CHAPTER IV
STANDARDS AND METHODS OF IMPLEMENTATION

Member States enjoy considerable freedom in the choice of methods for implementing the Conventions, either because of general terms in which their requirements are defined or because they specifically leave the determination of the parameters of protection to national decisions. Flexibility in Conventions may result not only from clauses permitting exceptions, exemptions, derogations, or variations, but also from the wording requirements in broad terms which leave wide choice as to the means of implementing them. Besides, flexibility can be seen through different methods of giving effect to the Conventions. The study henceforth explores the flexibility in the Conventions through broad concepts of flexible character, special countries clauses, equivalence clauses, different methods of implementation. It also examines the utility of federal states clauses and colonial application clauses in respect of the ratification and implementation of the Conventions.

IV.1. Broad Concepts of Flexible Character

Flexibility in the expression of basic standards is mainly a question of judgement in determining how much detail is needed to be included, what aspects must be relegated to a complementary (corresponding) Recommendation, and with what degree of generality or precision provisions included in the Convention must be expressed. There are certain "broad concepts of a highly flexible character" which are used so often in the Conventions that their application may be regarded as an acknowledged and important flexibility device. Broad concepts which may also be called flexible terminologies (terms) such as, "as far as possible", "as effective as possible", "as far as practicable", "where appropriate", "adequately and suitably", "at sufficient intervals", and so on, can

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2 Ibid., p.13.
be seen in various Conventions. These terminologies while providing considerable leeway in determining the manner of implementing the Conventions may also indicate generalised qualifications and equivocal expressions, such as, “great majority”, “large majority”, and so forth. Therefore, the broad concepts of flexible character can be found expressed in the Conventions through a variety of forms, and also couched with different approaches. The section henceforth looks at the broad concepts of flexible character in the above-mentioned ways through the provisions of relevant Conventions.

Article 1(2) of the Weekly Rest (Industry) Convention, 1921 (No.14) provides that, “This definition shall be subject to the special national exceptions contained in the Washington Convention limiting the hours of work in industrial undertakings to eight in the day and forty-eight in the week, so far as such exceptions are applicable to the present Convention”, (emphasis added). Article 1(2) while providing for special national exceptions, as available in the Hours of Work (Industry) Convention, 1919 (No.1) adopted at Washington, for the definition of the term “industrial undertaking” in Article 1(1), offers a ratifying Member State the discretion to determine those exceptions needed in the implementation of the Convention No.14 through the expression “so far as such exceptions are applicable” to the present Convention”.

Article 1(3) of the Convention No.14 provides that, “Where necessary, in addition to the above enumeration, each Member may define the line of division which separates industry from commerce and agriculture”, (emphasis added). Offering a leeway for a ratifying Member State in defining the line of division separating industry from commerce and agriculture, Article 1(3) qualifies the discretion on the definition through the expression “Where necessary”. It emerges that the above-named flexible

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7 The Convention No.14 lays downs the general standard that workers should enjoy a rest period of at least 24 consecutive hours every 7 days, and wherever possible, it should be granted simultaneously to whole of the staff of each undertaking. It has been ratified by 119 Member States including India as on 01 March 2008.
terminologies prompt the ratifying Member State to exercise the discretion on definition within the objectives of the Convention No.14 in its implementation. 8

Further, the flexible terms can be found in mandatory provisions. Article 2(2) of the Convention No.14 may be cited in this regard as, “This period of rest shall, wherever possible, be granted simultaneously to the whole of the staff of each undertaking”, (emphasis added). Another provision may be cited is Article 5 of the Convention No.14, which provides that, “Each Member shall make, as far as possible, provision for compensatory periods of rest for the suspensions or diminutions made in virtue of Article 4, except in cases where agreements or customs already provide for such periods”, (emphasis added). These flexible terms in mandatory provisions offer reasonable latitude in the implementation of the Convention No.14 at the disparate national conditions.

Similar qualified terms can be found in various Conventions. Article 1(1) of the Forced Labour Convention, 1930 (No.29) states that, “Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period”, (emphasis added). Article 5(2) of the Convention No.29 states that, “Where concessions exist containing provisions involving such forced or compulsory labour, such provisions shall be rescinded as soon as possible, in order to comply with Article 1 of this Convention”, (emphasis added). 10 Further, liberal deployment of qualified terms, such as, “whenever possible”, 11 “as full information as possible” 12, can be seen in the Convention No.29 through various provisions.

The enormous use of qualified terms can be found in recently adopted Conventions also. For instance, the Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No.148) refers to the terms, such as “as close a

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8 It appears that the above-mentioned two expressions, “so far as such exceptions are applicable” in Article 1(2) and “Where necessary” in Article 1(3) of the Convention No.14, are flexible terminologies inserted in order to improve exceptional and discretionary definitional clauses in terms of scope of application.
9 The terms “within the shortest possible period” are used again in Article 18 of the Convention No.29.
10 Though Article 5(2) of the Convention No.29 is a mandatory provision still it gives a flexibility indicating the compulsory rescission of concessions which contain provisions involving forced or compulsory labour but within a reasonable time period through the terms “as soon as possible” in terms of implementation. The use of the terms “as soon as possible” can be seen again in Article 14(2).
11 Article 11(1)(a) of the Convention No.29.
12 Ibid., Article 22.
collaboration as possible"\(^{13}\), and "as far as possible".\(^{14}\) To elaborate, the Home Work Convention, 1996 (No.177) may well be noted in this regard, where in accordance with Article 4 a ratifying State is obligated to adopt and implement a national policy on home work aimed at promoting, "as far as possible", equality of treatment between home workers and other wage earners.\(^{15}\) Similarly, Article 6 of the Convention No.177 requires that appropriate measures must be taken so that labour statistics include, "to the extent possible", data on home working.\(^{16}\)

Furthermore, flexible terms can also be found deployed in the form of unspecified expressions, such as "appropriate", "adequate", "sufficient", "suitable", and so on. They are not defined; however, they are used in order to facilitate the widespread acceptance of Conventions by Member States.\(^{17}\) The Forced Labour Convention, 1930 (No.29) may be mentioned again. Article 24 states that, "Adequate measures shall in all cases be taken to ensure that the regulations governing the employment of forced or compulsory labour are strictly applied, either by extending the duties of any existing labour inspectorate which has been established for the inspection of voluntary labour to cover the inspection of forced or compulsory labour or in some other appropriate manner. Measures shall also be taken to ensure that the regulations are brought to the knowledge of persons from whom such labour is exacted", (emphasis added). Besides, Article 25 may be cited here as, "The illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced", 

\(^{13}\) Article 5(3) of the Convention No.148.
\(^{14}\) Articles 8(3) and 9, ibid.
\(^{15}\) It may be noted that the terms "as far as possible" was introduced at the second Conference discussion on the Convention No.177, through an amendment to this effect. The drafters of the amendment opined that the intention was to introduce flexibility with respect to the time frame for promoting equality of treatment. The workers members had supported the amendment as it provided flexibility without weakening the objective of treating home workers equally. Others questioned the very purpose of drafting a Convention on the subject if the understanding was that countries might or might not promote equality of treatment; Record of Proceedings of the International Labour Conference, Provisional Record, 83\(^{rd}\) Session, 1996, p.10/27; see Politakis, n.6, footnote 50, p.481.
\(^{16}\) It may be noted that the terms "to the extent possible" were not appeared in the original text of the Convention No.177. They were inserted on the understanding that the measures in the field of statistics which Member States were called upon to take were demanding, and so governments should be allowed to discharge their obligation progressively within a reasonable time frame; Record of Proceedings of the International Labour Conference, ibid., p.10/28; see Politakis, n.6, footnote 51, p.481.
\(^{17}\) Politakis, ibid., p.482.
(emphasis added). Further, application of unspecified terms, such as "adequate medical staff", and "the sanitary conditions... are satisfactory", can be seen in the Convention No.29 through related provisions.

Recent Conventions also offer flexibility through unspecified terms positioned in their provisions. Article 4(2) of the Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No.148) can be cited as, "Provisions concerning the practical implementation of the measures so prescribed may be adopted through technical standards, codes of practice and other appropriate methods", (emphasis added). Further, the Convention No.148 contains the provisions inserting unspecified terms, such as, in Article 10 which, among other things, provides that "...the employer shall provide and maintain suitable personal protective equipment...", (emphasis added). Similar provision can be observed in Article 11(1) of the same Convention which states that, "There shall be supervision at suitable intervals...", (emphasis added).

It is instructive to note that the Worst Forms of Child Labour Convention, 1999 (No.182), being a core Convention contains several unspecified terms offering enough flexibility. Article 1 of the Convention No.182 may be quoted as, "Each Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency", (emphasis added). Likewise, Article 5 of the Convention states that, "Each Member shall, after consultation with employers’ and workers’ organizations, establish or designate

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18 Ibid., Article 17(1)(b).
19 Ibid., Article 17(1)(c).
20 The Convention No.148 also refers to other unspecified terms, such as, "suitable alternative employment" (Article 11(3)), "as appropriate" (Article 12), "adequately and suitably" (Article 13), "appropriate" (Article 16(b)).
21 At the Drafting Committee the worker members submitted an amendment to provide that "all necessary and effective" measures would be required, because the addition would indicate in stronger language the need for concrete action. The amendment was supported by the Government members of Argentina and Finland but opposed by the Employer members and the Government member of the Netherlands. After consultations, the Government member of the Netherlands proposed a subamendment which inserted the words "immediate and effective" before "measures", deleted the word "immediate" before "elimination" and added at the end of the Article the words "as a matter of urgency". The subamendment was supported by the Employer members and the Worker members. Following an indicative show of support, the subamendment was adopted; see Report of the Committee on Child Labour (Corr.), International Labour Conference, 87th Session, 1999, paras.127-128, http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chil.htm, 30 November 2006.
appropriate mechanisms\textsuperscript{22} to monitor the implementation of the provisions giving effect to this Convention", (emphasis added).

Further, Article 7(1) of the Convention No.182 may be cited as, “Each Member shall take all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention including the provision and application of penal sanctions or, as appropriate, other sanctions”,\textsuperscript{23} (emphasis added). Article 7(2) states that, “Each Member shall, taking into account the importance of education in eliminating child labour, take effective and time-bound measures\textsuperscript{24} to: (a) prevent the engagement of children in the worst forms of child labour; (b) provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration; (c) ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour”, (emphasis added).

Unspecified terms can further be seen in Article 8 of the Convention No.182, which provides that, “Members shall take appropriate steps to assist one another\textsuperscript{25} in giving effect to the provisions of this Convention through enhanced international

\textsuperscript{22} The Government member of Colombia sought clarification from the Legal Adviser of the International Labour Office on the meaning of the term “appropriate mechanisms”, in particular whether these would be national or international in scope. The Deputy Legal Adviser responded by stating that the draft instrument did not define the nature of the mechanisms but required the establishment or designation of a national mechanism; see ibid., para.194.

\textsuperscript{23} The Government member of India stated that when addressing human rights issues, such as in this Convention, the stronger language was preferable and believed the Office text provided better safeguards; see ibid., para.206.

\textsuperscript{24} While withdrawing an amendment submitted by the Government members of Bangladesh, China, India, Indonesia, Lebanon, Malaysia, Pakistan and Philippines, to delete the words “and time-bound”, the Government member of India, speaking on behalf of the co-sponsors of the amendment, stated that the Government members now preferred the original text, as the proposed Convention recognised in other provisions that action to eliminate the worst forms of child labour needed to be immediate and effective. He added that any programme of action would have to be multidimensional, with mutually reinforcing cohesive programmes which would necessarily have to be implemented in a time-bound manner; see ibid., para.211.

\textsuperscript{25} The Government member of Hungary requested the Legal Adviser’s view on how far the provisions in the subamendment would create a binding obligation for ratifying Member States to assist one another. The Deputy Legal Adviser while stressing the idea of partnership contained in the spirit of the Article explained that no obligation would arise from either proposal for ratifying Member States in relation to a particular level, or form of cooperation or assistance. There was only an obligation to take “appropriate steps” towards enhanced international partnership, and it was up to individual States to decide on those “appropriate steps”; see ibid., para.242.
cooperation and/or assistance"\textsuperscript{26} including support for social and economic development, poverty eradication programmes and universal education", (emphasis added).

In addition, similar unspecified terms intended to provide flexibility in terms of implementation can be seen in various other Conventions, such as, the Night Work Convention, 1990 (No.171), the Private Employment Agencies Convention, 1997 (No.181), the Safety and Health in Agriculture Convention, 2001 (No.184), and so on.

On the whole, it may be claimed that while these concepts are broad and flexible, they are not meaningless and do not deprive the Convention of its substance. They make it a dynamic and highly effective instrument. Though the immediate nature of provisions containing the flexible and unspecified terms is to impose an obligation on the employer in respect of implementation, the aim is normally to allow the government to determine whether the action taken in the particular case meets the required standard of adequacy, appropriateness, effectiveness, fairness, reasonableness, sufficiency or suitability.\textsuperscript{27} Therefore, this leeway can also be called flexibility in standards. As far as India is concerned, it may be observed that flexible terminologies and unspecified expressions can be found in various legislations. For instance a flexible term can be found inserted in section 10 of the Bonded Labour System (Abolition) Act, 1976, which has employed the term "as may be necessary" for giving a leeway to the state government in conferring such powers and imposing such duties required to ensure that the provisions of the Act are properly carried out.\textsuperscript{28}

\textsuperscript{26} Initially, the Government member of India maintained that he strongly opposed the wording "international cooperation or assistance", contained in the subamendment of Australia. Noting that cooperation encompassed assistance, he suggested a further subamendment which replaced the word "or" linking cooperation with assistance by the word "and". However, the Government member of Australia responded that there was a need for greater flexibility and that the word "or" reflected this need. On the other hand, the Worker members noted that cooperation and assistance should not be seen purely in economic and financial terms. Though these represented an important dimension, other forms of assistance such as international legal assistance had to be taken into account when considering the Article. Therefore, in order to arrive at a compromise solution a further subamendment was suggested, which included both "and" and "or" and read as "international cooperation and/or assistance". Finally, since there was no disagreement on the compromised wording the subamendment of the Worker members was adopted; see ibid., paras.244-249.

\textsuperscript{27} Jenks, n.4, pp.65-66.

\textsuperscript{28} Section 10 of the Bonded Labour System (Abolition) Act, 1976 states that, "The State Government may confer such powers and impose such duties on a District Magistrate as may be necessary to ensure that the provisions of this Act are properly carried out and the District Magistrate may specify the officer,
IV.2. Special Countries Clauses

Apart from being a basic provision for the introduction of flexibility in the Conventions, Article 19(3) of the ILO Constitution operated initially as a form of flexibility device permitting special clauses for specified countries. These clauses being known as “special countries clauses” contained modifications of normal standard in the manner envisaged by Article 19(3), and were included in a large number of Conventions. In the beginning, the provision was interpreted as limited to countries explicitly mentioned in the Convention. In this regard it is essential to observe that Article 19(3) was formulated in 1919 keeping in mind the conditions in the developing countries, particularly those in Asia. The first international labour Convention, which is the Hours of Work (Industry) Convention, 1919 (No.1) provided special clauses for seven countries including all five of the Asian States that were Members of the ILO at the time. Article 9 provides for certain modifications of the provisions of the Convention in their application to Japan. Yet, the Convention No.1 has remained unratified by Japan.

In the case of India Article 10 allows certain modifications in the provisions of the Convention No.1, which may be quoted as, “In British India the principle of a sixty-hour week shall be adopted for all workers in the industries at present covered by the factory acts administered by the Government of India, in mines, and in such branches of railway work as shall be specified for this purpose by the competent authority. Any modification of this limitation made by the competent authority shall be subject to the provisions of

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subordinate to him, who shall exercise all or any of the powers, and perform all or any of the duties, so conferred or imposed and the local limits within which such powers or duties shall be carried out by the officer so specified"; see the Bonded Labour (Abolition) Act, 1976, [source URL], 30 November 2006.

29 Article 19(3) of the ILO Constitution states that, “In framing any Convention or Recommendation of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organization, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries”.


31 The Convention No.1 stipulates the working hours of persons at eight in the day and forty-eight in the week in any public or private undertakings. It has been ratified by 47 Member States including India as on 01 March 2008.

Articles 6 and 7 of this Convention. In other respects the provisions of this Convention shall not apply to India, but further provisions limiting the hours of work in India shall be considered at a future meeting of the General Conference”. India ratified the Convention No.1 on 14 July 1921.

In compliance with the special provision provided in Article 10 allowing working hours to sixty-hour per week, India enacted the Factories Act, 1922 replacing the earlier Act of 1911. So, the 1922 Act while introducing weekly working limit of sixty-hours, reduced the daily working limit from twelve to eleven hours; and this working limit was extended to non-textile factories also, unlike the 1911 Act. However, the current corresponding legislation is the Factories Act, 1948. Though it has further reduced the weekly working time to forty-eight hours, and daily working time to nine hours, still it retains the effect of special provision provided in Article 10 allowing sixty-hours of work per week under section 64(4)(iii), and daily limit to ten hours under 64(4)(i). Likewise, the Indian Ports Act, 1908 was amended in 1922, and the Indian Railways Act, 1890 was amended in 1930 in order to give effect to the sixty-hour week modification provision under Article 10 of the Convention No.1 as against working limit of eighty hours a week.

Further, the special countries clause can be seen in Article 11 of the Convention No.1 making exemption for China, Persia, and Siam from the operation of the whole

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33 Article 6 of the Convention No.1 provides that, “1. Regulations made by public authority shall determine for industrial undertakings-- (a) the permanent exceptions that may be allowed in preparatory or complementary work which must necessarily be carried on outside the limits laid down for the general working of an establishment, or for certain classes of workers whose work is essentially intermittent; (b) the temporary exceptions that may be allowed, so that establishments may deal with exceptional cases of pressure of work. 2. These regulations shall be made only after consultation with the organisations of employers and workers concerned, if any such organisations exist. These regulations shall fix the maximum of additional hours in each instance, and the rate of pay for overtime shall not be less than one and one-quarter times the regular rate”. Article 7 provides that, “1. Each Government shall communicate to the International Labour Office-- (a) a list of the processes which are classed as being necessarily continuous in character under Article 4; (b) full information as to working of the agreements mentioned in Article 5; and (c) full information concerning the regulations made under Article 6 and their application. 2. The International Labour Office shall make an annual report thereon to the General Conference of the International Labour Organisation”.


Convention. In the case of Greece the special provision was made for the application of the Convention in Article 12 providing, among other things, that "the date at which its provisions shall be brought into operation in accordance with Article 19 may be extended to not later than 1 July 1923" in the case of the certain industrial undertakings, and "not later than 1 July 1924", in the case of certain other industrial undertakings as specified in Article itself. Similar special provision can be found in case of Romania in Article 13 extending the operation of the Convention to not later than 1 July 1924; and Romania ratified the Convention on 13 June 1921. Thus, the above analysis shows that though the Convention No.1 has contained special provisions for seven countries, only three countries have ratified it. It is essential to note that the special provisions contained in the Convention No.1 can also be utilised in the case of the Weekly Rest (Industry) Convention, 1921 (No.14). It means that the Convention No.14 particularly through the terms, "subject to the special national exceptions" in Article 1(2) makes it clear that those countries which are mentioned specifically in the Convention No.1 for availing its special provisions are also eligible for utilising the benefit of the same provisions in implementing the Convention No.14.

36 Article II of the Convention No.1 states that, "The provisions of this Convention shall not apply to China, Persia, and Siam, but provisions limiting the hours of work in these countries shall be considered at a future meeting of the General Conference". It may be noted that this provision while introducing special countries clause for China, Persia and Siam completely excludes the application of the Convention unlike the case of Japan under Article 9 and India under Article 10. The Convention No.1 remains unratified by China, Persia, and Siam.

37 This may be noted that the nature of the special provision in Article 12 appears also to be a "delayed application provision" allowing the operation of the Act at a later date for the Member State. This shows that the insertion of the said type of provision is to expedite the ratification process by the Member State soon after the adoption of the Convention. In the present case, Greece ratified the Convention No.1 on 9 November 1920.

38 It may however be noted that the special conditions contained in the Convention No.1 gave a good indication of the position of Asian countries in the ILO at that time. It was felt that the countries of Asia at different stages of economic and social development should be active Members, and their workers should share the benefits flowing from ILO action. In the meantime, it was also felt that the industrialised countries should not be placed at a comparative disadvantage through lower labour standards in other countries; see Ali, n.32, pp.353-354.

39 The Convention No.14 while defining the term "industrial undertaking" in Article 1(1) provides in Article 1(2) that, "This definition shall be subject to the special national exceptions contained in the Washington Convention limiting the hours of work in industrial undertakings to eight in the day and forty-eight in the week, so far as such exceptions are applicable to the present Convention".

40 India has ratified the Convention No.14 on 11 May 1923. The Convention No.14 has also been ratified by China on 11 May 1934, Greece on 11 May 1929, and Romania on 18 August 1923. Whereas, Japan, Persia, and Siam have not ratified the Convention No.14; see ILOLEX, Database of International Labour Standards, http://www.ilo.org/ilolex/english/convdisp1.htm, 08 December 2006. Thus, the ratification trend
Further, three other Conventions adopted in 1919 provides special clauses for specified countries. The Night Work (Women) Convention, 1919 (No.4) under Article 5 allows the suspension of the application of Article 3, which prohibits the employment of women during night in any industrial undertaking, in the case of India and Siam.\textsuperscript{41} The Minimum Age (Industry) Convention, 1919 (No.5) provides for the modification of the provisions of Article 2, which prohibits the employment of children under the age of fourteen years in any industrial undertaking, to Japan under Article 5, and to India under Article 6.\textsuperscript{42} The Night Work of Young Persons (Industry) Convention, 1919 (No.6) offers the modification of the provisions of Article 2, which prohibits the employment of young persons during night under the age of eighteen years in any industrial undertaking, to Japan under Article 5, and to India under Article 6.\textsuperscript{43}

Special provisions for specified countries can be found again in four revised Conventions. The Night Work (Women) Convention (Revised), 1934 (No.41) revising the Convention No.4 allows the suspension of Article 3, which while prohibiting the night work of women in any industrial undertaking permits exceptions to prohibition on certain category of women, in its application to India and Siam under Article 5.\textsuperscript{44} Likewise, the Night Work (Women) Convention (Revised), 1948 (No.89) revising the Convention No.41 provides for modified application of its provisions in the case of India under Article 10 and Pakistan under Article 11.\textsuperscript{45} The provisions with modified effect can be seen in the case of India under Article 9 of the Minimum Age (Non-Industrial Employment) Convention (Revised), 1937 (No.60), which revises the Convention

\textsuperscript{41} While India has ratified the Convention No.4 on 14 July 1921, it remains unratified by Siam. Currently, it is considered as a shelved Convention.

\textsuperscript{42} Japan ratified the Convention No.5 on 7 August 1926, but denounced it on 5 June 2000 as a result of the ratification of the Minimum Age Convention, 1973 (No.138). India ratified the Convention No.5 on 9 September 1955; see ILOLEX, n.40.

\textsuperscript{43} While Japan has not ratified the Convention No.6, India ratified it on 14 July 1921.

\textsuperscript{44} India ratified the Convention No.41 on 22 November 1935, but denounced it on 27 February 1950 as a result of the Night Work (Women) Convention (Revised), 1948 (No.89). The Convention No.41 remains unratified by Siam; see ILOLEX, n.40. Currently, the Convention No.41 is considered as a shelved Convention.

\textsuperscript{45} India has ratified the Convention No.89 on 27 February 1950. Pakistan has ratified it on 14 February 1951; see ILOLEX, ibid.
The Night Work of Young Persons (Industry) Convention (Revised), 1948 (No.90) permits the modified application of its provisions for India under Article 8 and for Pakistan under Article 9.

Apart from the above mentioned, special countries clauses can be found inserted in three more Conventions. Article 9 of the Minimum Age (Non-Industrial Employment) Convention, 1932 (No.33) offers modified provisions for India. The Minimum Age (Industry) Convention (Revised), 1937 (No.59) provides for modified application of its provisions to Japan under Article 6, to India under Article 7, to China under Article 8. Article 10 of the Medical Examination of Young Persons (Industry) Convention, 1946 (No.77) permits modified application in the case of India. Article 8 of the Night Work of Young Persons (Non-Industrial Occupations) Convention, 1946 (No.79) allows modified provisions to India.

The above description and analysis show that India has ratified 8 out of 12 Conventions embodying the special countries clauses. Overall, among those countries specifically mentioned in the relevant 12 Conventions, and in the Convention No.14 (though not specifically mentioned but by reference), it shows that while 14 countries have ratified, 16 countries have yet to ratify the concerned Conventions, along with three countries having ratified and denounced the related Conventions. So, basically, concerned 17 countries have ratified the relevant 12 Conventions containing special provisions. What emerges from the above is that special countries clauses per se have helped in augmenting the ratification process only in an average manner by Member States as considerable number of countries have not ratified relevant Conventions. Therefore, it becomes evident that flexibility offered through the special countries clauses has not helped effectively in enhancing the ratification process.

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46 India has not ratified the Convention No.60. Currently, it is considered as a shelved Convention.
47 While India has ratified the Convention No.90 on 27 February 1950, Pakistan has ratified it on 14 February 1951. see ILOLEX, n.40.
48 The Convention No.33 remains unratified by India.
49 Japan and India have not ratified the Convention No.59. China ratified the Convention on 21 February 1940, but denounced it on 28 April 1999 as a result of the ratification of the Minimum Age Convention, 1973 (No.138); see ILOLEX, n.40.
50 The Convention No.77 remains unratified by India.
51 India has not ratified the Convention No.79.
It may be noted that no substantial change was made in the special countries clauses when the Constitution was amended in 1946. Yet, the provision was applied only on a limited scale and exclusively in respect of certain Asian and Middle Eastern countries. Changes in political and economic conditions have made it increasingly difficult to secure general approval for differing standards for different parts of the world.\(^{52}\) It may also be observed that though the practice of inserting special countries clauses in the Conventions were mainly designed to address the disparate conditions of Asian Countries, it became unpopular as it tended to create two classes of Members; and Asian Members themselves were unhappy about it.\(^{53}\) In addition, the national pride of the developing countries has made them increasingly reluctant to seek the inclusion of derogatory provisions in the Conventions.\(^{54}\) However, it is also essential to note that special countries clauses were of substantial practical importance in the early years of the Organisation though no longer correspond to the current needs.\(^{55}\)

Alternatively, it was also thought that more extensive construction could be attributed to the wording of Article 19(3). They could be interpreted as applicable to any country, even if it was not specifically mentioned by name, where the conditions mentioned in Article 19(3) prevailed.\(^{56}\) This can be substantiated by illustrating Article 7 of the Night Work (Women) Convention, 1919 (No.4), which provides that, “In countries where the climate renders work by day particularly trying to the health, the night period may be shorter than prescribed in the above Articles, provided that compensatory rest is accorded during the day”. Similar instances can be seen in certain other Conventions also. Yet, it may be noted that, special countries clauses were being used in Conventions as explained above. Consequently, in 1946 first conscious attempt was made to include in a group of Conventions, namely, the Medical Examination of Young Persons (Industry) Convention, 1946 (No.77), the Medical Examination of Young Persons (Non-Industrial Occupations) Convention, 1946 (No.78), provision for modifications of the normal standard not limited to countries specified by name but applicable to all countries where

\(^{53}\) Ali, n.32, p.354.
\(^{55}\) Jenks, n.4, p.74.
\(^{56}\) McMahon, n.30, p.32.
special conditions prevail in accordance with meaning of Article 19(3). Thus, the latter interpretation has made Article 19(3) more effective in respect of promotion of Conventions through the provision of flexibility.

IV.3. Equivalence Clauses

Another form of flexibility introduced into the Conventions can be found through "equivalence" clauses, which permit departures from a given rule provided comparable protection is afforded overall. Certain Conventions particularly in the maritime sector make use of flexibility device based on the notion of equivalence, where Member States are not required to take precisely defined measures, instead they can meet their obligations by adopting and implementing measures that are broadly similar and commensurate. The equivalence clauses in the Conventions require that any national laws and regulations be "substantially equivalent", "at least equivalent", or that any protection or benefits be "not less favourable" than those provided for under the Convention. In other words, they authorise exceptions or variations on condition that the overall protection is not inferior or less favourable than that provided for in the Convention.

IV.3.1. Merchant Shipping (Minimum Standards) Convention, 1976 (No.147)

Equivalence clauses are found employed mainly in seafarers and social security Conventions. The Merchant Shipping (Minimum Standards) Convention, 1976 (No.147) may pertinently be cited for the use of "substantially equivalent" clause in...
terms of implementation. Article 2 provides that, "Each Member which ratifies this Convention undertakes-- (a) to have laws or regulations laying down, for ships registered in its territory-- (i) safety standards, including standards of competency, hours of work and manning, so as to ensure the safety of life on board ship; (ii) appropriate social security measures; and (iii) shipboard conditions of employment and shipboard living arrangements, in so far as these, in the opinion of the Member, are not covered by collective agreements or laid down by competent courts in a manner equally binding on the shipowners and seafarers concerned; and to satisfy itself that the provisions of such laws and regulations are substantially equivalent to the Conventions or Articles of Conventions referred to in the Appendix to this Convention, in so far as the Member is not otherwise bound to give effect to the Conventions in question...".

Precisely, Article 2(a) contains the undertaking of a Member State which ratifies the Convention: firstly, to have certain laws and regulations governing ships registered in its territory; and secondly, to satisfy itself that the provisions of such laws and regulations are substantially equivalent to the provisions of the Conventions referred to in the Appendix. However, the second part of the undertaking applies only in so far as the Member State is not otherwise bound to give effect to those Conventions; if it is so

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62 Appendix of the Convention No.147 contains the following Conventions: Minimum Age Convention, 1973 (No.138), or Minimum Age (Sea) Convention (Revised), 1936 (No.58), or Minimum Age (Sea) Convention, 1920 (No.7); Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No.55), or Sickness Insurance (Sea) Convention, 1936 (No.56), or Medical Care and Sickness Benefits Convention, 1969 (No.130); Medical Examination (Seafarers) Convention, 1946 (No.73); Prevention of Accidents (Seafarers) Convention, 1970 (No.134) (Articles 4 and 7); Accommodation of Crews Convention (Revised), 1949 (No.92); Food and Catering (Ships' Crews) Convention, 1946 (No.68) (Article 5); Officers' Competency Certificates Convention, 1936 (No.53) (Articles 3 and 4); (Note: In cases where the established licensing system or certification structure of a State would be prejudiced by problems arising from strict adherence to the relevant standards of the Officers' Competency Certificates Convention, 1936, the principle of substantial equivalence shall be applied so that there will be no conflict with that State's established arrangements for certification.) Seamen's Articles of Agreement Convention, 1926 (No.22); Repatriation of Seamen Convention, 1926 (No.23); Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87); Right to Organise and Collective Bargaining Convention, 1949 (No.98).
bound, then the normal obligations arising from ratification of an international labour Convention involving application in full apply. 63

Substantial equivalence is the minimum standard acceptable under Article 2(a) of the Convention No.147. "Substantially equivalent" must be something less than "at least equivalent". Since "equivalent" is qualified by "substantially", the level must also be something less than simple equivalence, the notion employed in Article 3 64 of the Convention. 65

The Committee of Experts provides that according to the Legal Adviser's view, expressed at the Conference Committee of the 62nd Session of the International Labour Conference, "the substantial equivalence implied that the State agreed to take account of the general goal of those (Appendix) Conventions, whose absolute conformity with national standards was not required", however, this has in turn been explained by reference to the minutes of that Committee, which give the Legal Adviser's views as that "national laws and regulations could be different in detail, but that the States should engage themselves to assure that the general goals intended by these instruments should be respected" 66

The Committee of Experts further provides that the way in which Article 2(a) is phrased implies that it must be first for the Government concerned to weigh the question whether due regard is given to the object and purpose of relevant Appendix Conventions. Yet, it is the task of the Committee of Experts to examine the measures taken by Member States to give effect to the provisions of Article 2(a). This means, in addition to examining whether the Member State has satisfied itself that there is substantial

64 Article 3 of the Convention No.147 provides that, "Any Member which has ratified this Convention shall, in so far as practicable, advise its nationals on the possible problems of signing on a ship registered in a State which has not ratified the Convention, until it is satisfied that standards equivalent to those fixed by this Convention are being applied. Measures taken by the ratifying State to this effect shall not be in contradiction with the principle of free movement of workers stipulated by the treaties to which the two States concerned may be parties".
65 General Survey on Labour Standards on Merchant Ships, n.63, para.73, p.42.
66 Ibid., para.69, pp.40-41.
equivalence, scrutinising in an objective manner the measures taken and the reasoning leading to a conclusion that there is substantial equivalence. 67

Where there is no full conformity with the Appendix Conventions, the Committee of Experts determines what the general goal or goals of the Convention is or are, that is, its object or objects and purpose or purposes. These may present themselves as one main general goal and several subordinate goals. Here, the test for substantial equivalence may be: firstly, whether the Member State has demonstrated its respect for or acceptance of the main general goal of the Convention and enacted laws or regulations which conduce to its realisation; and if so, secondly, whether the effect of such laws or regulations is to ensure that in all material respects the subordinate goals of the Convention are achieved. 68

Aspects of substantial equivalence clause has been the subject of sharp discussion again in 2003 at the tripartite Subgroup of the High-Level Tripartite Working Group on Maritime Labour Standards of the ILO, which was deliberating on the Office text of the new Maritime Labour Convention adopted in 2006. It appears that the ship owners like government representatives preferred terms, in the existing text under Article 2(a) of Convention No.147 according to which a Member State must “satisfy itself” about substantial equivalence, rather than “demonstrate” it, to be similarly inserted in the new Convention also. 69 However, the Seafarer spokesperson emphasised that it was important not to leave it to Member States alone to decide what is “substantially equivalent”, and the concept of having to demonstrate such compliance to an external group was essential. 70 The government representatives did not agree with the views of seafarers, and particularly United States and Germany supported the insertion of the expression “satisfy itself” about substantial equivalence. 71

67 Ibid., para.78, p.44.
68 Ibid., para.79, p.44.
70 Ibid., para.123, p.17.
71 Ibid., paras.116-117, 124, pp.16-17. It may be noted that referring to the Convention No.147 the representative of the Government of Japan viewed that substantial equivalence was extremely important for widespread ratification; see ibid., para.114, p.15.
It may also be noted that during the discussion in 2005 at the Conference Committee on Fishing Sector, which was set up to formulate instruments on fishing sector as it was excluded from the scope of the Maritime Labour Convention, the reference was on substantial equivalence clause. The representative of the Legal Adviser stated, among other things, that under the concept appeared in Article 2 of the Convention No.147 “each ratifying Member undertook to satisfy itself that its laws and regulations on safety standards, social security measures and shipboard conditions of employment and shipboard living arrangements were substantially equivalent to the Conventions or Articles of Conventions referred to in the Appendix to that Convention. In practice, that meant that the Member was permitted to achieve the goals of the Convention by means other than those specified within the detailed provisions of the Convention. The Member’s compliance might be subject to monitoring, however, and it was for the Member to prove that the goals of the Convention had been achieved”. 72

Thus, the above analysis shows the significance and utility of substantial equivalence clause 73 in terms of the implementation of a provision contained in the Convention No.147. India ratified the Convention No.147 on 26 September 1996. The Government of India in its 2004 report supplied to the ILO has stated that the laws and regulations under the Merchant Shipping Act, 1958 are substantially in conformity with the requirements of the Convention No.147. 74 In addition, other laws and regulations similarly applicable are the Merchant Shipping (Certificates of Competency) Rules, 1961, the Seamen Provident Fund Act, 1956, the Workmen’s Compensation Act, 1923, the Trade Unions Act, 1926, the Seafarer Welfare Fund Society, which is a tripartite body having as its members, representatives of shipowners, seafarers and Government constituted as a trust. 75

73 Utilisation of substantial equivalence clause can also be seen in Article 6(6) of the Seafarers’ Identity Documents Convention (Revised), 2003 (No.185).
75 Ibid.
Further, an instance of applicability of substantial equivalence clause, as examined by the Committee of Experts on the application of provisions for officers’ competency certificates as under the Merchant Shipping Act, 1958, as amended in part in 1987, and the Merchant Shipping (Certificates of Competency) Rules, 1961, may be cited in the case of India. The Committee of Experts views that the relevant provision lays down a general requirement of a certificate of competency and specifies the various ranks according to which the central government should grant a certificate of competency to any applicant reported by the examiners to have passed the examination of qualifications satisfactorily and to have given satisfactory evidence of his “sobriety, experience and ability and general good conduct on board ship”; that the central government has powers to supervise the system; that the 1961 Rules concern only the form of certificates, which must indicate that an examination has been passed. The Committee of Experts coinciding the Conference Committee’s view on the above has observed that substantial equivalence for present purposes involves essentially a licensing system which is compulsory (Article 3 of Convention No.53) and in which both experience, leading to demonstrable ability on board ship, and the examination of qualifications are required (Article 4(1)(b) and (c)).  

Therefore, substantial equivalence in respect of the Convention No.147 signifies that there must be substantial compliance with the provisions of those Conventions mentioned in the Appendix (of the Convention No.147), which are not ratified by India. In the case of ratified Convention therein the question of substantial equivalence in conformity does not arise; instead, it requires full compliance.

IV.3.2. Equality of Treatment (Social Security) Convention, 1962 (No.118)

Equivalence clauses can be found utilised in social security Conventions in different forms. Article 9 of the Equality of Treatment (Social Security) Convention, 1962 (No.118) may be cited, which provides that, “The provisions of this Convention

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76 General Survey on Labour Standards on Merchant Ships, n.63, para.86, p.49.
77 Among those Conventions mentioned in the Appendix of the Convention No.147, except the Seamen’s Articles of Agreement Convention, 1926 (No.22) no other Convention is ratified by India. So, rest of the Conventions mentioned in the Appendix require the compliance substantially equivalent with their provisions by India in accordance with Article 2(a) of the Convention No.147.
78 The Convention No.118 aims at securing equal treatment of nationals and non-nationals in the matter of social security. It has been ratified by 37 Member States including India as on 01 March 2008.
may be derogated from by agreements between Members which do not affect the rights and duties of other Members and which make provision for the maintenance of rights in course of acquisition and of acquired rights under conditions at least as favourable on the whole as those provided for in this Convention”. While the provision is derogatory in nature allowing Member States to deviate from the provisions of the Convention by an agreement entered into between them, it requires the same States to make equally favourable provision for maintenance of rights in course of acquisition and acquired rights.79 It shows that Article 9 uses an equivalence clause employing the words “at least as favourable on the whole as”, which is different from the substantial equivalence clause contained in Article 2(a) of the Convention No.147, as the former requires a higher degree in compliance of no less than equivalence to the provisions of the Convention.

IV.3.3. Invalidity, Old-Age and Survivors’ Benefits Convention, 1967 (No.128)

Equivalence clause can further be seen in Article 39(1) of the Invalidity, Old-Age and Survivors’ Benefits Convention, 1967 (No.128),80 which provides that, “Any Member which ratifies this Convention may, by a declaration accompanying its ratification, exclude from the application of the Convention-- (a) seafarers, including sea fishermen, (b) public servants, where these categories are protected by special schemes which provide in the aggregate benefits at least equivalent to those required by this Convention”. In this regard, the Committee of Experts has observed that since many countries have special old-age schemes for public servants and seafarers, Article 39 of the Convention No.128 provides for the possibility of excluding these categories of workers from its application where they are protected “by special schemes which provide in the aggregate benefits at least equivalent” to those required by this instrument. Thus, a State can only avail itself of paragraph 1 of Article 39 if certain conditions are met regarding the extent of protection offered by special schemes.81 It may also be noted that more specifically it appears that the special schemes applicable to public servants generally

80 The Convention No.128 regulates the protection of workers in respect of entitlement to invalidity, old-age and survivors’ benefits. It has been ratified by 16 Member States as on 01 March 2008.
provide more favourable old-age benefits than those granted under general schemes, and the same is true to a great extent of seafarers. So, the phrase employed "at least equivalent" requires higher degree of compliance with the provisions of the Convention when compared to substantial equivalence. It shows that social security Conventions have contained certain provisions allowing flexibility through equivalence clauses in terms of national implementation.

IV.3.4. Safety and Health in Mines Convention, 1995 (No.176)

In addition, equivalence clauses are found useful in cases where solutions have to be found to highly technical problems. Besides social security conventions, such clauses can be seen in certain technical Conventions adopted in the area of occupational safety and health. Article 2(2) of the Safety and Health in Mines Convention, 1995 (No.176) may be cited in this regard, which provides that, "After consultations with the most representative organizations of employers and workers concerned, the competent authority of a Member which ratifies the Convention: (a) may exclude certain categories of mines from the application of the Convention, or certain provisions thereof, if the overall protection afforded at these mines under national law and practice is not inferior to that which would result from the full application of the provisions of the Convention;". The provision provides for conditional exclusion of certain categories of mines from the application of the Convention, which indicates that the requirement of overall equivalence must be satisfied before invoking the exclusion. In other words, the overall protection afforded at these mines under national law and practice must at least correspond to the level of protection as provided in the case of full application of the Convention. It is also essential to note that the exclusion based on the overall

82 Ibid., para.72, p.36.
83 Flexibility provisions through “at least equivalent” clauses can also be seen in Articles 3(1) and 7(2) of the Employment Injury Benefits Convention, 1964 (No.121), and Article 4(1) of the Medical Care and Sickness Benefits Convention, 1969 (No.130).
84 Servais, n.3.
85 The Convention No.176 regulates the various aspects of safety and health characteristic for work in mines, including inspection, special working devices, and special protective equipment of workers, and also prescribes requirement relating to mine rescue. It has been ratified by 21 Member States as on 01 March 2008.
equivalence must be preceded by consultations with the most representative organisations of employers and workers.

In addition, equivalence clauses utilised in the area of occupational safety and health can also be seen in Article 21 of the Safety and Health in Agriculture Convention, 2001 (No.184); Article 1(4) of the Prevention of Major Industrial Accidents Convention, 1993 (No.174); Articles 4 and 5 of the Hygiene (Commerce and Offices) Convention, 1964 (No.120). It may be noted that on the whole these clauses are known as “substantial equivalence” clauses. In this regard, it is significant to note that the Director-General of the ILO in his 1984 Report has observed that “while clauses of this kind may be useful in relation to particular technical problems, they are not free from difficulty. They lay considerable responsibility on the supervisory bodies in determining what can be regarded as substantially equivalent protection, and may lead to controversy and uncertainty. In other words, while “substantial equivalence” clauses may in some circumstances prove useful, in general it would appear preferable to aim at more precise delimitation of flexibility”.

IV.4. Methods of Implementation

Many Conventions initially provided that effect should be given to them through “national legislations”; however, this term has been a subject of a very broader interpretation. Generally, having regard to the fact that the Article 19(5)(d) of the ILO Constitution provides that a Member State which ratifies a Convention shall take “such action as may be necessary to make effective the provisions of such Convention”, custom, administrative measure or, in certain circumstances, collective agreements may in principle suffice to give effect to the Conventions. Certain Conventions clearly on ‘not inferior overall protection’ as contained in the Convention No.176 can be seen in Article 1(2) of the Chemicals Convention, 1990 (No.170).

87 Politakis, n.6, p.471.
89 Article 19(5)(d) of the Constitution of the ILO states that, “if the Member obtains the consent of the authority or authorities within whose competence the matter lies, it will communicate the formal ratification of the Convention to the Director-General and will take such action as may be necessary to make effective the provisions of such Convention”.
specify an extensive variety and number of ways of their implementation, and permit
effect to be given to them by methods appropriate to national conditions and practice, by
means of laws or regulations, collective agreements, arbitral awards, and so on, or a
combination of these means.91 It may be noted that the flexibility thus employed in the
methods of implementation can also be termed as "flexibility in application
procedures".92 The study hereafter explores various methods applied for giving effect to
the provisions of relevant Conventions.

IV.4.1. Equal Remuneration Convention, 1951 (No.100)

Article 2 of the Equal Remuneration Convention, 1951 (No.100) is an example of
having contained the flexibility for different methods of implementation. It may be
observed that the Convention No.100 also possesses the promotional character, as
discussed in Chapter II of the present study. While Article 2(1) provides that, “Each
Member shall, by means appropriate to the methods in operation for determining rates of
remuneration, promote and, in so far as is consistent with such methods, ensure the
application to all workers of the principle of equal remuneration for men and women
workers for work of equal value”, Article 2(2) states that, “This principle may be applied
by means of-- (a) national laws or regulations; (b) legally established or recognised
machinery for wage determination; (c) collective agreements between employers and
workers; or (d) a combination of these various means”. In short, it can be understood that
the principle of equal remuneration contained in Article 2(1) can also be implemented by
a ratifying State in a flexible way under Article 2(2), which provides different methods
for implementing the Convention.

In accordance with Article 2(1) the obligation of a ratifying Member State to
ensure the implementation of the principle of equal remuneration is limited to those areas
where such action is consistent with the methods in operation for determining rates of
remuneration, that is, where the government is in a position to exert direct or indirect
influence on the level of wages. Such cases mainly are: where the State is the employer

91 Ibid., p.60; see McMahon, n.30, p.47.
or otherwise controls business; where the State is in a position to intervene in the wage-fixing process, that is, principally, where the rates of remuneration are subject to public control or statutory regulation; and where there is legislation bearing on equal treatment in the field of remuneration. However, in the areas where the right to collective bargaining excludes the Government from the wage-fixing process, the government has to promote the application of the principle. 93

Nevertheless, it may be noted that to the extent to which the ratifying Member State intervenes in the field of wage-fixing, the government is barred from referring to the principle of free collective bargaining and accordingly becomes responsible under Article 2(1) of the Convention for ensuring the application of equal remuneration. Equally, where the binding force of collective agreements establishing wage rates is extended by State authority to workers or enterprises which were not represented by the parties to the agreement, the State becomes responsible for ensuring the observance of the principle of equal remuneration. 94 In this connection, the Committee of Experts has affirmed that respect for the parties' freedom and independence in collective bargaining should not inhibit promotional action by the authorities, called for in the Convention, where this appears necessary for improving the practical application of a matter of public policy, such as equal remuneration. 95

It may be noted that in certain Member States, legislation enables the effects of a collective agreement, which at first bound only the employers and workers represented by the bargaining parties, to be extended to all workers and employers in a particular branch of activity and/or in a geographical region. It also enables the authorities to control the legality of their provisions and, in particular, observance of the principle of equal remuneration as a condition for granting the extension. 96 However, in the absence of legislation empowering the government to enforce the principle of equal pay in respect

94 Ibid., para.27, p.14.
95 Ibid., para.134, p.104.
96 Ibid., para.154, p.119.
of wage rates fixed by collective agreement, the extension procedure provides the Member State with a means of supervising the contents of collective agreements.\(^97\)

Therefore, while there is no general obligation to enact legislation under the Convention, which may also be applied by other means according to Article 2(2), it follows from Article 2(1) that any existing legislative provision which violates the principle of equal remuneration must be amended so as to comply with the Convention.\(^98\)

It is important to note that Article 4 requires the ratifying Member State to co-operate as appropriate with the employers’ and workers’ organisations concerned for the purpose of giving effect to the provisions of the Convention.

In order to give effect to the provisions of the Constitution of India and to ensure the enforcement of the Convention No.100, the Equal Remuneration Ordinance was promulgated in the year 1975. The Equal Remuneration Act, 1976 subsequently replaced the Ordinance.\(^99\) The State governments have appointed competent authorities under the 1976 Act and have also set up Advisory Committees under the Act. The Union Ministry of Labour and Employment and the Central Advisory Committee regularly monitor the situation regarding enforcement of the provisions of 1976 Act. The following social welfare organisations have been recognised under the 1976 Act for the purpose of filing complaints in courts against employers for violation of the provisions of the Act: (1) The Centre for Women’s Development Studies, New Delhi; (2) The Self-Employed Women’s Association, Ahmedabad; (3) The Working Women’s Forum (India), Chennai; and (4) The Institute of Social Studies Trust, New Delhi.\(^100\)

**IV.4.2. Hours of Work (Industry) Convention, 1919 (No.1)**

Similar kind of flexibility in the methods of implementation can be found in the Hours of Work (Industry) Convention, 1919 (No.1). It can be given effect to by two methods: first, through laws or regulations made by public authority; and second, through

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\(^97\) Ibid., para.155, p.121.
\(^98\) Ibid., para.28, p.14.
\(^100\) Ibid., pp.76-77.
agreements between the organisations or representatives of employers and workers. While these two methods are not mutually exclusive, the Convention No.1 does not preclude the application of its provisions through laws or regulations being combined with or supplemented by application through collective agreements. However, in the specific cases when the provisions of the Convention require the adoption of laws or regulations, such laws or regulations cannot be substituted by collective agreements.  

As far as the first method is concerned it may be observed that though the Convention No.1 does not specifically prescribe instances when laws should be adopted, it explicitly indicates the cases in which the competent authority is required to adopt regulations. Under Article 6 of the Convention No.1 such regulations are prescribed to determine for industrial undertakings the permanent exceptions that may be allowed in preparatory or complementary work which must necessarily be carried on outside the limits laid down for the general working of an establishment, or for certain classes of workers whose work is essentially intermittent, as well as the temporary exceptions that may be allowed so that establishments may deal with exceptional cases of pressure of work.

In respect of the second method of implementation, the Convention No.1 under Article 2(b) permits the distribution of the weekly hours of work to be arranged not only by the competent public authority but also by agreement between the organisations or representatives of employers and workers. The Convention No.1 under Article 5 also provides that, "in exceptional cases, where it is recognised that the provisions of Article 2...".

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102 Article 6(1)(a) of the Hours of Work (Industry) Convention, 1919 (No.1). It may be noted that Article 6 of the Convention No.1 starts from saying that, "Regulations made by public authority shall determine for industrial undertakings...".
103 Article 6(1)(b) of the Hours of Work (Industry) Convention, 1919 (No.1).
104 General Survey on Hours of Work by the Committee of Experts, n.101, para.37, p.14. Similar type of provision can be seen in Article 7 of the Hours of Work (Commerce and Offices) Convention, 1930 (No.30).
105 Article 2(b) of the Convention No.1 may be quoted as, "where by law, custom, or agreement between employers’ and workers’ organisations, or, where no such organisations exist, between employers' and workers' representatives, the hours of work on one or more days of the week are less than eight, the limit of eight hours may be exceeded on the remaining days of the week by the sanction of the competent public authority, or by agreement between such organisations or representatives; provided, however, that in no case under the provisions of this paragraph shall the daily limit of eight hours be exceeded by more than one hour".
cannot be applied, but only in such cases, agreements between workers' and employers' organisations concerning the daily limit of work over a longer period of time may be given the force of regulations, if the Government, to which these agreements must be submitted, so decides'. Even though this case involves both collective agreements and regulations, it could also be classified as coming under the second method of giving effect to the provisions of the Convention No.1 because, in this case, the Government does not make its own regulations, but approves existing collective agreements.106

IV.4.3. Labour Inspection Convention, 1947 (No.81)

Much broader flexibility in the methods of giving effect to the Conventions can be perceived in Article 27 of the Labour Inspection Convention, 1947 (No.81), which provides that, "In this Convention the term "legal provisions" includes, in addition to laws and regulations, arbitration awards and collective agreements upon which the force of law is conferred and which are enforceable by labour inspectors".107 On the one hand, the provision makes it clear that legislation is not usually the only method of laying down working conditions; instead, it can be supplemented by arbitration awards and collective agreements. On the other, the provision indicates that ratifying Member States therefore can decide whether or not they wish to empower the labour inspectorate to enforce collective agreements and arbitration awards.108 Thus, the provision can be resorted to as a flexible interpretation by the ratifying Member State on two counts in terms of the implementation of the Convention No.81.

On the whole, it can be realised from the provisions of the Convention No.81 that labour inspection services require an institutional framework based on laws or regulations.109 In a great many countries, the organisation of the labour inspectorate is

106 General Survey on Hours of Work by the Committee of Experts, n.101, para.39, p.15.
107 Similar provision can be seen in Article 2 of the Labour Inspection (Agriculture) Convention, 1969 (No.129). It may be noted that the Convention No.81 lays down the basic principles requiring each ratifying State to maintain a system of labour inspection in industrial and commercial workplaces. The Convention, having other parts, deals in Part I with labour inspection in industry, and in Part II with labour inspection in commerce. It has been ratified by 137 Member States including India as on 01 March 2008.
109 It can be clearly understood, in case of industrial workplaces, from Article 2(1) of the Convention No.81, which provides that, "The system of labour inspection in industrial workplaces shall apply to all
based on laws designed to protect workers, whether the text be of a general nature or specific to certain issues or branches of the economy.\textsuperscript{110} It may also be noted that according to the Committee of Experts many countries have adopted measures to have mandatory collective agreements and/or arbitration awards enforced through the national system of labour inspection. Generally, the inspection services are empowered to enforce collective agreements whatever their nature, though in certain countries this is the case only with the collective agreements that have been extended to other undertakings by government decision.\textsuperscript{111}

It may be assessed that when compared to the Convention No.1 mentioned above, Article 27 of the Convention No.81 seems to be providing broader flexibility in the methods of implementation, as the latter Convention can be given effect to even by the implementation of arbitration awards in addition to the extent of possibility (discretion) of those methods being enforced by labour inspectors.

\textbf{IV.4.4. Termination of Employment Convention, 1982 (No.158)}

Again similar broader flexible provision can be found in Article 1 of the Termination of Employment Convention, 1982 (No.158),\textsuperscript{112} which provides that, “The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations”. The provision shows that the Convention No.158 has granted national systems wide latitude to decide the methods and sources of law for the application of the provisions.\textsuperscript{113} Precisely, it may be viewed that the Convention leaves to the ratifying workplaces in respect of which legal provisions relating to conditions of work and the protection of workers while engaged in their work are enforceable by labour inspectors”. Similar provision is inserted in Article 23 of the Convention No.81 in case of commercial workplaces.\textsuperscript{110}

\begin{thebibliography}{9}
\bibitem{110} General Survey on Labour Inspection by the Committee of Experts, n.108, para.28, p.11.
\bibitem{111} Ibid., para.65, p.27.
\bibitem{112} The Convention No.158 lays down the principle that the employment of a worker should not be terminated unless there is a valid reason for such termination connected with the workers’ capacity or conduct or based on the operational requirements of the undertaking, establishment or service. As far as the termination is concerned Article 3 provides that, “For the purpose of this Convention the terms “termination” and “termination of employment” mean termination of employment at the initiative of the employer”. The Convention No.158 has been ratified by 34 Member States as on 01 March 2008.
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Member State the choice between the different methods of implementation in conformity with national practice, taking account of national differences in the regulation of relations between employers and workers; and thus affords considerable flexibility in applying the instrument. It also indicates that if one or more provisions of the Convention are not applied or are applied only partially by means of collective agreements, judicial decisions or other methods, the ratifying Member State has the obligation of implementing the provision(s) through legislation. It may be noted that Article 1 applies to all the provisions contained in the Convention.

When an analysis is made to see how far these methods mentioned in Article 1 are helpful in implementing the Convention No.158, it comes to know that, according to the Committee of Experts, the methods are not equally suitable for giving effect to the Convention in all fields and for all the persons concerned. For instance, although the application in this field of common law, custom or practice results in the enunciation of certain principles for specific cases, such as the right to damages for breach of contract in the event of termination without notice where the worker is not guilty of serious misconduct (wrongful dismissal), they cannot provide the full scope of the protection prescribed by the Convention. Some of the provisions of the Convention which concern, for example, the protection of income or measures in the event of collective termination, generally presuppose the existence of legislative standards and administrative machinery.

In many cases, collective agreements supplement basic legislative provisions. Also that collective agreements or individual contracts may not establish less favourable provisions for workers than those contained in the legal provisions on termination of employment. Further, Article 1 of the Convention No.158 provides for the implementation of the Convention through court decisions also. Here, judicial decisions play a fundamental role, particularly where texts are of a more general nature or scope as

115 Ibid., para.23, p.8.
116 Ibid., para.25, pp.8-9.
117 Ibid., para.28, p.10.
regards termination of employment. In the absence of explicit provisions, they may also establish certain general principles of law on particular questions in many of the Member States.\footnote{118} Hence, it can be understood that legislation is central to the implementation of the Convention, though flexibility can be had in implementing through the application of other methods.

India has not ratified the Convention No.158. However, India principally regulates termination of employment through the Industrial Employment (Standing Orders) Act, 1946, and the Industrial Disputes Act, 1947, as amended. Standing Orders are written documents dealing with terms and conditions of employment, drafted by employers in all establishments, and on which trade unions or workers are given an opportunity to object. They are certified by the government Certifying Officer who adjudicates upon the fairness and reasonableness of the provisions of any standing order and upon its conformity to the model standing order.\footnote{119} Another source of regulation is the case law of the courts. Any questions arising from the application or the interpretation of a standing order can be raised before the Labour Court and its decision will be final and binding.\footnote{120}

Besides the Labour Court, Industrial Tribunal and National Tribunal also have wide discretion to review disputes relating to termination of employment, including the examination of the evidence, and to award relief as they see fit including compensation in the form of damages and reinstatement.\footnote{121} It also indicates that India has flexible methods of implementation of its national laws applicable to the termination of employment of

\footnote{118}Ibid., para.32, p.12.\footnote{119}ILO, “Dialogue: Labour Profiles of National Legislation Covering Termination of Employment-India”, http://www.ilo.org/public/english/对话/ifpdial/info/termination/countries/india.htm, 04 January 2007.\footnote{120}Ibid., In this regard Article 13A of the Industrial Employment (Standing Orders) Act, 1946 may be quoted, which provides that, “If any question arises as to the application or interpretation of a standing order certified under this Act, any employer or workman or a trade union or other representative body of the workmen may refer the question to any one of the Labour Courts constituted under the Industrial Disputes Act, 1947 (14 of 1947), and specified for the disposal of such proceeding by the appropriate Government by notification in the Official Gazette, and the Labour Court to which the question is so referred shall after giving the parties an opportunity of being heard, decide the question and such decision shall be final and binding on the parties”; see Ministry of Labour, Government of India, “List of Various Central Labour Acts”, http://www.labour.nic.in/act/welcome.html, 12 January 2007.\footnote{121}ILO, n.119.
workers, and that in turn India appears to be complying with the unratified Convention No.158 in its spirit.

IV.4.5. Discrimination (Employment and Occupation) Convention, 1958 (No.111)

Another way of allowing flexibility, different from those analysed above, in the methods of giving effect to Conventions can be found in a promotional Convention. It does not specify the methods of implementation unlike the Conventions dealt with above. Instead, it directs the measures to be adopted to or determined in accordance with national conditions and practice.122 Accordingly, Article 2 of the Discrimination (Employment and Occupation) Convention, 1958 (No.111) may be cited in this respect, which provides that, “Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof”.123

So, under Article 2 a national policy, to be declared and pursued by a ratifying Member State, must be aimed at promoting equality “by methods appropriate to national conditions and practice”. Article 2 leaves it to each Member State to use methods which, taking into account national conditions and practice, appear to be the most appropriate in view of their nature, time scale and their timeliness.124 Besides, it appears that the methods required under the Convention in pursuing a national policy to eliminate discrimination may include actions to repeal any statutory provisions and modify any administrative instructions which are inconsistent with the policy, and to adopt positive measures which contribute to promoting equality of opportunity and treatment.

123 It may well be noted that Article 2 of the Convention No.111 was analysed and interpreted as the provision of promotional nature in promoting “equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof” in chapter II. Whereas, the present analysis of Article 2 focuses on the aspects of flexibility in terms of methods of implementation unlike the one of the same provision made in the case of promotional Conventions in chapter II of the present study.
generally.\textsuperscript{125} It points out that Convention No.111 being a promotional Convention can be implemented through legislation also.

Implementation can be resorted to by a declaration of policy resulting from constitutional norms or from legal provisions, or expressing in a declaration of government policy submitted to Parliament or another appropriate body or in any other manner consistent with national practice. It may also result from a combination of such methods. The Convention in this way shows that it allows considerable flexibility in the manner of declaring the policy of equality and of pursuing action designed to implement the principle of equality contained in the Convention.\textsuperscript{126}

India ratified the Convention No.111 in 1960. It is essential to observe that the Convention No.111 has been ratified by India on the strength of the expression “by methods appropriate to national conditions and practice” in operative part of the Convention, which has lent an element of flexibility to the text of the instrument and allowed a degree “of freedom on the part of a ratifying country in the matter of deciding upon the measures to be taken to give effect to its provisions”.\textsuperscript{127} As it is also a promotional Convention India has been implementing the Convention through institutional measures. Besides, the Convention is being implemented through the provisions of the Constitution of India, the Equal Remuneration Act, 1976 as amended in 1987, along with other legislations. From the above analysis, it emerges that the Convention No.111 gives wider flexibility in the methods of implementation to ratifying Member States, and as it does not specify particular methods for the implementation, India has been giving effect to the Convention in a variety of ways including legislative process.

\textsuperscript{126} General Survey on Equality in Employment and Occupation by the Committee of Experts, n.124, para.160, pp.170-171.
\textsuperscript{127} Vaidyanathan, n.35, p.49.
Similar flexibility in the implementation of Conventions without specifying particular methods can be seen in the Tripartite Consultation (International Labour Standards) Convention, 1976 (No.144). It does not set out precise requirements as to the methods of its implementation. While Article 2(1) provide for obligation of the implementation of the Convention No.144 as, “Each Member of the International Labour Organisation which ratifies this Convention undertakes to operate procedures which ensure effective consultations, with respect to the matters concerning the activities of the International Labour Organisation set out in Article 5, paragraph 1, below, between representatives of the government, of employers and of workers”, Article 2(2) permits unspecified methods in the implementation of the Convention as, “The nature and form of the procedures provided for in paragraph 1 of this Article shall be determined in each country in accordance with national practice, after consultation with the representative organisations, where such organisations exist and such procedures have not yet been established”.

Article 2(2) points out that the Convention No.144 does not require a Member State to enact legislation in order to implement the respective procedures. This was confirmed by the Governing Body when it approved the report form for the Convention that the Convention No.144 could be implemented through customary law or practice as

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128 The Convention No.144 is aimed at effective consultation between the representatives of the government, of employers and of workers on international labour standards. It has been ratified by 122 Member States including India as on 01 March 2008.

129 Article 5(1) of the Convention No.144 provides that, “The purpose of the procedures provided for in this Convention shall be consultations on-- (a) government replies to questionnaires concerning items on the agenda of the International Labour Conference and government comments on proposed texts to be discussed by the Conference; (b) the proposals to be made to the competent authority or authorities in connection with the submission of Conventions and Recommendations pursuant to article 19 of the Constitution of the International Labour Organisation; (c) the re-examination at appropriate intervals of unratified Conventions and of Recommendations to which effect has not yet been given, to consider what measures might be taken to promote their implementation and ratification as appropriate; (d) questions arising out of reports to be made to the International Labour Office under Article 22 of the Constitution of the International Labour Organisation; (e) proposals for the denunciation of ratified Conventions”.

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well as through the enactment of laws and regulations. Accordingly, in many Member States consultation procedures are governed by decree, regulations or ministerial orders and, more rarely, by statutes, such as the Labour Code. They can also be established under the terms of a national agreement. Although they have considerable latitude in deciding on the methods of implementation, the Member States bound by the Convention are required to show, in the information which they have to provide every two years in their reports under Article 22 of the ILO Constitution, that the necessary consultations are actually conducted in practice. In this respect, the Committee of Experts has observed that the mechanisms of its application or the place in the national legislative hierarchy of instruments which give effect to it are less crucial in establishing effective consultation procedures than the overall quality of social dialogue in the Member State concerned.

India ratified the Convention No.144 on 27 February 1978. It comes to know that India discusses, among other things, the matters relating to ILO Conventions in the Indian Labour Conference, which was set up in 1942 on the pattern of the International Labour Conference of the ILO. It is tripartite and consultative in nature, besides also being represented by each state government. It arrives at conclusions on consensus, and meets once a year. A smaller consultative body called Standing Labour Committee was constituted as a sub-committee of the Indian Labour Conference almost simultaneously to advise the Government and the Conference. The Standing Labour Committee, set up in 1942, is expected to meet as often as the Conference or the Government finds it necessary.

More particularly, in order to examine the Conventions adopted by the ILO with a view to suggest measures for their ratification and implementation, the Government has set up a Tripartite Committee on Conventions in 1954. The conclusions of the Committee are generally endorsed by the Indian Labour Conference or the Standing Labour

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131 Ibid., para.50, p.27.
132 Ibid., para.51, p.28.
Committee. Further, in order to review the possibility of ratifying the maritime Conventions adopted by the ILO, an informal Tripartite Committee was set up in 1959 in the Ministry of Transport and Shipping. It comes to know from the 1998 individual observations of the Committee of Experts that the Government in its communication to the ILO has indicated that "the representative organisations of employers and workers are regularly consulted on various matters relating to the standards and activities of the ILO, in particular those laid down in Article 5, paragraph 1(a) and (c), of the Convention No.144. Following consultations, the Government is preparing to ratify certain ILO Conventions, in particular the priority Conventions Nos.105 on forced labour and 122 on employment policy, and also Convention No.127 on maximum weight", (emphasis added).

Later on, India ratified the Conventions Nos.105 and 122. Therefore, it can be observed that the tripartite bodies play a very significant role in implementing Article 5(1) in accordance with Article 2(1) read with Article 2(2) of the Convention No.144.

IV.5. Federal States Clause

The application of Conventions and Recommendations by federal States presents special problems owing to the division of legislative and administrative authority to give effect to their provisions between the federal Government and the federated units. That is, the division of powers between the central government (federal government) and federated units (provinces, states, cantons, and so on) can give rise to difficulties in seeking maximum harmonisation in the field of labour standards. The nature of the problem depends on the degree of autonomy enjoyed by the federated units as regards labour matters. It may be noted that a number of the federal States have certain powers to accept and implement treaty commitments on matters, which for municipal purposes are within the jurisdiction of their respective States and provinces, but these powers, the precise extent of which varies from one country to another and is in each case controversial, are, in the case of most of the countries concerned, largely ineffective in

136 The International Labour Code, n.52, p.LXXIX.
practice owing to political and administrative difficulties.\(^{138}\) Though usually the decision to ratify is taken by the federal legislature, the great majority of subjects covered by the Conventions come within the purview of state law.\(^{139}\) Hence, Article 19(9) of the Constitution of the ILO was framed in 1919\(^{140}\) aiming to mitigate the rigor of obligations contained in ILO Conventions in respect of their application in the federal States. This clause, which is commonly referred to as the "Federal States Clause", provided that, "in the case of a Federal State, the power of which to enter into Conventions on labour matters is subject to limitations, it shall be in the discretion of that Government to treat a draft Convention to which such limitations apply as a Recommendation only, and the provisions of this Article with respect to Recommendations shall apply in such case".\(^{141}\) The Peace Conference recognised that this solution was not really satisfactory, as it placed federal States under a lesser degree of obligation than other States, but it also recognised that "the solution is the best possible under the circumstances".\(^{142}\) As it was never a satisfactory provision, it was taken over in 1946 by what is now Article 19(7).\(^{143}\)

\(^{138}\) The International Labour Code, n.52, p.LXXX.
\(^{140}\) It comes to know that initially economic difficulties alone were recognised by the makers of the treaty of Versailles as standing in the way of the attainment of "strict uniformity in the conditions of labor". However, it was soon brought to the notice of the Peace Conference that all governments might not prove equally competent constitutionally to deal with labour problems, and that some might prove totally lacking in legal capacity to adhere to the proposed labour Conventions. This legal limitation was felt to be likely to arise especially in the case of federal governments, in many of which all matters of labour legislation are reserved to the member-states (constituent states), and are beyond the legislative powers of the central (federal) governments. It was thought that these legal difficulties would prove more obstinate impediment to the uniform regulation of labour matters than differences in climate, habits and customs, and economic opportunity. Therefore, the Peace Conference, after sharp disputes upon the point, decided to make special provision for legal as well as economic differences among the various countries. See Harold W. Stoke, "Federal Governments and International Labor Agreements", American Political Science Review, vol.25, no.2, 1931, pp.424-425.
\(^{141}\) Jenks, n.4, pp.7-8.
\(^{142}\) Johnston, n.54, p.98.
\(^{143}\) Relevant portion of Article 19(7) runs as follows, "In the case of a federal State, the following provisions shall apply: (a) in respect of Conventions and Recommendations which the federal government regards as appropriate under its constitutional system for federal action, the obligations of the federal State shall be the same as those of Members which are not federal States; (b) in respect of Conventions and Recommendations which the federal government regards as appropriate under its constitutional system in whole or in part, for action by the constituent states, provinces, or cantons rather than for federal action, the federal government shall- (i) make, in accordance with its Constitution and the Constitutions of the states, provinces or cantons concerned, effective arrangements for the reference of such Conventions and Recommendations not later than 18 months from the closing of the session of the Conference to the appropriate federal, state, provincial or cantonal authorities for the enactment of legislation or other action; (ii) arrange, subject to the concurrence of the state, provincial or cantonal governments concerned, for
Article 19(7) embodies a clarification of the obligations of federal States in respect of Conventions and Recommendations which the federal Government regards as appropriate under its constitutional system, in whole or in part, for action by the constituent states, provinces, or cantons rather than for federal action. Federal States Clause contained in Article 19(7) applies to all Conventions. It may be clarified that the provision deals with the procedure to be followed prior to or in lieu of ratification, and in the case of ratification by the federal State does not in any way qualify its obligations under the Convention.

Traditionally, it has been in the common law federal countries, such as the United States, Canada and Australia that the problem of constitutional limitations on the federal power to accept and give effect to law-making treaties has been acute, when compared to European federations like Switzerland, Germany, and Austria, partly because these federal powers have been broader in international matters, partly because the processes of constitutional change have been less difficult. It may be noted that in the newer federations, the federal authorities often have certain powers in respect of labour legislation, sometimes concurrently with the Member States. It is true in the case of India, where the labour matters substantially are in the Concurrent List of the Constitution. Labour is a concurrent subject falling under the Concurrent List, Seventh Schedule to the Constitution of India. Article 246(2) of the Constitution of India

periodical consultations between the federal and the state, provincial or cantonal authorities with a view to promoting within the federal State co-ordinated action to give effect to the provisions of such Conventions and Recommendations; (iii) inform the Director-General of the International Labour Office of the measures taken in accordance with this article to bring such Conventions and Recommendations before the appropriate federal, state, provincial or cantonal authorities with particulars of the authorities regarded as appropriate and of the action taken by them; (iv) in respect of each such Convention which it has not ratified report to the Director-General of the International Labour Office at appropriate intervals as requested by the Governing Body, the position of the law and practice of the federation and its constituent states, provinces or cantons in regard to the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement, or otherwise...".

144 The International Labour Code, n.52, p.239.
145 Jenks, n.4, p.95.
148 Article 246(2) of the Constitution of India states that, “Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List")".
empowers the Union and the States jointly to legislate on issues relating to trade union, industrial and labour disputes, social security and social insurance, employment and unemployment, welfare of labour including conditions of work, provident funds, employer’s liability, workmen’s compensation, invalidity and old age pensions and maternity benefits. When the Central Government enacts a labour law while ensuring uniformity and parity throughout the country, the State Governments are empowered to either accept a Central law as it is, or after making suitable amendments therein or even enact their own law, considering the typical conditions of labour in their states.

Whereas, regulation of labour in railways, mines, oilfields, defence industries and industries of national importance, Naval, Military, and Air Force, is controlled exclusively by the Central Government. In addition, the Government of India in its 2004 Memorandum submitted to the ILO in accordance with Article 19 of the Constitution has stated that, “the Constitution of India...empowers the Union Parliament to make laws with respect to any of the matters enumerated in the Union List which includes participation in International Conference, Associations and Other Bodies and implementation of all decisions made there at, and to make any laws for the whole or any part of the territory of India with respect to any matter notwithstanding that such matter is enumerated in the State List (Article(s) 245 and 246). The Union Parliament and the Union Government thus constitute the competent authority for compliance of obligation with respect to Conventions and Recommendations adopted by the International Labour Conference”. Hence, it may essentially be noted that the flexible distribution of legislative power between the Central and State Governments on the subject of “Labour”,

150 In other words, the distribution of legislative powers between the Union and the State governments in respect of “Labour” provides flexibility to the Union to legislate, and at the same time gives freedom to the States to legislate according to their particular needs. Hence, no further centralisation of legislative powers in regard to “Labour” is essential; see C.K. Johri (ed.), Issues in Indian Labour Policy: Papers and Conclusions of the Fourth National Seminar on Industrial Relations in a Developing Economy, 1968 (New Delhi: Shri Ram Centre for Industrial Relations, 1969), p.34.
151 Ibid., pp.45-46.
must not be confused with the power of treaty-making at the international level, which exclusively belongs to the Central Government under the Constitution. Precisely, the treaty-making in India continues to be regarded as a function falling within the executive powers of the Union, by virtue of Article 73\textsuperscript{153} read with Article 246\textsuperscript{154} and Item 14 of the Union List, Seventh Schedule to the Constitution of India.\textsuperscript{155} The treaty-making power in India is regarded as an “executive act” within the competence of the Government.\textsuperscript{156} Indeed Parliament has power to enact a law regulating treaty-making power pursuant to Article 246, but it has not done so. Hence, it is the continuance of the Commonwealth practice.\textsuperscript{157} However, in India the power to enact implementing legislation lies in the hands of the Union Parliament by virtue of Article 253 of the Constitution of India.\textsuperscript{158} It is also that it has been the practice of India to ratify a Convention when its domestic law and practice are in conformity with the relevant Convention. Therefore, since the treaty-making power falls within the domain of the Central (Union) Government, it is obligated to give effect to the ratified Convention within the domestic level by virtue of Article 253 read with Article 246 of the Constitution. This virtually makes it clear that the federal States clause as contained in Article 19(7) of the ILO Constitution is not applicable in the case of India.

Apart from the general provision contained in Article 19(7) allowing flexibility in the case of the federal States, few individual Conventions also contain flexible provisions intending to easier their ratification and implementation by the federal States. For this

\textsuperscript{153} Article 73(a) of the Constitution of India in fact provides both the executive and Parliament at par with each other, except that the latter may regulate executive ‘discretion’ by enacting a law.

\textsuperscript{154} Article 246 of the Constitution of India provides for predominance of the Union List. It expressly secures the predominance of the Union List over the State List and the Concurrent List, and that of the Concurrent List over the State List. It is clear that treaty making power of the Union can not be violated by the States.


\textsuperscript{156} Nawaz, n.134, p.612.

\textsuperscript{157} Mani, n.155.

\textsuperscript{158} Article 253 of the Constitution of India provides that, “Notwithstanding anything in the foregoing provisions of this chapter Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or Convention with any other country or countries or any decision made at any international conference, association or other body”.
Article 4(1) of the Labour Inspection Convention, 1947 (No.81)\textsuperscript{159} may be cited, which provides that, "So far as is compatible with the administrative practice of the Member, labour inspection shall be placed under the supervision and control of a central authority". Article 4(2) clarifies the term "central authority" according to which, "In the case of a federal State, the term central authority may mean either a federal authority or a central authority of a federated unit". Thus, Article 4 of the Convention No.81, while affirming the principle of having a single central authority but (only) in so far as is compatible with the administrative practice of the Member State, also allows a degree of flexibility for federal States by defining the term "central authority" denoting either a federal authority or a central authority of a federated unit.\textsuperscript{160} Similar flexible provisions can be seen in Article 7 of the Labour Inspection (Agriculture) Convention, 1969 (No.129).\textsuperscript{161}

Precisely, what the provisions signify is that the attachment of labour inspection systems to a central authority or body facilitates the establishment and application of a uniform inspection policy for the whole of the national territory. Therefore, both the Convention No.81 under Article 4(1), and the Convention No.129 under Article 7(1), emphasise the desirability of placing labour inspection under the supervision and control of a central authority or body so far as is compatible with the administrative practice.\textsuperscript{162}

The Committee of Experts in its 2006 General Survey on Labour Inspection has observed that flexibility clauses applicable to federal States must not be regarded as derogating from the principle of having a single central authority provided that the constituent units of the federal State have budget resources intended for use in implementing the functions of the labour inspectorate within their respective jurisdictions. However, an initiative in

\textsuperscript{159} The Convention No.81 lays down the basic principles requiring each ratifying State to maintain a system of labour inspection in industrial and commercial workplaces. It has been ratified by 137 Member States as on 01 March 2008.


\textsuperscript{161} Article 7(1) of the Convention No.129 provides that, "So far as is compatible with the administrative practice of the Member, labour inspection in agriculture shall be placed under the supervision and control of a central body". Article 7(2) further provides that, "In the case of a federal State, the term central body may mean either one at federal level or one at the level of a federated unit". The Convention No.129 lays down the basic principles requiring each ratifying Member State to maintain a system of labour inspection in agriculture. It has been ratified by 45 Member States as on 01 March 2008.

\textsuperscript{162} General Survey on Labour Inspection by the Committee of Experts, n.108, para.109, p.57.
one country to decentralise the labour inspectorate, without also making it an obligation for the decentralised regional or local authorities to institute a system to allow it to function and to provide adequate budgetary resources, was contrary to the terms of the Convention.\textsuperscript{163}

The Committee of Experts has noted that in federal States like India, Australia, and Switzerland there exist systems of consultation between federal inspection authorities and the authorities of the constituent units as strengthening the effectiveness of inspection services.\textsuperscript{164} It may be noted that under the relevant provisions of these Conventions the labour inspectorate must function as a system under the supervision and control of a central authority, in cooperation with other public or private institutions and in collaboration with employers and workers or their organisations.\textsuperscript{165}

India ratified the Convention No.81 but not the Convention No.129. India implements the labour inspection through section 9 of the Factories Act, 1948, sections 6 and 7 of the Mines Act, 1952, section 5 of the Plantations Labour Act, 1951, and section 17 of the Child Labour (Prohibition and Regulation) Act, 1986. Further, the labour inspection is also being implemented through section 19 of the Minimum Wages Act, 1948, section 7(b) of the Payment of Gratuity Act, 1972, section 27 of the Payment of Bonus Act, 1965, section 15 of the Maternity Benefit Act, 1961, section 14 of the Payment of Wages Act, 1936; and by virtue of these provisions the labour inspectors may enter the workplace at “a reasonable time” to perform inspections.\textsuperscript{166} The labour inspection is placed both under the Central and State sphere, and the respective governments (ministries) under the Acts are responsible to enforce and supervise the system.

Further, it may be mentioned that clauses similarly applying to federal States can be found in the instruments such as the Reduction of Hours of Work (Public Works)

\textsuperscript{164} General Survey on Labour Inspection by the Committee of Experts, n.108, para.126, p.65:
\textsuperscript{165} General Survey on Labour Inspection by the Committee of Experts, n.163, para.138, p.47.
Convention, 1936 (No.51), the Labour Clauses (Public Contracts) Convention, 1949 (No.94), and the Migration for Employment Convention (Revised), 1949 (No.97). But India has not ratified any of these three Conventions. Since Article 19(7) is applicable to all Conventions, it can be seen that even in the absence of individual federal States clause in given Conventions, a federal State can make use of Article 19(7) in their implementation. But in the case of India, though it is a federal State, Constitutionally it is possible for the Central Government to ratify and implement the Conventions within the domestic sphere, as the treaty-making capacity lies exclusively with the Central Government and as the subject of labour is placed in the Concurrent List to the Seventh Schedule of the Constitution of India. So, it shows that flexibility contained in federal States clause is not beneficial to India in respect of the ratification and implementation of concerned Conventions.

IV.6. Colonial Application Clause

Another provision offering the basis of certain flexibility is Article 35 of the Constitution, which is in general referred to as the “Colonial Application Clause”. The provision gives rise to flexibility in respect of application of the Conventions to “non-metropolitan territories”. By whatever name they are known, such as colonies, possessions,

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167 Article 1(1) of the Convention No.51 provides that, “This Convention applies to persons directly employed on building or civil engineering works financed or subsidised by central Governments”.

168 Article 1(1) of the Convention No.94 provides that, “This Convention applies to contracts which fulfil the following conditions: (d) that the contract is awarded by a central authority of a Member of the International Labour Organisation for which the Convention is in force”. It may be noted that the term “central authority” was initially used to draw a dividing line between central and local authorities. As was pointed out during the preparatory work for the Convention, the language used conforms to usual practice and refers to “departments and other agencies of the central Government”, while “in the case of a federal State, the “central authority” may be either the federal authority or a central authority of a constituent unit”. See G.P. Politakis, “Wages”, in ILO, International Labour Standards: A Global Approach (Geneva: International Labour Office, 2001), p.259.

169 Article 6(2) of the Convention No.97 provides that, “In the case of a federal State the provisions of this Article shall apply in so far as the matters dealt with are regulated by federal law or regulations or are subject to the control of federal administrative authorities. The extent to which and manner in which these provisions shall be applied in respect of matters regulated by the law or regulations of the constituent States, provinces or cantons, or subject to the control of the administrative authorities thereof, shall be determined by each Member. The Member shall indicate in its annual report upon the application of the Convention the extent to which the matters dealt with in this Article are regulated by federal law or regulations or are subject to the control of federal administrative authorities. In respect of matters which are regulated by the law or regulations of the constituent States, provinces or cantons, or are subject to the control of the administrative authorities thereof, the Member shall take the steps provided for in paragraph 7 (b) of Article 19 of the Constitution of the International Labour Organisation”.

170 Jenks, n.4, p.8.
protectorates, mandated territories, trust territories, these areas have shared a common character; that is, they are not self-governing or not completely self-governing. The difficulties which arise in respect of application of the Conventions in non-metropolitan territories are partly identical with those confronting self-governing countries which are not yet sufficiently developed to apply the international standards immediately without modification, and partly, in view of the increasing extent to which matters within the purview of the ILO fall within the self-governing powers of non-metropolitan territories. The original Article required Member States to apply the Convention which they had ratified to their colonies, protectorates and possessions which were not fully self-governing, except where owing to the local conditions the Convention might be inapplicable or subject to such modifications as might be necessary to adapt the Convention to local conditions. In order to emphasise the importance of the Constitutional obligation the Conference in its first session inserted in each of the Conventions an elaborated "colonial application clause". Articles in the same sense were also included in some of the Conventions adopted by other sessions of the Conference but in a different and compendious manner directly referring to Article 35 of the Constitution. Afterwards, a modified "colonial application" provision was included

171 Johnston, n.54, p.22. It may however be noted that the terminology used by the ILO in this respect has not been uniform. This is due to the changes which have occurred in the social philosophy relating to these territories. The original Constitution spoke of "colonies, protectorates and possessions which are not self-governing". While the Forced Labour Convention, 1930, referred to "territories placed under sovereignty, jurisdiction, protection, suzerainty, tutelage or authority" of a Member State, the Social Policy in Dependent Territories Recommendation, 1944, used the term "dependent territories". A Committee of the 1946 Conference preferred "non-self-governing territories". The term "non-metropolitan territories" was first employed in the Constitution as amended in 1946, and since then it has been uniformly used in all Conventions, in the title of the Committee of Experts on Social Policy in Non-Metropolitan Territories, and in all the publications of the Office. See ibid., p.232.

172 The International Labour Code, n.52, pp.LXXXI.

173 McMahon, n.30, p.33.

174 In this regard, Article 16 of the Hours of Work (Industry) Convention, 1919 (No.1) may be cited as follows: "1. Each Member of the International Labour Organisation which ratifies this Convention engages to apply it to its colonies, protectorates and possessions which are not fully self-governing: a) except where owing to the local conditions its provisions are inapplicable; or b) subject to such modifications as may be necessary to adapt its provisions to local conditions. 2. Each Member shall notify to the International Labour Office the action taken in respect of each of its colonies, protectorates, and possessions which are not fully self-governing". Similar provisions are inserted in Article 5 of the Unemployment Convention, 1919 (No.2), Article 6 of the Maternity Protection Convention, 1919 (No.3), Article 9 of the Night Work (Women) Convention, 1919 (No.4), Article 8 of the Minimum Age (Industry) Convention, 1919 (No.5), Article 9 of the Night Work of Young Persons (Industry) Convention, 1919 (No.6).

175 For instance, Article 12 of the Weekly Rest (Industry) Convention, 1921 (No.14) provides that, "Each Member of the International Labour Organisation which ratifies this Convention engages to apply it to its
in the Forced Labour Convention, 1930 (No.29), the provisions of which were mainly designed for non-metropolitan territories. Similar modified provisions are inserted in various Conventions on the protection of indigenous workers in 1936 and 1939, and in the Conventions on social policy in non-metropolitan territories and the Convention on labour inspection in 1947. Later on, it came to be agreed that it was unnecessary to include in individual Conventions an obligation unequivocally laid down by the Constitution. Article 35 was taken over by a more detailed Article in 1946 when the Constitution was amended; and the new Article had taken cognizance of a case where the subject-matter of the Convention was within the self-governing powers of the territory. In accordance with present Article 35, Conventions must be brought to the notice of the government of the territory after a Convention is ratified. Following this the Member State, in agreement with the government of the territory, is to advise the ILO by means of a Declaration as to how the Convention is to be implemented in the territory. Declarations may indicate that the Convention is applicable, applicable with modification or inapplicable; and they may be varied from time to time if circumstances within the territory change. However, it may well be noted that both the original Article and the

176 Article 26 of the Forced Labour Convention, 1930 (No.29) provides that, "1. Each Member of the International Labour Organisation which ratifies this Convention undertakes to apply it to the territories placed under its sovereignty, jurisdiction, protection, suzerainty, tutelage or authority, so far as it has the right to accept obligations affecting matters of internal jurisdiction; provided that, if such Member may desire to take advantage of the provisions of article 35 of the Constitution of the International Labour Organisation, it shall append to its ratification a declaration stating— (1) the territories to which it intends to apply the provisions of this Convention without modification; (2) the territories to which it intends to apply the provisions of this Convention with modifications, together with details of the said modifications; (3) the territories in respect of which it reserves its decision. 2. The aforesaid declaration shall be deemed to be an integral part of the ratification and shall have the force of ratification. It shall be open to any Member, by a subsequent declaration, to cancel in whole or in part the reservations made, in pursuance of the provisions of subparagraphs (2) and (3) of this Article, in the original declaration".

177 Johnston, n.54, pp.235, 237.
178 Ibid., p.233.
179 McMahon, n.30, p.33. Article 35(4) of the Constitution provides that, "Where the subject-matter of the Convention is within the self-governing powers of any non-metropolitan territory the Member responsible for the international relations of that territory shall bring the Convention to the notice of the government of the territory as soon as possible with a view to the enactment of legislation or other action by such government. Thereafter the Member, in agreement with the government of the territory, may communicate to the Director-General of the International Labour Office a declaration accepting the obligations of the Convention on behalf of such territory".
amended Article\textsuperscript{180} provided for a flexibility clause permitting modification of the obligations contained in a Convention when this was necessary to adapt the Convention to local conditions.\textsuperscript{181}

For India the colonial application clause can not be applied for the reason that, firstly, it does not have any colonial area administered by it, and secondly, before Independence it was not a colony in the sense of the said flexibility. When it was admitted as an original Member to the ILO in 1919 the British Government gave an assurance that British India was “democratically administered”.\textsuperscript{182}

\textbf{IV.7. Summing-up}

Initially, the Chapter has examined the broad concepts of flexible character, which are often used in the Conventions in order to allow the Member State to determine whether the action taken in the particular case meets the required standard of adequacy, appropriateness, effectiveness, fairness, reasonableness, sufficiency or suitability. The study has found the flexible terms deployed in the Conventions concerning weekly rest in industry, forced labour, working environment, home work, and worst forms of child labour. These types of terms are usually inserted in national legislations also.

The study next focused on the flexibility through special countries clauses, which permitted special clauses, containing modifications of normal standard in the manner envisaged by Article 19(3) of the ILO Constitution, for specified countries. In this respect, the study has analysed the Convention on hours of work in industry along with India’s compliance. Further, while identifying the relevant Conventions containing the special countries clauses, the study has found that the said flexibility has not resulted effectively in promoting the ratification process by Member States. Since the flexibility

\textsuperscript{180} The amended (present) Article 35(1) of the Constitution runs as follows: “The Members undertake that Conventions which they have ratified in accordance with the provisions of this Constitution shall be applied to the non-metropolitan territories for whose international relations they are responsible, including any trust territories for which they are the administering authority, except where the subject-matter of the Convention is within the self-governing powers of the territory or the Convention is inapplicable owing to the local conditions or subject to such modifications as may be necessary to adapt the Convention to local conditions”.

\textsuperscript{181} McMahon, n.30, p.34.

became unpopular as it tended to create two classes of Member, in 1946 first conscious attempt was made to include in a group of Conventions provision applicable to all countries where special conditions prevail in accordance with the meaning of Article 19(3). However, though special countries clauses were of substantial practical importance in the early years of the Organisation, they no longer correspond to the current needs.

Another form of flexibility which the study has concentrated is equivalence clauses, which permit departures from a given rule, provided comparable protection is afforded overall. The study has examined various types of equivalence clauses embedded in the Conventions relating to minimum standards in merchant shipping, equality of treatment in social security, the invalidity, old-age and survivors’ benefits, and safety and health in mines. Mainly focusing on the substantial equivalence clause in merchant shipping Convention, the study has recorded the viewpoints of seafarers’ representatives, and the position of India’s implementation of the instrument. The study has found that these flexibility clauses lay considerable responsibility on the supervisory bodies in determining what can be regarded as substantially equivalent protection, and may lead to controversy and uncertainty.

Further, the study examined the flexibility in the methods of implementation. Certain Conventions clearly specify an extensive variety and number of ways of their implementation, and permit effect to be given to them by methods appropriate to national conditions and practice, by means of laws or regulations, collective agreements, arbitral awards, and so on, or a combination of these means. In this regard, the study analysed the Conventions concerning equal remuneration, hours of work in industry, labour inspection, termination of employment, discrimination in employment and occupation, and tripartite consultation. Usefulness of this flexibility for India in its implementation of relevant Convention has also been tested.

The next flexibility device dealt with in the study is the federal States clause, which can be employed in the case of federal States if they find the ratification and implementation of the Conventions difficult owing to the division of legislative and administrative authority between the federal and state governments. Accordingly, the federal government has the flexibility to regard the obligations in respect of the
Conventions as appropriate under its constitutional system, in whole or in part, for action by the constituent states, provinces, or cantons rather than for federal action. In the case of India, the study has found that since the treaty-making power falls exclusively within the purview of the Central Government, and also the subject of "labour" is in the Concurrent List of the Constitution, the federal States clause cannot be useful to India.

The study has finally examined the nature of the flexibility in the Conventions through the colonial application clause, which provides Member States the latitude in respect of application of the Conventions to non-metropolitan territories. As far as India is concerned, the said flexibility cannot be applied as it does not have any colonial area administered by it.