and Practice of Modern Government", where he has attempted in-depth analysis with comprehension, original research & first hand observation highlighting the crucial problems of the Civil Service mainly aimed to get, keep, manage, and inspire in the service of the state enough of the best minds and characters of the living generation. This has been reconsidered with novel information and perspective. Constitutional and Administrative Law by John Alder and Constitutional Law by E.C.S. Wade & Godfrey Philips has tremendous impact on Civil Service & Civil Servant. Other books on Indian Constitutional Law like Durgadas Basu's shorter Constitution of India and the Introduction to Constitution of India have a chapter each on the services under the Union and the State, Dr. Basu gives importance to Civil Service and interpretation, recruitment and conditions of Service to be regulated by legislation subject to the provisions of the Constitution. The most respectable book on Constitutional Law of India by H.M. Seervai has given a wonderful account of what the role of Civil Services citing quotations from Sir Warren Fisher, Permanent Head of the British Treasury, Sardar Vallabhbhai Patel and from Shah Commission's Report. Seervai's treatise gives an excellent account of Article - 309 to 311, 313 and other articles in Part – XIV of the Constitution including Chapter – 2 of Part – XIV. Another important book that is found to be very close to the subject of the research study is "The Civil Servant under the Law and the Constitution" by Dr. N. Narayan Nair**,** casting increasing attention on the roles governing the conduct of the Civil Servant and legislations that control Civil service, aimed at enhancing disciplined efficiency and fair service conditions. It also examines the position of the Civil Servant and the significant features of the problem pertaining to the Civil Servants under the Law and the Constitution. The subject has received a very careful treatment marked by spirit of enquiry assisted by a close examination of the opinions of jurist and judicial pronouncements. Other books close to my topical area of research study is Prof. Narendra Kumar's "Law Relating to Government Servants and Management of Disciplinary Proceedings". Prof. Kumar has in a very simple language highlighted Service law pertaining to certain controls like 'the *pleasure doctrine* under Article 310 system of Confidential Reports, disciplinary proceedings such as suspension, removal and dismissal from service and reduction in ranks etc. In order that these control mechanisms are not arbitrary constitutional and other provisions are enacted for the protection of the Civil Servants which they can enforce through the Courts. Report of the Law Commission of India on various topical legal issues concerning my research has also been studied and their significant findings have been integrated into my research. Research findings of Indian Bar Review have also been studied to integrate important research concerns. Internet Depository on my research area is a significant source of legal research and various inputs would necessarily be used in my topical research area. Justice Rama M. Jois in his work "Service under the State" influences most simple level as a source of overall understanding of civil services law and civil services jurisprudence. It is an authoritative exposition of adjudicative law as well as a critique of it helping its future renovation. The discourse on the rights of Civil Servants is anchored in the text and context of article 311 of the Indian Constitution.

Objectives of Study

To study on practical implication of the judicial decisions explaining the extent and scope of judicial control in Government's relation to civil service matters.

To study on the role of administrative system for promoting transparency and people's participation.

To study on the decision making, implementation and evaluation of projects programmes and public policies for good governance.

To identify the strategy that could be formulated for maintaining balance between the interest of the civil servants and that of the fundamental interest of the society that conflict with each other.

To suggest the necessary legislative and reforming parameters needed in this regard.

Hypothesis

In India the Civil Servants are responsive, transparent, accountable ethical public friendly and corruption free and deliver good governance.

In India Civil Servants unlike their counterparts in develop countries as public masters an inherited legacy of British Colonialism in India and they don't think and behave as real public servants paid by the tax payers.

Article 311 of the Constitution of India 1950 has created an environment of excessive security and made civil servant largely immune from imposition of penalties for their non-performance and Commission of crime. Article 311 of the Constitution of India 1950 is over protective and promoting arbitrary action.

All India Services Act 1951 and the concerned rules such as Central Civil Services Conduct Rules, 1964 need suitable amendment to cater to the present situation and in conformity to Article – 309.

Research Methodology

The methodology adopted in this study is doctrinal and empirical one. Case study method and statistical data analysis are the basis of Empirical of this research. Data collected from both primary and secondary sources which is based on Constitution of India, official reports of Law Commissions, Reports of the findings of various GoI committees, All India Reporter on service matters etc. and leading legal bulletins. Besides a detailed survey and analysis of plethora of judicial decisions rendered in this regard by the Supreme Court and a number of High Court are to be made. Reports as available in the form of Books, Journals, Manuals Periodicals Articles and public opinion on instances of corruption constitute the pool of Secondary Sources used.

Civil Service in the Modern Day World

The modern civil service, irrespective of the country to which it belongs, is being vested with more and more powers of administration, subordinate legislation and adjudication. His colorless role as executor of the will of the political heads has been replaced by a more positive role in the and of government. This has come as a fait accomplish and the new mode of assessment of the civil servant in the twentieth century has gone to the extent to make a categorical declaration: the official whom we call the 'civil servant' would be a poor instrument indeed if his service consisted only of dog-like obedience to orders or of the motions of an automation". The extent to which he is expected to involve himself in the formulation of policy, as been stated already, but all admit that he should assist the minister in its formulation. This provides him with an excellent chance to stamp his individuality in the molding of policy by means of advice he tenders to the minister; and by other subtle means of persuasion, suggestion and even criticism. This is made possible by the permanent character of the civil service. The expertise at the disposal of the civil service is of immense value to the ministers to avoid pitfalls by defining the limits within which a successful government policy can be sustained. It is a matter of common knowledge that numerous programmes that are embodied in acts of legislature owe their origin to the initiative of persons who occupy senior positions in the civil service. This unostentatious part played by the civil servant will never come to light, but many a political head of the executive will readily concede that the detached criticisms offered by his permanent civil servants have saved him from blunders and the resultant political wilderness. In such a context it is inevitable that there must be a close intimacy and mutual regard between the political chiefs and their senior officials. However, this privileged partnership in policy-making is restricted to a narrow range of persons occupying the senior posts. The extreme example of a handful of civil servants acting as powerful policymaking instruments was provided by the Indian Civil Service of the pre-independent period Delegated legislation and administrative justice are the other reasons for the enormous increase of powers wielded by the civil service. The legislatures while enacting acts, arc delegating rulemaking powers to the executive government, with the consequent necessity for the setting up of administrative courts for the determination of disputes arising under these legislations. Statutes vest wide discretionary powers with the civil servants. According to Professor Laski Administrative discretion is the essence of the modern state." It is through exercise of these discretionary powers and by the rule-making powers by virtue of delegated legislation, the modem civil servants wield vast amount of power. From the foregoing discussion it is clear that a civil service capable of carrying on the administration is an essential prerequisite to a democratic system if it is to live up to its new responsibilities and great expectations. The character and quality of the civil service guarantee the smooth functioning of the governmental system. Lack of imagination and initiative on the part of the civil service means ineffective administration. Alert and zealous officials can transform the permanent service into an instrument of real service. So it boils down to securing service personnel of proper educational background, sense of proportion, proper temperament, drive, energy and vision if the noble purposes set forth are to be achieved. All strata of society can supply men of these qualities; and many of them have proved themselves to be officials of intelligence and creative ability. There should be a proper selection by an impartial body with the avowed purpose of selecting from many intellectually keen candidates, those who will develop into strong and resourceful officers of proper calibre with the motive force of service to humanity. The keenest intellect of every generation should find a place in the civil service of the country. To achieve this purpose, the civil service should be made attractive to men of talents and capacities. There must be a a guarantee of future prospects to the new entrant with ample chances for proving his mettle. The first condition which will attract a capable person to the public service is a sumptuous pay packet. The business establishments in the private sector are competing in this respect to absorb the cream of the intellectuals by offering high remuneration. All the industrial countries are experiencing this difficulty. There are also chances of wholesale exodus of civil servants to private business establishments lured by better remuneration. So the salary offered to the new entrant should compare favourably with the salary and fringe benefits paid to the nongovernment employees of similar status to ensure their retention in the civil service. The position of power is equally a great attraction for men of intelligence and ability and this certainly may also be an important factor in retaining able civil servants. Perhaps more important than remuneration in attracting and retaining efficient permanent officials is the security of tenure held out. The permanency of state employment makes the civil service a 'sheltered' occupation. The fact that there is no fear of discharge except on charges of inefficiency or misconduct has its own attraction. In India even though the civil servant holds the post at the pleasure of the Executive Head following the English doctrine of pleasure, there are constitutional safeguards for the civil servant against arbitrary dismissal, removal or reduction in rank. The Supreme Court of India has also dwelt at length on the necessity to impart a sense of security to civil servants. The Supreme Court says" in

a modern democratic state, the efficiency and incorruptibility of public administration is of such importance that it is essential to afford civil servants adequate protection against capricious action from their superior authority. If a permanent civil servant is guilty of misconduct, he should, no doubt, be proceeded against promptly under the relevant service rules, subject, of course, to the safeguards prescribed by Article 311(2); but in regard to honest, straight-forward and efficient permanent civil servants, it is of outmost importance even from the point of view of the state that they should enjoy a sense of security which alone can make them independent and truly efficient" Fixed hours of work, regular leave, regular (though modest) increments, a not-insignificant pension, chances of promotion to higher grades etc. are the other attractions of the civil service. The method of recruitment of the civil servant plays a very important role in procuring an effective civil service. Before remarking the efficiency aspect of the civil service it has to be mentioned that training is the corner stone of staff efficiency. To throw a raw recruit unceremoniously to learn by experience is a haphazard method. It is highly desirable to formulate a sound scheme to impart training to the new entrant whether clerical, technical or administrative.

Role of the Permanent Civil Service in Present Day Scenario

The work of the civil service falls broadly into two main categories. In one category may be placed all such work as either is of simple mechanical kind or consists in the application of well-defined regulations decision and practice to particular cases in the other category the work which is concerned with the formation of policy with the revision of existing practice or current regulations and decisions and with the organisation and direction of the business of the government. The top administrative class which performs the activities enumerated in the second category plays a pivotal role in the administration of the country. The minister who heads a department is an amateur. He is a politician. He is appointed not because he possesses expert knowledge of the work of the department but for other considerations. The civil servants are experts. They possess besides technical knowledge a vast fund of practical experience. The minister therefore has to depend on the advice of the civil servants who are a sort of permanent brains trust. They advise and assist the minister concerning the work of the department and find solutions to various administrative problems arising outside the normal routine of the department. Although policy making is the responsibility of the minister even in this field he is dependent upon the permanent undersecretary whose knowledge and experience provide the necessary factual foundation for policy determination. Warren Fisher has described the role of Civil servants in the following words : "Determination of policy is the function of ministers and once a policy is determined it is the unquestioned and unquestionable business of the civil servants to strive to carry out that policy with precisely the same goodwill whether he agrees with it or not. That is axiomatic and will never be in dispute. At the same time it is the traditional duty of civil servants while decisions are being formulated to make available to their political chiefs all the information and experience at their disposal and to do this without fear or favour irrespective of whether the advice thus tendered may accord or not with the ministers initial view. The presentation to the minister of relevant facts the ascertainment and marshalling of which may often call into play the whole organization of the department demands of the civil servants the greatest care. The presentation of inferences from the facts equally demands from him all the wisdom and all the detachment he can command.

Civil Service Reforms for Good Governance

The civil service as the primary arm of government must keep pace with the changing times in order to meet the aspirations of the people. The purpose of 'reform' is to reorient the Civil Services into a dynamic efficient and accountable apparatus for public service delivery built on the public service ethos and values of integrity impartiality and neutrality. The reform is to raise the quality of public services delivered to the citizens and enhance the capacity to carry out core government functions thereby leading to sustainable development. Prior to developing the contents of Civil Service Reforms there is a need for an open objective stock taking of the current situation. Civil Service is essential for the functioning of government. The civil service has long been regarded as the 'steel frame' of administration in India right from colonial days. The colonial legacy of civil service is still continuing in this fast changing era of globalization. It is in this context that civil service reform forms a quintessential part for good governance. The importance of civil service right from ancient period to the modern and presents the problems affecting civil services the reforms that are needed as suggested by various Committees and the reorientation that is needed for the civil service for effective service delivery. Civil service refers to the body of government officials who are employed in civil occupations that are neither political nor judicial. The concept of civil service was prevalent in India from ancient times. The Mauryan administration employed civil servants in the name of ***adhyakshas*** and ***rajukas.*** The examination for civil servants in those days too was very stringent as revealed by Kautilya's Arthasastra. The expense of the territory and the need to hold it intact made it imperative for the Mauryan administration to recruit civil servants based on merit. The concept of civil service again came into prominence when British in search of creating a framework to hold the territories of India created the much coveted 'Indian Civil Services' or the ICS. Many changes took place in the Indian civil services since Lord Cornwallis introduced it in India. The Indian Civil service was created to foster the idea of unity in diversity. The service was expected to give continuity and change to the administration amidst the changing political scenario and turmoil affecting the country. By and large the Indian civil service was created to foster the idea of unity in diversity. The service was expected to give continuity and change to the administration. A well-functioning civil service helps to foster good policymaking effective service delivery accountability and responsibility in utilizing public resources which are the characteristics of good governance. "Good Governance" is being used as an all-inclusive framework not only for administrative and civil service reform but as a link between Civil Service Reform and an all-embracing framework for making policy decisions effective within viable systems of accountability and citizen participation. Administrative reform focuses on rationalizing structures and operations of government machinery. Governance reform tends to focus on facilitating the effective functioning of and interactions between the states the market and the civil society. It refers to the improvement of legal institutional and policy frameworks to create proper decision making and implementation environments for economic growth and distribution. It encompasses participatory systems for elements of civil society to become actively involved in

formulation of policies and programmes and their implementation. It also includes effective and transparent systems and processes for accountability in government activities. Civil service reform cannot be seen in isolation and it has to be undertaken along with administrative and governance reforms for effective results. Although comprehensive reform that involves governance the civil service administrative practices and civil society is ideal it requires sustained commitment from political and administrative leaders. It is also too complex to implement all at once. Few countries have undertaken comprehensive reforms and there are mixed results. The challenge lies in finding linkages among the governance civil service and**:** should come from within the civil servants to create pro-active vibrant and accountable civil service.

Civil Servant's Accountability for Good Governance

The civil servants have always played a pivotal role in ensuring continuity and change in administration. However, they are dictated by the rules and procedures which are formulated taking their advice into account. It is the 'rule of law' rather than the 'rule of man' that is often blamed for widespread abuse of power and corruption among government officials The explosion of media in the recent past has opened civil servants to external scrutiny and called for transparent accountability mechanisms in terms of outcomes and results not processes. The issues of accountability of civil servants in service delivery have come to the fore front in all dialogues regarding civil service reforms. The credibility of civil service lies in the conspicuous improvement of tangible services to the people, especially at the cutting edge. Conceptually, the civil servants are accountable to the minister in charge of the department, but in practice, the accountability is vague and of a generalized nature. Since there is no system of *ex ante* specification of accountability the relationship between the minister and the civil servants is only issue-sensitive. The civil servants deal with the minister as the issues present themselves. The accountability relationship can be anything from all-pervasive to minimalistic and it is left to the incumbent minister to interpret it in a manner that is most convenient to him. It is true that the legislatures in India are armed with control mechanisms such as questions adjournment motions no confidence motions calling attention notices half an hour discussions and control through legislative committees. However the legislatures in India have failed in demanding and enforcing any meaningful accountability from the civil service. The control mechanisms of the legislatures have at least succeeded only in reviewing how much money has been spent and how much more is going to spent. The reasons why the legislatures in India are not in a position to enforce accountability from the civil service is because their review is *ex post*. In all democratic countries civil servants are accountable both to the political executive and to citizens for ensuring responsive transparent and honest policy implementation and service delivery. But ensuring accountability for performance is not a simple task in government service there are immense complexities involved in making public officials answerable for outputs and outcomes. Setting performance targets and their measurement is easier in respect of service delivery agencies particularly when the service provided is tangible and thus an easily measured unit but for many public organizations where the output is policy related and therefore not very concrete assessment of performance becomes much more complicated. Accountability of the executive arm of government to Parliament and to the citizens of the country is of course the fundamental feature of a democracy. The final expression of accountability in a democracy is through the medium of periodic elections which is an instrument for punishing and rewarding the Government of the day, and therefore serves as an ultimate instrument of accountability. In India constitutional and statutory bodies such as the office of the Comptroller & Auditor General the Election Commission and the Central Vigilance Commission (CVC) are examples of other oversight mechanisms that are autonomous but lie within the framework of the State. Analysts have categorized these accountability mechanisms into "horizontal" accountability mechanisms which refer to those located within the State as against 'vertical' accountability mechanisms which are those outside the State and include the media civil society and citizen.

Advisory Role of Civil Servants in Formulation of Policy

Rendering policy advice to the political executive is the most important staff function of the civil servant. Policy making is the ultimate responsibility of the Minister. After a policy is approved by the elected government it is duty of the civil servant to implement such policy in the right earnest whether he/she agrees with it or not. At the same time it is the duty of the civil servant to provide the factual basis thorough analysis of all possible implications of any measure under consideration and free and frank advice without fear or favour at the stage of policy formulation. It is unfortunate that at times senior civil servants get bogged down in routine administrative decision making and are unable to contribute adequately to this crucial aspect of their functions. However for civil servants to be able to provide appropriate policy inputs they must acquire the necessary combination of a broad perspective of the sector as well as of the Government as a whole combined with conceptual clarity and requisite knowledge. If a policy that is being formulated is perceived by the civil servant to be against public interest his/her responsibility is to convince the political executive about the adverse implications of such a policy. However, if the political executive does not agree with such an advice there is little that the civil servant can do other than putting his/her views clearly on record. It is for the other institutional mechanisms such as Parliament the CAG Judiciary and ultimately the electorate to hold the political executive to account for bad policy.

Civil Servants Who Help the Ministers for Promoting Good Governance.

Civil servants can place all the facts and opinions before the Minister without any fear.

The Civil servant is responsible for the continuity of policy.

The civil servant must maintain secrecy.

The Civil Servant remains anonymous but he has to bring creativity and excellence based upon facts.

The ultimate prerogative in Policy-making is of the Minister.

In India, the relationship is the same in theory but in practice many problems have crept which have become **challenging problems for good governance.**

a) The increasing tendency on the part of Ministers to interfere in day-to-day administration to allow accommodation to individuals and groups for parochial and political consideration

b) Lack of clear and adequate perception by Ministers of their administrative responsibilities and their inability for various reasons to do full justice to them.
c) Lack of fuller appreciation by the Civil Servants of the political side of the Ministers role
d) Differences in the Social background, intellectual ability professional commitment temperament and outlook of Ministers and Senior Civil Servants.

Good governance is generally characterized by **participation, transparency, accountability**, **protection of human rights and a society based on the rule of law**. Recent advances in communication technologies and the Internet provide opportunities to transform the relationship between governments and citizens in a major way, thus contributing to the achievement of good governance. It is in this context that the issue of e-governance needs to be analysed. Good governance must be founded on moral virtues ensuring stability and harmony. **Confucius** described righteousness as the foundation of good governance and peace. The art of good governance simply lies in making things right and putting them in their right place. Confucius's prescription for good governance is ideally suited for a country like India where many of our present day players in governance do not adhere to any principle and ensure only their own interests. **Confucius** emphasizes the righteousness for life and character building. This is in conformity with Dharma or righteousness as taught by all religions in the world and preached in Buddhism very predominantly in its fourth noble truth. He also emphasizes that man himself must become righteous and then only there shall be righteousness in the world. This is comparable with what Gandhiji said "Be the change you wish to see in the world.

Role of Civil Service is in Challenging Situation

The report of the Comptroller and Auditor General on the 2G spectrum deals submitted in November 2010 revealed a presumptive loss caused to the Central government of about Rs.1.76 lakh crore. The Central Bureau of Investigation's decision to arrest the former Telecommunications Secretary Siddhartha Behura along with the former Minister A. Raja in connection with the 2G spectrum case revives an old debate over the relationship between the civil servant and the politician. The drastic action by the agency should shake the entire bureaucracy especially the officers of the Indian Administrative Service and the Indian Police Service out of their complacency. It should make them introspect on how they should regulate their response to ministerial demands for unequivocal compliance of directions. The issue is ticklish and may never be resolved to the satisfaction of either side or even those members of the public who believe that the independence of the civil service became extinct a long time ago. Nevertheless it has become necessary to place things in perspective so that the public understands the dynamics of a relationship which places enormous strain of officers at the senior levels of the bureaucracy. There is nothing that has been reported till now that suggests that Mr. Behura had been dishonest and received monetary favours from the companies which benefited. Only a CBI charge sheet will lead to the process of confirming or disproving his integrity. There is just a possibility that while being personally honest he had been more than willing to do the Minister's bidding in order to stay in the good books. It is not insignificant that he had worked under Mr. Raja earlier in the Ministry of Environment. The fact that he signed more than 100 letters in regard to the issue of licences within days of assuming charge as Secretary is a cause for grave misgivings he was dishonest or negligence or displayed a lack of application of the mind. His lawyer claims his client had raised several objections to the Minister's actions. It is not known these had been recorded on the flies. If Mr. Behura's dissent had indeed been put down on paper that would provide an extenuating circumstances when his criminal liability is assessed.

Conclusion

Civil servants have special obligations to the community because of three reasons. First, they are responsible for managing resources entrusted to them by the community. Second, they provide and deliver services to the community. Third, they take important decisions that affect all aspects of the community's life. The community has a right to expect that its civil service functions fairly, impartially, and efficiently. It is essential for the community to be able to trust and have confidence in the integrity of the civil service decision-making process. Within the civil service itself the decisions and actions of civil servants should reflect the policies of the government of the day and the standards that the community expects from them as government servants. The expectation that the civil service will maintain the same standards of professionalism responsiveness and impartiality in serving successive political governments is a key element of the way which democratic polity functions.

Necessity of Civil Service Law

A civil service law describes and establishes the core principles, values, and characteristics which create the distinctive culture and ethos of the civil service. Drafted properly, it can provide a clear and unified framework within which the civil service can carry out its distinctive roles and responsibilities. It also provides a legal basis for the legislature to express the important values and culture it wants in the civil service. It becomes an unambiguous statement to those within the civil service and to the people of India of what is expected of the civil servants. In addition, the legal framework makes civil service law not just one initiative of the government in power, but a lasting initiative towards better performance and accountability.

Civil Service Law and Civil Services Authority

It is good to note that the Government of India plans to enact a civil service law. The Draft Civil Services Bill is soon to become a law. The purpose of the Bill is stated to be as follows:

To provide a statutory basis for the regulation of the Civil Services in India as enshrined in Article 309 and Article 312 of the Constitution of India, to regulate the appointment and conditions of the service of Civil Servants to lay down the fundamental values of Civil Services the Civil Services Code of Ethics. Civil Services Management Code to establish Civil Services Authority for facilitating review and to develop Civil Services as a professional, neutral, merit based and accountable instrument for promoting good governance and better delivery of services to the citizens. Section 14 of the Bill enumerates the functions of the central authority as given below:

Aid and advise the Central Government in all matters concerning the organisation, control operation and management of Civil Services and Civil Servants.

Recommended to the Central Government the Civil Services Code of Ethics and Civil Services Management Code

Recommend to the Central Government the policies on the protections given to the Civil Servants.
Recommend to the Central Government the policies for good governance in the civil service transparency to be maintained by the civil servants in the discharge of their duties and the activities.
Recommend to the Central Government changes to be made in the system and procedures in different departments and areas of governance by civil services,
Make recommendations to the Central Government on the grievance redressal mechanism for the civil servants.
Ensure adherence to the Civil Services Code and Act by the Cadre Controlling Authorities and,
Discharge such other functions as the Central Government may specify

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Shreya Singhal V. Union of India: Case analysis

[1] Mohd. Owais Farooqui, [2] Aftab Alam
[1] PhD Student, NALSAR University of Law, Hyderabad, Telangana, India.
[2] Student of LL.M., Tata Institute of Social Sciences, Mumbai, Maharashtra, India.

1. Background of the case

Mumbai police arrested two girls Shaheen Dhada and Rinu Srinivasan in 2012 for communicating their dismay at a bandh brought in the wake of Shiv Sena boss Bal Thackery's demise. The girls posted their remarks on the Facebook. The arrested girls were discharged later on and it was decided to drop the criminal cases against them yet the arrests of them pulled in across the country protest. It was presumed that the police have abused its authority by invoking Section 66A at the same time it is a breach of fundamental right of speech and expression. The offence under section 66A of IT act being cognizable, law enforcement agencies have authority to arrest or investigate without warrants, based on charges brought under the information technology act. The outcome of this was many highly famous arrests of people throughout the country for posting their views and opinions whereas govt called them '*objectionable content*' but more often these content were dissenting political opinions. In January 2013, the central govt had turned out with an advisory under which no person can't be arrested without the police having prior approval of inspector general of police or any other senior official to him/her. The Supreme Court called the entire petition related to constitutional validity of information technology act or any section within it under single PIL case known as *"Shreya Singhal v. Union of India."[W.P. (crl).No.167 of 2012]*

2. International law related to freedom of speech and expression

The right to freedom of expression is articulated under Article 19 as Human Right in Universal Declaration of Human Right as well as in International Covenant on Civil and Political Rights which states that "*everyone shall have the right to hold opinions without interference "and "everyone shall have the right to freedom of expressions; this right shall include freedom to seek, receive and impart information's and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."*

Human Rights Council of United Nations on July5th, 2012 unanimously adopted a resolution to protect the free speech of the individuals on the internet

3. Facts in Issue.

A writ petition was filed in public interest under Article 32 of the Constitution of India by petitioner, seeking to declares Section 66A,69A and section 79 as unconstitutional on the fact that the phraseology used in Section 66A,69A and section 79 of the IT Act, 2000 is so broad and vague, at the same time incapable of being judged on objective standards, that it is susceptible to wanton abuse and hence falls foul of Article 14, 19 (1)(a) and Article 21 of the Constitution. Petitioner further argues that the terms, menacing, offensive, annoyance, inconvenience, obstruction, danger, and insult have not been defined in the General Clauses Act, IT Act or any other law and so they are susceptible to wanton abuse. petitioner further urged that the provision sets out an unreasonable classification between citizens on one hand and on the other hand netizens as the freedom generally guaranteed under Article 19(1)(a) to citizens including general media now is tamed as far as netizens are concerned. If netizens make comments which could be made generally by citizens, they can be arrested. This is how Article 14 is been violated by this provision

4. Petitioner's arguments

a. Section 66A takes away the Freedom of Speech and Expression guaranteed under Art. 19(1)(a) and is not saved by the reasonable restriction mentioned under Art. 19(2).
b. That causing of annoyance, inconvenience etc. are outside the scope of Article 19(2)
c. Section 66A seeks to create an offence but have infirmity and vice of vagueness as it does not clearly defines the terminology used in it. The terminology used are subjective in nature and are left open at the desire and will of the law enforcement agencies to interpret it. The limitation is not present.
d. Article 14 violated as there is no intelligible differentia as to why only one means of communication is targeted by this section. Thus, self-discriminatory.

5. Respondent's arguments

a. Legislature is in the best position to address the requirements of the people and the courts will only step in when a law is clearly violative of Part III and there is presumption in favour of Constitutionality of the law in question.
b. Court would so construe a law to make it functional and in doing so can read into or read down the provisions of law.
c. Only probability of abuse cannot be a justification to declare a provision invalid.
d. Loose Language is used to safeguard the rights of the people from those who violate them by using this medium.
e. Vagueness is not a ground to declare a statute unconstitutional if it is otherwise qualified and non-arbitrary

6. Free speech

Preamble of Indian constitution guarantees freedom of thought and expression and it is of key significance. The right to freedom in Article 19 guarantees the Freedom of speech and expression which was acknowledge in the Maneka Gandhi v.

Union of India [1], where the Supreme Court held that the freedom of speech and expression has no geographical limitation and it moves with the right of a citizen to collect information and to exchange thought with others not only in India but abroad also. The zest of the Article 19 says: "Everyone has the right to freedom of opinion and expression, this right includes freedom to hold opinions without interference and to pursue, receive and promulgate information and ideas through any media and regardless of state boundaries."

In Romesh Thappar v. State of Madras [2], it was stated that "Freedom of speech and Expression that of the press lay at the foundation of all democratic organisations, without free political discussion no public education which is essential for the proper functioning of the process of popular government, is possible." The Supreme Court in *Union of India v. Association for Democratic Reforms and Anr* [3] held that "One sided information, disinformation, misinformation and non-information, all equally create an uninformed citizenry which makes democracy a farce. Freedom of speech and expression includes right to impart and receive information which includes freedom to hold opinions". Liberty of speech and expression is infact the most essential of all freedoms. In the leading case of Bennett Coleman v Union of India (1973) [4] it was observed that freedom of speech and press is the ark of the covenant of democracy because assessment of views by people is vital for the working of democratic institution. The Supreme Court in *Sakal Papers v Union of India* (1962) [5] observed that the freedom of speech and expression is one of the most important principles under a democratic constitution. Similarly in the S. Khushboo v Kanniamal and Anr (2010) [6] the apex Court observed that the freedom of speech and expression even not absolute in nature is essential as we need to tolerate unpopular opinions. The right of freedom of speech and expression needs free flow of opinions and views essential to support collective life. Custom of Social dialogue by and large is of great social importance

7. U.S. and India

1. In case of *Whitney v. California* [7] Justice Brandeis stated that the Liberty should be treated as a means as well as an end and to justify suppression of free speech there should be a reasonable explanation to fear that serious evil will result if such free speech is practiced.
2. The Supreme Court debated at length that whether U.S. Judgements must be taken in context of Art. 19? Three distinction were made:
    - US first amendment is absolute and congress shall make no law which abridges the freedom of speech
    - US first amendment speaks of freedom of speech and of the press without any reference to expression whereas Art. 19(1)(a) talks about freedom of speech and expression without any reference to the press.
    - Under US law speech may be abridged if it is obscene, libellous, lewd, and profane whereas under Indian law it is subjected to eight elements mentioned under art. 19(2).

The only difference between US and Indian freedom of speech and expression is that if in US, there is a compelling necessity to achieve an important governmental policy or serious goal a law may pass the muster test but in India if it is not cover under eight subject matter then it shall not pass the muster test [8].

8. Constitutionality of 66A

In context of information. there are three concepts essentials to understand the Freedom of Expression: -

a. Discussion
b. Advocacy
c. Incitement

The first is discussion, the second is advocacy, and the third is incitement. Just discussion or even advocacy of any particular cause howsoever disliked, unpopular or hated is at the heart of Article 19(1) (a). It is only when any such discussion or advocacy steps into the level of incitement that Article 19(2) gets initiated. It is at this stage/level that a law may be made for curtailing the speech or expression that leads inexorably to or tends to cause public disorder or be prone to cause or have tendency to affect the sovereignty & integrity of India, security of the country, friendly relations with other States, etc.

Further, to curtail the freedom specified under article 19(1)(a) the ground must qualify the test of article 19(2) which enumerate only eight condition or element but section 66A does not pass the muster test and element of article 19(1)(a).

9. On public order

"Public Order" is an expression which indicates a state of peace and tranquillity which prevails over and amongst the members of a society as a outcome of the internal Regulations enforced by the state which state have established with due process of law.

In the case Dr. Ram Manohar Lohia v. State of bihar and others [1966 AIR 740, 1966 SCR (1)709] Supreme Court pointed out the difference between maintenance of law and order and its disruption and the maintenance of public order and its disruption. Public order was said to enfold more of the society and community than law and order. Public order is the smooth and peaceful condition of the life of the community or society at large taking the country as a whole or even a particular locality. Disruption of public order is to be differentiated, from acts directed against or toward individuals who do not disturb the society to the extent or level of causing a general disruption of public tranquillity. It is the degree of disturbance and its impact upon the life of the community in a locality which decides whether the disturbance results only to a breach of law and order.

10. On clear and present danger and tendency to affect

Whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils. It is an issue of proximity and degree. The expected danger should not be farfetched, remote or conjectural. It must have immediate and direct link with the expression. The expression of thought should be substantially dangerous to the public interest or to say that the expression must be inseparably bolted up with the action. This is known as the test of "clear and present danger."

11. On defamation

It must be noticed that for something to be defamatory, injury to reputation is an essential ingredient. Section 66A does not expressly or impliedly concern itself with injury to reputation.

Something might be grossly offensive and might be annoy or may be inconvenient to somebody but may not be affecting his reputation. It is established therefore that the Section 66A is not aimed at defamatory statements.

12. On decency or morality.

In the case of, *Directorate General of Doordarshan v. Anand Patwardhan* [9] Supreme Court observed the law in the United States of America and said that a material might be regarded as obscene if the average person applying contemporary society or community standards would find out that the subject matter taken up as a whole appeals to the prurient interest and that taken as a whole it otherwise lacks serious artistic, literary, political, educational or scientific value.

Section 66A cannot possibly be said to frame an offence which comes within the expression of 'decency' or 'morality'. What might be grossly offensive or annoying under the Section 66A need not be essentially obscene? The word 'obscene' is absent in Section 66A.

13. On incitement to an offence

The mere causing of inconvenience, annoyance, danger etc., or being grossly offensive or having a menacing character is not defined as offences under the Indian Penal Code at all. They are ingredients of some offences under the Indian Penal Code but are not offences in themselves. By taking these reasons into consideration, Section 66A in fact has nothing to do with "incitement to an offence". Section 66A acutely curtails information that may be sent on the internet based on whether it is annoying, grossly offensive, inconvenient, etc. and being not related to any of the eight conditions mentioned Under Article 19(2) so therefore, fail to pass muster test laid down in Article 19(2) and Hence, it is said to breaches Article 19(1)(a).

14. On vagueness

The words used in the section 66A for formation of the offence are subjective and relative in character. That the words used in Section is so vague and loose that an accused person cannot be put on notice as to what precisely is the offence which has been committed by him/her at the same time the authorities administering the Section are not sure as to on which side of a clearly drawn boundary of a specific communication will fall every expression used is vague in meaning. What might be offensive to one might not be offensive to others. What might cause inconvenience or annoyance to one might not cause inconvenience or annoyance to others. Even the word "persistently" is not precise assume a message is sent thrice, can it be said that it was sent "persistently"? Does a message have to be sent (say) at least eight times, before it can be said that such message is "persistently" sent? There is no clear cut line conveyed by any of these expressions and that is what makes the Section 66A unconstitutionally vague

It is an essential fundamental of due process that a law is void for vagueness if their restrictions are not clearly defined. Vague laws offend many important values. First, because we suppose that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may deceive the innocent persons by not providing just and fair warning. Second, if discriminatory and arbitrary enforcement is to be avoided, laws should provide explicit and clear standards for those who apply them. A vague law impermissibly gives basic policy matters to policemen, juries and judges for resolution on an ad hoc and subjective basis, with the severe dangers of discriminatory and arbitrary application. In *Kartar Singh v. State of Punjab* [10] it was observed that it is the one of the core principle of legal jurisprudence that a law must be void of vagueness if its prohibitory application is not clearly defined.

A most basic principle in our legal system is that enactments which regulate persons or entities should give fair and reasonable notice of conduct that is illegal or legal. In case of *Connally v. General Constr. Co.* [11] it was observed that a statute which either forbids or requires the doing of an act in language is so vague that men of common intelligence must necessarily guess or predicts at its meaning and confused as to its application, violates the first fundamental of due process of law. This essentiality of clarity in Regulation is essential to the protections given by the Due Process. It requires the scrapping of laws that are impermissibly vague. A punishment or conviction fails to comply with due process if the law or Regulation under which it is obtained "fails to provide a man of ordinary intelligence fair notice of what is prohibited, or is so vague that it authorizes seriously discriminatory enforcement." In the case of the Goonda Act the invalidity arises from the probability of the misuse of the law to the detriment of the individual.

15. On chilling effect and over breadth

Section 66A is cast so widely that impliedly any views on any subject would be covered by it, as any serious views dissenting with the majority or person with authority of the day would be caught within its scope. The Section 66A is unconstitutional also on the point that it takes within its scope protected speech and speech that is innocent in nature and can liable therefore to be used in such a manner as to have a chilling effect on free speech and would, therefore, have to be invalidate on the ground of over breadth.

16. On presumption in favour of constitutionality of an enactment

The possibility of abuse of an enactment otherwise valid does not implant to it any element of invalidity. The opposite must also imply that a statute which is otherwise not valid as being unreasonable cannot be saved by its being applied in a reasonable manner. The Constitutional validity of the enactment would have to be determined on the basis of its provisions and on the ambit of its application as reasonably construed. If so evaluated it passes the test of reasonableness, possibility of the powers conferred being improperly used is no ground for pronouncing the enactment itself invalid and similarly if the enactment properly interpreted and tested in the light of the requisites set out in Part III of the Constitution of India does not pass the test it cannot be declared valid only because it is applied in a manner which may not conflict with the constitutional safeguards. Moreover its reasonable and fair implementation depend upon the law enforcement agency and then it will become subjective to case to case things to be analyzed by the court and this will lead to miscarriage of justice.

17. On doctrine of severability under article 31(1)

In any case Hon'ble Court not being pleased about the constitutional validity of either any expression or a part of the law, the Doctrine of Severability as stated Under Article 13 may be came into play. According to Article 13(1), an existing law not consistent with any Fundamental Right is void only to the proportion of the inconsistency and not further. The rationale given by respondent is vague and ambiguous as it does not clearly point out which part of section 66A can be saved.

That Section 66A assert to sanction the implementation of restrictions on the fundamental right contained in Article 19(1) (a) in language wide enough to shield restrictions both within and without the limits of constitutionally valid legislative action.

In case of *Romesh Thappar v. State of Madras* [12], the question was as to the validity of Section 9(1A) of the Madras Maintenance of Public Order Act, 23 of 1949. That section empowered the Provincial Government to ban the entry and circulation within the State of a newspaper "for the purpose of securing the public safety or the maintenance of public order." Subsequent to the enactment of this statute, the Constitution of India came into force, and the validity of the provision depended on whether it was protected by Article 19(2), which saved "existing law insofar as it relates to any matter which undermines the security of or tends to overthrow the State." It was held by this apex Court that as the purposes enumerated in Section 9(1-A) of the Madras Act were wider in amplitude than those specified in Article 19(2), and as it was not possible to divide Section 9(1-A) into what was within and what was without the protection of Article 19(2), the provision must fail in its entirety. That is really a good decision that the impugned provision was on its own language and contents cannot be severed. This case is also dealing with an Article 19(1)(a) violation; Romesh Thappar's judgment would apply.

18. On article 14

The Petitioners had submitted that Article 14 is also violated in that an offence whose ingredients are vague in nature is unreasonable and arbitrary and would result in discriminatory and arbitrary application of the law. Moreover, there is no intelligible differentia between the medium of broadcast, print, and live speech as contrary to speech on the internet and, therefore, new class of criminal offences cannot be made out on this ground. Similar offences in nature which are committed on the internet have a three year maximum sentence Under Section 66A as contrary to defamation which has a two year maximum sentence in addition to that, defamation is a non-cognizable offence at the same time under Section 66A the offence is cognizable.

Apex Court does not agree with the Petitioners that there is no intelligible differentia between the medium of broadcast, print, and real live speech as contrary to speech on the internet. Apex Court held that there is intelligible differentia as the internet gives any person a platform which need very little or no payment by which to air his views and anything posted on a site or website travels with speed of light and reaches to millions of peoples all over the world. Apex court declares that there is an intelligible differentia between speech on the internet and other mediums of communication for which separate offences may certainly be created by legislation. Therefore the challenge on the basis of Article 14 fails.

19. On section 69a and 79

According to Section 69A blocking of internet site can take place only by a clear and reasoned order after following with several procedural rules and safeguards which also includes a hearing to the originator and intermediary. There are two ways in which a blocking order for a website can be passed - first by the Designated Officer after complying with the 2009 Rules and second by the Designated Officer when he has to act on an order passed by a competent court. The intermediary using its own prudence to whether information must or must not be blocked is notably absent in Section 69A read with 2009 Rules.

Exemption from liability of intermediary is enumerated under section 79(3)(b) says that the intermediary upon having actual knowledge (certified copy of order) that a court order has been passed directing it to promptly remove or block access to specific material if they fail to expeditiously remove or block access to that material. This is on the ground that otherwise it would be very hard for intermediaries like facebook, Google etc. to follow order when lakhs of requests are pending and the intermediary is then to verified as to which of such requests are reasonable and which are not. It has been noticed that in other countries worldwide this view has gained acceptance (exemption of intermediaries under similar condition)

Apex Court held that Court order or the notification and direction by the Government or by its appropriate agency should strictly be in accordance to the subject matters laid down in Article 19(2). Unlawful acts beyond what is stated in Article 19(2) clearly cannot form any part of Section 79. With these two condition/restriction, Supreme Court reject from striking down Section 79(3)(b).

20. Market place of ideas by justice holes

The marketplace of ideas theory says that, with minimal or no state intervention a laissez faire policy approach to the law for speech and expression, propositions, ideas, theories, and movements will fail or succeed on their own merits if left to their own prudent devices, free individuals have the logical capability to filter through competing views in an free atmosphere of exchange and deliberation, giving ground to truth, or the best possible results, to be achieved in the end.

John Stuart Mill expanded this concept, by reasoning that free expression is valuable for individual and society because it assist to sustain and develop the rational mental faculty of man and, is a contributory tool, advanced the search for truth. The impact of Milton and Mill is clearly seen in Justice Oliver Wendell Holmes, dissent opinion in Abrams v. United States, 250 U.S. 616 (1919), the case that conventionally established the marketplace of ideas as a legal notion. Without any doubt, Holmes never used this phrase of “marketplace of ideas.” What he wrote in *Abrams* was this:

The best test of truth is the power of the thought to get it accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing

purposes of the law that an immediate check is required to save the country.

Even though attractive, the idea is highly optimistic because of the fact that there is no concrete evidence to prove that good, rational just arguments always beat and win over unjust and bad arguments. Psychological research proves that people are very prompt in accepting the opinion that he/she prefer or already hold, and not to change it only on rational grounds. so, casteist, sexist, communally charged, class ideologies will dominate a society, not on the strength of its truth but on the strength of its dominance over the society

21. Judgement in a glance

1. Section 66A is struck down in its entirety being violative of Article 19 (1) (a) and not saved under Article 19(2).
2. Section 69A and IT (procedure & safeguard for blocking for access of info by public) rules are constitutionality valid.
3. Section 79 is valid subject to reading down of Section 79(3) (b).
4. Section 118(d) of Kerala Police Act is struck down (public order).

22. Overview of the judgement

The judgment has preserved and saved the freedom of speech and expression given to people under article19 (1) (a) of Indian Constitution and also restraining state from arbitrary apply of power in context to freedom mentioned under article 19 of the constitution, at the same time Given clear guidelines for further enacting law in relation to reasonable restriction on fundamental right and freedom given by Indian constitution But miss to implore the principle of transparency for rules to block the website. Needs some further interrogation and fine tuning in regard to viewers right as he/she must know why state is not allowing them to have certain information and that reason can be challenged by the viewers also

However, the Apex Court has put a lot of faith in technical and complicated government process based on dicey understanding of the capabilities and capacities of the different parties involved. For example, the law regarding content-blocking procedure have been declared effective on the belief and presumption that the blocking of website rules (2009) gives a reasonable chance and opportunity to be heard and to challenge an unconstitutional blocking order.

This is, many times, misleading. It presumes that the originator of content will be contacted and informed about the blocking of his/her content and a reasonable opportunity will be given to challenge the blocking of the content. Secondly, the assumption that the intermediary will give reason and defend the content before the concerned government body. Both assumptions are practically far off the mark.

The very technical nature of the Internet, with its geographic spread and anonymity, makes it likely possible that the originator of the content may not be contacted, because of content- originator may be in foreign country or can lack the resources to argue and pursue his/her case. Intermediaries will not reasonably defend the content since they prefer to avoid spending resources on protecting third-party content. The cumulative impact of this is that the information available to access will continue to be affected by unreasonable government blocking orders.

The blocking procedure continues to be covered in secrecy by the application of Rule 16 of the Blocking of Access rules, which demands that confidentiality must maintained in case of any blocking orders. This rule was contested in the *Shreya Singhal* case but the Apex Court left this rule untouched. For originators of content and viewers to notice that their content has been ordered to be blocked by government or its agency, the hosting page must carry a notification of the order for blocking along with reasons.

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Operation of judicial precedent in Malaysia and Nigeria: A comparative analysis

[1] Murtala Ganiyu Murgan, [2] Dr Abdul Ghafur, [3] Dr Abdul Haseeb Ansari

[1] PhD candidate, Ahmad Ibrahim Kulliyah of Laws, International Islamic University, (IIUM) Kualar Lumpur, Malaysia

[2] Professor of Law, Ahmad Ibrahim Kulliyyah of Laws, IIUM, Malaysia

[3] Deputy Dean, Ahmad Ibrahim Kulliyyah of Laws, IIUM, Malaysia

Abstract
The doctrine of judicial precedent, which states that the court must stand by what has been decided in a case when deciding a new case by a judge in court, is commonly known among the countries that practice common law system, but the operation of the doctrine is said to differ. This paper makes a comparative study of operation of judicial precedent in Malaysia and Nigeria, with a view to knowing the areas of difference, similarity and improvement. Based on doctrinal research approach, this paper examines operation of doctrine of judicial precedent among different categories of courts in Malaysia and Nigeria. Some discrepancies observed are that under the practice of horizontal precedent, the decision of Federal court in Malaysia is bound by precedent while the Supreme Court in Nigeria is not. Also, the decision of Court of Appeal in Nigeria is bound by precedent while that of Malaysia is not. However, the similarities observed in the practice of precedent are that the decisions of High courts and Magistrate courts in Malaysia are bound by precedent just like in Nigeria. Also, judicial precedent is not applicable to Shari'ah courts, the Native and customary courts in Malaysia and Nigeria. The paper concludes that more attention should be paid to observing horizontal precedent by the Supreme Court and Appeal Court in the two countries. This study provides an opportunity to compare note on the administration of judicial precedent in Nigeria and Malaysia.

Keywords: Judicial precedent, Operation and Comparative analysis.

Introduction
Discussion on the above topic shall focus on the concept of judicial precedent which includes the definition of judicial precedent, the types of judicial precedent, the principle of judicial precedent and the doctrine of judicial precedent. It shall also discuss the operation of judicial precedent as well as advantages and disadvantages of judicial precedent. Further, this paper shall embark on comparative analysis on the operation of judicial precedent in the civil / common law courts, the *Sharīʿah* courts and native/customary courts in Malaysia and Nigeria.

Concept of Judicial Precedent
Judicial precedent is defined as a judgment of a court of law, cited as an authority for deciding a similar set of facts in a similar case. A decision of the court is used as a source for future decision because, while giving judgment in a case, the judge having set out the facts of the case, will state the laws applicable to the facts and provide his decision on the case. Such decision given by the judge of a higher court, which remains binding on all other courts below and accepted as binding on such courts below, shall become authority for future similar decision and be regarded as judicial precedent. Judicial precedent which is also known as Stare Decisis, means to stand by what has been decided in a case in court or to stand by earlier decision made in court by judges. Further, judicial precedent can be defined as a judicial decision that is binding on lower courts or other equal courts of the same jurisdiction, with regards to its conclusion on a point of law and May also, be persuasive to courts of equal and other jurisdiction in future cases involving sufficient similar facts. Some instances where the above principle of judicial precedent was applied include the cases of Jones v Kany, and Jones v Kernott, In the above, the supreme court of UK did not depart from previous decisions of House of Commons. Also in the case of *Clement v Iwuanyanwu (1988) 3 NWLR Pt (107), 54,* Oputa JSC, described judicial precedent as a decision of higher court considered as an example for identical cases with similar questions of law in future, such binding decision may not totally be that of a higher court as some courts are also bound by their own decisions.. The law derived solely from decision of the court is known as the common law which is largely a judgment law. The majority of English law was not enacted by parliament but developed by judges who applied existing rules to new situations as they arose. This is achieved by following the example or precedent of earlier decisions and. through this, the judges have developed common law case by case, by way of analogy. Therefore the practice of precedent is common with countries that follow common law system.

Types of Precedent
Precedent may be classified as original, derivative and declaratory or binding and persuasive as follows:
Original precedent: Original precedent is the precedent that establishes a new rule of law and usually occurs in cases of first impression where no existing precedent is available. However, this type of precedent is not common.
Derivative precedent: Derivative precedent is the one which extends frontier of an existing rule to accommodate similar cases where none exists before.
Declaratory Precedent; this is of a least value, it is just a mere declaratory precedent, it does not confer any validity on a decision, however, it helps to consolidate the authority and validity of past decision.

Persuassive Precedent: a precedent is known to be persuasive when it is urged to be followed or departed from, this is common the lower courts of the same power or senior courts of the same jurisdiction. For example, decisions of foreign court are not binding on courts in Nigeria or Malaysia, but are always taken on persuasive authority, notwithstanding the fact that judges often refer to judgment of foreign courts.

Binding Precedent: a precedent is said to be binding when the lower court within which it is being used is bound to follow the decision of the higher court. This means judges of lower court must follow decisions of superior court but can choose whether or not to follow decision of inferior court or court of coordinate level with them. However, the use of binding or persuasive precedent depends on the position of the court from which it emanates.

The principle of judicial precedent or Stare Decisis

Two principles that are involved in judicial precedent or stare decisis include:

1. Ratio decidendi: this means reasons behind the decision, it also means the principle of rule of law on which court decision is bounded. Ratio decidendi can also be explained as the point in a case which determines the judgement or the principle on which the case is established. It is also known as the binding aspect of previous decision in court. This is because judges use decisions made from ratio decidendi to create binding a precedent to be followed by a lower courts. In addition, the rule of judicial precedent only appeal to cases with similar facts as a judge is not bound by decision of superior court that the facts are different from the case in hand.
2. Obiter dictum which constitutes the second principle of judicial precedent means anything said by the way of original case. Obita dictum is the passing comment made by the judge which may be relevant but not a direct justification for the decision. As it was explained by Edgar Jnr FCJ, in *Cooperative Central Bank Ltd (receivership) v Feyen Development Sdn Bhd,* an obita dictum is a mere chance remark by court the and is issued in contradiction to ratio decidendi which is the rule of law on which authority is based. Obita dictum is persuasive on courts because it is not strictly relevant and a judge may not have to strictly follow it in a later case.

However, the distinctions between Ratio decidendi and Obita dictum are that while Ratio decidendi should be followed in court, Obita dictum is viewed by court as a statement that can be ignored. Also, Ratio decidendi is judicially binding on the lower courts while Obita dictum is persuasive. Ratio decidendi is a statement made while relating to a case in court or while responding to an argument made by an attorney, while obita dictum was a statement made by the way. In term of weight and authority, ratio decidendi is observed to carry greater weight than Obita dictum. Further, in term of judicial application, Ratio decidendi is found to be more directly related to the facts in a case, it is binding and form part of judicial precedent while Obita dictum is not.

The Doctrine of judicial precedent or Stare decisis

The doctrine of judicial precedent or stare decisis means that in cases where material facts are similar, a lower court is bound to follow the earlier decision of a higher court and in case of a higher and superior court, to follow its own prior decision and prior decision of court of the same level i.e. of equal coordinate jurisdiction, weather past or present in the same hierarchy. This is the position with binding precedent as the decision of superior court must be respected by the lower courts. Superior court has the power to overrule decisions of lower court. Appellate courts are always bound by their past decisions but can also depart from such decisions in some specific cases. In the case of *Clement v Iwunayanwu*, Oputa JSC explained doctrine of judicial precedent as a binding decision of higher court which is considered as an example for identical cases with similar facts in future. Also, in the case of *Sundralingam v Ramana thay Omg,* Hock Thye FJ, stated that "Each court is of course bound by decision of the court above it." It is similarly the case in Singapore when Wee Chong Jin CJ, in the case of *Mahkah Yew v public prosecutor stated*: "The doctrine of Stare decisis is a necessary and well established doctrine in our system of jurisdiction and our judicial system."

However, the doctrine of Stare decisis is said to operate well in the following three ways; firstly, if the part of earlier judgment in the earlier case being relied upon is the ratio decidendi of the case, secondly, if the earlier case involves fact that are not different from each other and thirdly, if the earlier case is a decision from the court of concurrent or inferior jurisdiction than the court faced with the case at hand. For example, if earlier decision was given from a magistrate court, a judge of high court may disagree with earlier decision in his current decision if the facts of the case are similar.

Operation of Doctrine of Judicial Precedent or Stare Decisis

The doctrine of stare decisis operates in two ways namely;

Vertical: this means that prior decision of a higher court is binding on the lower courts.

Horizontal: this means same court is bound to follow its own prior decision and prior decision of a court of the same level whether past or present.

The major reason for compliance with precedent is that a higher court in the superior cader laid down the principle as applicable law. If lower court disobeys the principle, on appeal, the higher court can correct or reverse the decision of the lower court as was the position in the cases of Favelle *Mort Ltd v Murray (1978)8 ALR 649* and *Viro v R (1978) 18 ALR 275, 260* in the High court of Australiaf. From the above, it can be understood that in practice, courts must abide by decisions of higher and other relevant court in the same heirachy. However, decisions of superior court outside that jurisdiction are somehow not binding but may be followed.

Advantages of judicial precedent:

Operation of judicial precedent is said to have the following advantages:

1. Judicial precedent avoids waste of judicial effort and time for rethinking about solution to similar to similar problem previously settled.
2. It avoids arbitrariness in judicial decision during determination of cases.
3. It promotes predictability of judicial decision in cases with similar facts in court.
4. It encourages uniformity in judicial decisions.
5. It promotes certainty of applicable law whereby one is almost certain of the applicable laws to be used and the likely judicial decision in cases with similar facts in court.

6. Judicial precedent preserves the tradition of compliance and respect in the judicial system as the higher court has the power to correct or reverse the decision of the lower court.
7. Judicial precedent promotes uniformity in judicial decision.

Disadvantages of judicial precedent:

Operation of judicial precedent is said to have the following disadvantages:

1. Judicial precedent does not encourage flexibility in judicial decision as all courts must abide by the principle of stare decisis in their decisions.
2. Judicial precedent lacks judicial autonomy. This observation is corroborated by the principle of stare decisis which states that any lower court that fails to comply with the applicable law and decisions laid down by the higher court shall have its decision corrected or reversed.
3. Judicial precedent is conservative as it does not allow for quick transformation and application of law in line with the changing situations in the society.
4. Judicial precedent focuses more on compliance with precedent rather than the quality of law and decisions it discharges.This makes the practice of precedent to be fraught with restrictions.
5. Judicial precedent is stereo typed in practice and this weakens the power for judicial independence and accountability among courts.

Operation of Judicial Precdent in Malaysian Courts

The practice of judicial precedent is found applicable in Malaysian courts and this has been confirmed by Chang Min Tat F.J in *public prosecutor v Datuk Tan Chang Swee(1980)2 MLJ 276-277,* where the need for Federal court, the high court and other inferior courts in Malaysia to follow the doctrine of stare decisis was reaffirmed. The doctrine of stare decisis is however, operated in vertically and horizontally in Malaysian courts as follows:

Vertical operation of judicial precedent in Malaysia

By vertical operation, it means the higher or superior court binds all courts subordinate to follow to it, to follow its prior decisions. A look at hierarchy of courts in Malaysia shows that the Federal court is at the top followed by court of appeal and followed by the high court of Malaya and high court of Sabah and Sarawak. The above is followed by session's court and session court of Sabah and Sarawak. This is followed by magistrate court of Sabah and Sarawak. The next to magistrate court is the penghulu's court of Malaya. However, apart from the above civil courts, there is also the existence of *Sharīʿah* court and Native court which constitute the three types of courts in Malaysia. By way of operation the civil courts, decisions of the Federal court bind all courts. The court of appeal is bound by decisions of Federal court but court of Appeal's decisions bind the two High courts of Malaya and Saba/Sarawak and subordinate courts. The High courts are bound by decisions of Federal court and court of appeal.

Decisions of the High court's bind the subordinate courts but decisions of subordinate courts are not binding. All courts in the hierarchy must follow prior decisions of courts higher than itself and it may not decline to follow such decisions of higher court on the ground that it is wrong, obsolete or delivered per incuriam of ignorance and faulty reasoning. This was the position in Haris Solid State v Bruno Gentil Pereira (1996) 3mlj 489 when counsel for the appellant argued before the court of appeal that majority decision of Federal court in *Rama Chandra v The industrial court of Malaysia(1977) 1 MLJ 145* was wrong and ought not to be complied with. The court of appeal disagreed with this submission that the court is bound to follow the prior decision of Federal court, even if it suffers from any infirmity, because, it was a decision of the apex court and it constituted a binding precedent. Also, in the case of *Cooperative Central Bank v Feyen Development (1997), 2MLJ 829,* the question arose as to whether it was permissible for an intermediate court like the Court of Appeal in Malaysia to disregard judgment of the Federal Court on the ground that it was given per incuriam.

Delivering the judgment of the Federal Court on this case, Edgar Joseph Junior, the Federal court judge, adopted in an unequivocal term, the remarks *of Lord Hailsham in Cassell v Broome (1972) AC 1027, 1054* which expressed disapproval of the House of Lords for the court of appeal's refusal to follow the House of *Lord's prior decision in Rookes v Barnard (1964) AC 1129.* Based on this, the Court of Appeal in Malaysia was reminded of its obligation to accept loyally the decisions of the higher court (Federal Court) and the need not to allow itself to be reminded to follow and apply the principles of judicial precedent in future. The above goes to show the importance attached to the practice of judicial precedent in Malaysia. In the case of two conflicting decisions of the court of appeal, the courts lower in heirachy are expected to follow the later decision of the court of appeal as this represents the existing state of law.

Several cases in Malaysia were treated in line with doctrine of judicial precedent above. However, despite the level of compliance with judicial precedent under vertical operation of stare decisis in Malaysia, it is noted that the operation is not so smooth as it is faced such problems like:

1. Status of decision of the privy council and
2. Status of decisions of a predecessor courts of the present Federal court.

On the status of decision of the Privy Council, it has been observed that the Court of Appeal has on many occasions refused to follow the decisions of the Privy Council on appeal cases, a case in point was that of Court of Appeal Justices Gopal Sri Ram, N.H. Chan and V.C George who declined to follow the Privy Council's decision in South South Asia Fire Bricks v Non Metallic mineral Product Manufacturer Employees Union.

Also, on the status of decision of predecessor courts of the present Federal Court, it has equally been observed that the inter mediate courts especially High Court and Court of Appeal in Malaysia have on some occasions disregarded decisions of the Privy Council and the present Federal Court. One of such attempts was *Harta Empat v Koperasi Rakyat*. The practice which flouts the doctrine of judicial precedent may short live the existence of judicial precedent in Malaysia if remains unchecked.

Horizontal operation of judicial precedent in Malaysia

By horizontal operation of judicial precedent, it means that a court usually an appellate court is bound by its own decision, the decision of its predecessors and decisions of courts of co-ordinate jurisdiction. In this circumstance, the Federal court, the court of appeal and even the high courts in Malaysia are bound to follow their own prior decision and prior decisions of a court of the same level, whether present or past. The horizontal operation of the doctrine of judicial precedent is however observed to be more problematic compared to vertical operation.

This is because both the Federal court and the court of Appeal have been found in many cases not to allow to allow themselves to be bound by their own prior decisions or by decisions of a court of coordinate jurisdiction whether present or past.

Following the creation of a Federal court which replaced Supreme Court, Section 17 of the court of judicature acts 1995, in Malaysia, provided that any proceeding pending before the Supreme Court 1994, shall continue in the Federal court and the Federal court shall exercise all powers of the defunct Supreme Court. On the basis of the above provision, decision in appeal pending before supreme court are to be treated as decisions of the present Federal, as the Federal court is expected to be bound by the practice and precedent of the then supreme court. However, it is observed that the reverse was the case, as the Federal court refused to be bound by decision or precedent of the then supreme court. This can be seen in the civil matter of *Malaysia National Insurance v Lim Tiok.* The case was which was to determine the extent of liability of insurers against their third party under compulsory insurance policy was a direct action brought by a third party. The Supreme Court had earlier decided this case but the current issue was whether the Supreme Court's decision should be reviewed or over ruled. The Federal court eventually reviewed the prior decision of Supreme Court.

The Federal Court decided that the decision was wrongly decided and should not be followed. In effect, the Federal court of Malaysia over ruled a decision of the supreme court of Malaysia. As far as the High Courts are concerned about the practice of horizontal judicial precedent, The attitude and assumption of Malaysian High Court Judges are that one High Court Judge is not bound by decision made by another High Court Judge either of original or appellate jurisdiction. This was the position in the case of *Ng Hoi Cheu v Public prosecutor(1968) 1MLJ 53*, where Justice Chang Min Tat did not follow the decision of his contemporary Justice Smith while exercising appellate jurisdiction. Also, in *Joginder Singh v Public prosecutor* the High court while exercising appellate jurisdiction ruled that it would not follow the decision of High Court in an appeal presided over by three judges. The above practice of High Court is observed to continue to exist unchanged under the Malaysian court system. Similarly, the court of Appeal in Malaysia over ruled High court's decision in *Yarikat Kayu Bersata v OMW(Sarawak)(1995)* and other cases which followed it. By so doing, the court of Appeal has jettisoned the fact that it is bound by its own decision and decision of other court of coordinate jurisdiction.

Operation of Judicial Precedent in *Sharīʿah* Courts in Malaysia

In Malaysia, the three types of courts comprise of the civil courts, the *Sharīʿah* courts and the native courts as earlier mentioned. The civil courts constitute of the Federal court, the court of Appeal and the High court as created by Federal constitution of Malaysia. Under civil court, judicial precedent is known to be widely practiced. However, *Sharīʿah* courts for states and Federal were created under the Federal constitution 9th schedule, while the native courts were created under 19th schedule item 13 of the federal constitution, in Saba and Sarawak. It has been reported in the case of *Sukma Darmaja Sasmitat Madja v Ketuah pengarah Penjara,* Malaysia and anor, that these set of courts are administered in a parallel way as one court cannot interfere in the work of others. The *Sharīʿah* court in Malaysia constitutes of *Sharīʿah* Appeal court, *Sharīʿah* High court and *Sharīʿah* subordinate court. Eventhough, *Sharīʿah* subordinate court is under the administrative control of *Sharīʿah* high court in the states in relation to judicial matters, all *Sharīʿah* courts are independent and the doctrine of judicial precedent is not applicable in *Sharīʿah* courts. Even several attempts made to introduce judicial precedent into *Sharīʿah* court system in Malaysia have not succeeded.

Operation of Judicial Precedent in Native Courts in Malaysia

Under the Federal Constitution of Malaysia Schedule 19 item 13, Native Courts were created in Saba and Sarawak.As reported in the case of *Sukma Darmawa Sasmittat Madja v Ketuah Pengarah Penjarah Malaysia & anor above*, this type of court is administered in a parallel way as other courts like the *Sharīʿah* court or civil court cannot interfere in the work of each other particularly interim of enforcing judicial precedent. Indeed, the doctrine of judicial precedent is not applicable in the native courts in Malaysia.

Decisions of foreign courts

Decisions of courts that are not within Malaysian judicial hierarchy are not binding, but only persuasive. This was clearly shown in the case of Privy Council in *Jamil bin Harun v yankamsiah,* an appeal against decision of Federal court to include principle of itemizing heads of damage in personal injury cases where the Federal court followed the house of Lord's decision. In this case, relying on foreign decisions to decide cases in Malaysian courts was declared not binding but persuasive.

Judicial Precedent and the Nigerian Legal System

The Nigerian legal system is based on common law system, the *Sharīʿah* law system and the customary law system similar to that of Malaysia. Under the common law system, the courts based decisions on the disputes brought to them after previous decision of a superior court and this practice is called judicial precedent. This judicial precedent is called a binding precedent if the court is bound to follow the precedent.

The Doctrine of Judicial Precedent or Stare Decisis in Nigeria

The doctrine of stare decisis stipulates that precedent must be followed in judicial decisions among courts. The doctrine applied in *Osakwe v. Federal College of Education (Technical) Asaba.* In this case, The Supreme court of Nigeria per Ogbuagu J.SC clearly defined stare decisis as abiding by the former precedent where the same or similar points came up again for litigation. However, the doctrine of stare decisis is said to be binding on lower courts from higher courts and persuasive between one high court and another high court or between courts of coordinate jurisdiction.

Operation of Judicial Precedent in Nigerian Courts

It has been observed, that the doctrine of judicial precedent or Stare decisis is also applicable under Nigerian legal system, in the sense that the lower court is bound to follow the decision of the higher court on any point even, if the decision of the higher court was reached per incuriam, as in the of *Osakwe v. Federal college of education Asaba (supra)*. It is however, further observed that both vertical operation of judicial precedent and

persuasive horizontal judicial precedent are generally operated in the common law courts in Nigeria.

Operation of Vertical Judicial Precedent in Nigerian Courts. By vertical operation of judicial precedent, it means the higher or superior court binds all subordinate courts under it to follow its prior decision. This practice of vertical operation of stare decisis is however enhanced by the operation of hierarchy of courts in Nigeria, which will be explained as follow:

Hierarchy of courts in Nigeria

The hierarchy of courts in Nigeria is as follows:

1. The Supreme court
2. The court of Appeal.
3. The High courts (Federal and state).The Sharia court of Appeal and the Customary Court of Appeal in the federal capital territory and the states.
4. The Magistrate court.
5. Area court or district courts of various grades, Customary and Native courts.
6. The National Industrial court, Investment and Securities Tribunal and Court Martial constitute specialized courts in Nigeria.

Supreme Court

The Supreme Court was established by section 230 (1) of 1999 constitution of Nigeria. It is the apex court in the hierarchy of courts in Nigeria. By vertical precedent its decision binds the court of Appeal and all other courts in Nigeria. The supremacy of the Supreme Court over all courts in Nigeria and essence for compliance with its decisions by all courts in Nigeria have been reaffirmed in the cases of *Dairo v. UBN PLC and Osho V. Foreign Finance Incorporation.*

Conflicting Decision:

In case of two conflicting decisions emanating from Supreme Court or the court of Appeal or High court, the court of appeal or court below is expected to follow the latter or last decision of Supreme Court as decided in the case of *Osakue v. Federal College of Education Asaba (supra).* Comparatively, the position with binding vertical precedent of Supreme Court in Nigeria is similar to Malaysia as already discussed, all civil courts in Malaysia are bound to follow the decisions of the Federal Court of Malaysia.

The Court Of Appeal

Established by section 237 of 1999 constitution of Nigeria. The Court of Appeal is next to Supreme Court on the hierarchy of courts, its decisions are binding on the high court and all other courts below.

Conflicting Decision of Court of Appeal:

In case of two conflicting decisions of Court of Appeal, the court below is expected to stand by the earlier or first decision. Comparatively, the position with the Court of Appeal in Nigeria over vertical binding precedent above is the same with Malaysia. As already observed, the High Courts and other courts below are bound to follow the decision of the Court of Appeal in Malaysia even if delivered per incuram.

The High Court

There exist Federal and State high courts in Nigeria. The Federal high court was established by section 249(1) of the 1999 constitution. The High court attends to cases from many trial courts and it has the widest jurisdiction. All High courts in Nigeria are courts of coordinate jurisdiction. By vertical operation, the decisions of High court are binding on the magistrate courts and other courts below just as the decisions of Appeal court are binding on the high courts in Nigeria. Comparatively the position of binding precedent under high court in Nigeria is virtually the same with the civil courts in Malaysia.

Magistrate Court

The Magistrate courts are bound by decisions of Supreme Court, Court of Appeal and High courts generally. This position of binding precedent on magistrate Courts in Nigeria is equally the same under Malaysian legal system.

Horizontal Operation of Judicial Precedent in Nigerian Courts

The above means the superior courts are bound by their previous decisions and decisions of court of coordinate jurisdiction. However, it is observed that only persuasive horizontal precedent is popularly operated among superior courts of coordinate jurisdiction as under this category.

Supreme Court

The Supreme Court is not bound by its previous decisions and can overrule her previous decisions if found unjusticeable. Previous decisions over ruled by the Supreme Court of Nigeria include: Adisa v. Oyinwola, Johson v. Lawanson (and Mauria Grauhin Ltd v. Wahab Atanda Aminu. Wherein Supreme Court of Nigeria over ruled Privy Council Decision. Comparatively, it is observed that the Federal Court in Malaysia has similarly refused to be bound by previous decisions and can also over rule such, as it did in the case of *Malaysia National Insurance v. Lim Tiok (1997)2ML J 165.*

However, it has been noticed that lack of observation of precedent by the Supreme Court is bringing about conflicting decision and confusion at the apex court. The conflicting decision of Supreme Court is reflected in the case of GTB PLC v Fadco Ind. LTD, Also, in the case of Moh v Martins Electronics Company Ltd. The confusion would have earlier been solved in the case of Osakwe v Federal College of Education Asaba, where the Supreme Court held that where court of Appeal is faced with confusion over two conflicting judgments, the later judgment should be followed. But the confusion in this ruling later came to the glare when the same justice of the Supreme Court handed down a conflicting decision that the lower court or appellate court are free is free to choose any of the two conflicting decisions of Supreme that appears to look better. Therefore, this type of conflicting decision emanating from lack of observation of precedent by the Supreme Court can bring about rendering of partial judgement and should be discouraged.

Court of Appeal

The Court of Appeal in Nigeria is however bound by its previous decisions and cannot over rule them. But in case of decision from two divisions of Court of Appeal, the Court of Appeal is not bound to follow decision of the other division. Comparatively, the Court of Appeal in Malaysia is not bound by its previous decisions and can overrule them as it did in the case of *Yarikatu Kayu Bersatu v. UMW(Sarawak) (1995).*

However, despite the claim of observing precedent in the Court of Appeal in Nigeria, it has been found that observation of

precedent in the Court of Appeal is not adequate enough and this calls for a change. In line with this view, the former Chief Justice of Nigeria, Justice Dahiru Musapha, said the way judges of Court of Appeal distinguish cases and use it to circumvent judicial precedent has become alarming that the bad practice has to discontinued with. This type of situation which is prevalent in the Court of Appeal and the Supreme Court of Nigeria further prompted the remark of Justice Musdapha which denounced contradictory decisions coming out of Supreme Court and Appeal Court of Nigeria. He also bemoaned the confusion such judgments bring among the legal practitioners and the public and called for observance of doctrine of judicial precedence so as to deter judges from rendering partial judgement and promotion of judicial inequity.

The High Court

The High Courts in Nigeria is not bound by its previous decisions or previous decision of another High Court but can only follow persuasive decision of another High Court of the same coordinate jurisdiction. Comparatively, the High Courts in Malaysia are not similarly bound by their previous decisions or decision of another High Court but can only accept persuasive decisions of another High Court of coordinate jurisdiction.

Operation of Judicial Precedent in *Sharīʿah* Court of Appeal and *Sharīʿah* Courts.

It has been observed that Nigeria also operates many types of court system which include common Law court, *Sharīʿah* court and customary courts. Under this system, application of doctrine of judicial precedent is said to be limited to courts that practice common law system, while *Sharīʿah* court of Appeal and the Area courts do not practice judicial precedent. However, it has been found that by the virtue of appellate system, the *Sharīʿah* court of Appeal follow the decision of Federal Court of Appeal and the Supreme court of Nigeria, while customary courts and area courts should follow decisions of high court.

In accordance with provision of section 11(e) of the constitution of Federal Republic of Nigeria 1999, for creation of *Sharīʿah* court of Appeal of each of the northern states, the *Sharīʿah* court of appeal of each of state is empowered to determine cases in accordance with Muslim laws. Therefore, where all parties either Muslim or non-Muslim have agreed to the proceeding and by writing, agreed that their case be settled in accordance with *Sharīʿah*, such parties who have agreed to be bound by a particular law cannot come forward and request to be bound by judicial precedent again. From the above, the doctrine of judicial precedent does not apply in *Sharīʿah* court as the rules of *Sharīʿah* courts do not acknowledge the doctrine. As such, each court must determine a case on its merit and make intellectual interpretation based on principles of Islamic jurisprudence.

To strengthen the claim on exclusion of *Sharīʿah* courts from applying judicial precedent, it has been reported that there were two prominent *Sharīʿah* cases that bothered on application of judicial precedent and application of judicial precedent in *Sharīʿah* courts on those two cases was totally criticised. The first case was that of *Karimatu Yakubu Paiko & anor v Yakubu Paiko & anor*, which bothered on Ijba (the right of a father to marry off her virgin daughter without her free consent). In deciding this case, the Federal Court of Appeal cited an earlier decision of *Sharīʿah* court of appeal. Subsequently, some scholars criticized the Federal court of Appeal for relying on the earlier decision of the *Sharīʿah* court of appeal in reaching its own decision was a deviation from *Sharīʿah* principles and pointed that the prescription of the law on non-applicability of judicial precedent in *Sharīʿah* courts is clear. In the second case of *Chamberlain v Abdullahi Dan Fulani*, It was remarked by Gwarzo J, that in Islamic law, a judge is not bound by a precedent in a case which is similar and if a judge passed a judgment in a case, when a similar case comes, his judgment in the first case will not extend to the second case.

Therefore, a fresh and independent examination is required under the rule of law by same judge or another. Further, it has been observed that S.6.(3) of the constitution of Federal Republic of Nigeria (1999), has created hierarchy of courts including *Sharīʿah* court and stated that each court will have all the power of a superior court of record. However, the fact that S. 240 of the constitution of Federal Republic of Nigeria1999, provides for appellate jurisdiction of the Federal Court of Appeal over cases from *Sharīʿah* court of Appeal of states and makes the decision of Federal court of appeal binding on the *Sharīʿah* court of appeal and all courts below it in Nigeria, appears to be seen as the provision establishing binding precedent on the *Sharīʿah* court of appeal, but this can be seen as the only limitation on the freedom of *Sharīʿah* court on precedent but it can be said from all the above that judicial precedent is not provided for under *Sharīʿah* law. Comparatively therefore, it can be said that the doctrine of judicial precedent is not applicable in *Sharīʿah* courts in Malaysia and Nigeria as the *Sharīʿah* courts were not empowered to do so under the legal system of the two countries.

Operation of Judicial Precedent in Customary Court of Appeal and customary courts

It has been generally observed that the customary court of Appeal and customary courts in Nigeria are not empowered to apply common law doctrine and they do not practice common law system, so, application of judicial precedent does not apply to customary courts in Nigeria, even though, for appellate purposes, appeals can be forwarded from customary court of appeal to the court of Appeal. By comparison, it is observed that the practice of judicial precedent is not applicable in native courts in Malaysia and in Customary Courts in Nigeria.

Decisions of Foreign Courts

It is allowed for Nigerian Courts to rely on English authorities and decision while interpreting provions of Nigerian statutes that are the same as the English provisons but as a general caution, the Supreme Court has stressed the need to rely on Nigerian provisions above the foreign one. Therefore, foreign cases and decisions are only persuasive and are not binding on Nigerian courts. Thus, the court in *Alli v Okulaja* did not see any reason to be bound by English court of Appeal decision in *Edmeades v Thames Board Mills Ltd.* Having realized the fact that Nigeria is equally an independent state. The decisions of foreign courts are similarly not binding on courts in Malaysia but persuasive.

Comparisons

From the study above, the following comparisons can be drawn in respect of the practice of judicial precedent in Malaysia and Nigeria:

The Federal Court which is the apex Court in Malaysia, is bound to follow its previous decision, or the decision of its predecessor under the practice of horizontal precedent. But contrary to this, the Supreme Court which is the apex court in Nigeria, is not

bound to follow its previous decisions and can overrule such previous decisions. Therefore, it can be deduced from the above that there is a discrepancy in the observation of horizontal precedent between Malaysia and Nigeria at the Federal/Supreme court level.

The Court of Appeal in Malaysia, does not allow itself to be bound by its previous decisions and that of its co-ordinate court under the practice of horizontal precedent and has on several cases, over ruled decisions of its predecessor and co-ordinate court. But to the contrary also, the court of Appeal in Nigeria is bound to follow its previous decisions and cannot over rule such. This also shows that there is discrepancy in the observation of precedent at the Appeal Court level by Malaysia and Nigeria.

As for decision of the High Court a noticeable similarity has been observed over this. The High court in Malaysia is not bound to follow precedent on its previous decisions, that of their predecessors and co-ordinate court. Similarly, the High Court in Nigeria is not bound by its previous decision and has over ruled decisions of co-ordinate High Court. It is hereby remarked that vertical precedent is effectively observed by the High court of the two countries.

As for practice of precedent at the magistrate court level, similarity in practice is also observed. The Magistrate court in Malaysia is, bound by decisions of the Federal Court, the Court of Appeal and the High court. while the Magistrate court in Nigeria, is also bound by to follow precedent over the decisions of the Supreme court, the Court of Appeal and the High court. Therefore, it can be said that the two countries are similar in observing effective vertical judicial precedent at the magistrate court level.

In respect of practice of precedent among the Shariah courts, the Native and Customary courts, it is observed that the Shari'ah Court of Appeal, the Shariah court and the Native court in Malaysia are not bound by judicial precedent. Similarly, the Shari'ah Court of Appeal, the Shar'iah Court of and the customary court in Nigeria are not bound by judicial precedent. Therefore, the two countries do not practice precedent in the Sharia'h, Native and Customary courts.

As regards decisions of foreign court, it is observed that reliance on decisions of foreign courts to decide Malaysian cases is not binding but persuasive. Also in Nigeria, relying on decisions of foreign court to decide Nigerian cases is only persuasive and not binding Therefore,it can also be said that Both Malaysia and Nigeria observe similar practice of nonbinding precedent on decisions of foreign courts.

Conclusion

From the above, the definitions of judicial precedent have been examined. The types of judicial precedent, the principle of judicial precedent, the doctrine of judicial precedent, operation of doctrine of judicial precedent as well as advantages and disadvantages of judicial precedent have been discussed. The paper further made a comparative analysis on the application of judicial precedent in various courts in Malaysia and Nigeria, including, the *Sharīʿah* and the native/customary courts. The paper found that there are discrepancies in the observation of precedent in Malaysia and Nigeria at the Federal/Supreme court and Appeal court levels. while the Federal court in Malaysia is bound by precedent, the Supreme Court in Nigeria is not. Also, while the Court of Appeal in Malaysia is not bound by precedent, the Court of Appeal in Nigeria is bound. It is hereby remarked that the above position does not make for proper observance of judicial precedent in the two countries however the paper observed similarities in operation of precedent in Malaysia and Nigeria in other courts. Both the High Court and the Magistrate court in Malaysia are bound by precedent in their court decisions while the High Court and magistrate court in Nigeria are similarly bound by precedent. Further, it is similarly observed that the doctrine of judicial precedent is not applicable in the *Sharīʿah* courts and the native/ customary court in Malaysia and Nigeria. Based on the above, it is advised that the two countries should pay more attention to observing horizontal precedent at the Supreme Court and Appeal court levels so as to discourage partial judgment and judicial inequity.

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